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# REFLECTIONS UPON THE POLITICAL OFFENSE IN INTERNATIONAL PRACTICE

BY ALONA E. EVANS

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## I. THE POLITICAL OFFENDER *v.* THE ASYLUM STATE

The political offense represents a controversial dimension of criminal law which encompasses as many degrees of chicanery, expediency, and misery as any aspect of human experience within the realm of the law. An examination of the *New York Times* or the *London Times* for a week selected at random will not fail to provide a half-dozen or more reports of requests for asylum by *soi-disant* political offenders. The contemporaneity of the practice of political asylum and its massive scale<sup>1</sup> render supererogatory any recounting of the history of asylum from ancient times through its nineteenth-century transformation in objective from the protection of common criminals into the protection of political offenders,<sup>2</sup> and justify the premise that political asylum is today a universal and a utilitarian practice, a premise which has been formulated in general terms in Article 14 of the Universal Declaration of Human Rights:

1. Everyone has the right to seek and to enjoy in other countries asylum from persecution.

2. This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.<sup>3</sup>

But Article 14 leaves to speculation the definition of both "right to asylum" and "non-political crime." The frequent evocation of both warrants some consideration of their meaning, particularly the nature of the political

<sup>1</sup> The United States Committee for Refugees has estimated that there were over 15,000,000 refugees in the world on June 30, 1961. Hearing on World Refugee Problems by the Senate Judiciary Committee, 87th Cong., 1st Sess., at 62-63 (1961). The establishment of the "wall" between East and West Berlin in August, 1961, terminated the massive flight of refugees from West Germany which amounted to nearly 4,000,000 people since 1945. German Information Center (New York), Berlin, Crisis and Challenge 27-29 (c. 1962).

<sup>2</sup> There is an extensive literature dealing with various aspects of the practice of political asylum, most of it representing the work of European and Latin American publicists. The following are useful studies: Alcindor, "Droit d'Asile," in 2 De Lapradelle and Niboyet (eds.), Répertoire de Droit International 32-64 (1929); Bolesta-Koziebrodzki, Le Droit d'Asile, (1962); Cabral de Moncada, O Asilo Interno em Direito Internacional Público (1946); García Mora, International Law and Asylum as a Human Right (1956); Timbal Duclaux de Martin, Le Droit d'Asile (1939).

<sup>3</sup> U.N. General Assembly, 3d Sess., Official Records, I, Resolutions, at 71-77 (1948); 43 A.J.I.L. Supp. 127 (1949).

offense, whether it is advanced as a plea for asylum or as a defense to a denial of asylum.

### A. *The Right to Asylum*

Although there are municipal law concessions to political asylum in the form of constitutional provisions recognizing the right to asylum, constitutional or statutory exceptions of the political offender from extradition, or statutory exemptions of the person convicted of "a purely political offense" from the class of excludable aliens,<sup>4</sup> in general practice the "right to asylum" is permissive for states,<sup>5</sup> and few will overtly subscribe to the position attributed to Uruguay that the grant of asylum is a "duty upon the asylum state," justifiable as a "guarantee of democracy against dictatorship."<sup>6</sup>

The dilemmas of the asylum state begin with the application for asylum. An examination of state practice indicates that the grounds for the grant of asylum are a *mélange* of considerations of humanitarianism and foreign and domestic policy. Humanitarianism comes to the fore particularly in great crises, as in the admission of Hungarian refugees into the United States under special statutory provisions, and in the departure from at least forensic adherence to the United States policy of not granting diplomatic asylum, as in the case of the protection of Cardinal Mindszenty in the American Legation at Budapest, a situation which has continued since November, 1956.<sup>7</sup> Considerations of foreign policy, *i.e.*, the bases of relations between the asylum state and the fugitive's state and their current condition color the decision to grant asylum, as was evident in the grant of asylum by Colombia to Victor Raúl Haya de la Torre in its Embassy at Lima in January, 1949, and by Paraguay to Juan Perón in its gunboat in the harbor of Buenos Aires in September, 1955.<sup>8</sup> Political or military ex-

<sup>4</sup> *E.g.*, Art. 129, Constitution of the U.S.S.R., 1936; Art. 31, Constitution of Costa Rica, 1949; Art. 16(2), Basic Law, Federal Republic of West Germany, 1949, in 3 Peaslee (ed.), *Constitutions of Nations* 499 (2d ed., 1956), 1 *ibid.* 579, 2 *ibid.* 33. The grant of political asylum is not automatic because of the existence of a constitutional provision dealing therewith, *e.g.*, case of the grant of asylum to Major Mortazawi of the Iranian Army, *Izvestia*, Sept. 16, 1961, reported in 13 *Current Digest of the Soviet Press* 24 (No. 37, Oct. 11, 1961). See also Art. 15, Constitution of Mexico, 1917; Art. 141(33), Constitution of Brazil, 1946, in 2 Peaslee 664; 1 *ibid.* 236; 18 U.S.C., sec. 3185; 8 U.S.C., sec. 1182(a)(9)(10); Chile, Ley No. 13,353/1959, *Código Penal* 427 (official ed., 1959); Germany, Extradition Law, Dec. 23, 1929, in *Harvard Research in International Law, Draft Convention and Comments on Extradition*, 29 *A.J.I.L. Supp.* 385 (1935).

<sup>5</sup> *Chandler v. United States*, 171 F. 2d 921, 935 (1st Cir., 1948), 43 *A.J.I.L.* 804 (1949). Extradition treaties often provide in terms that the decision regarding the grant of asylum is to be made only by the asylum state. For a recently drafted text, see Art. V, sec. 6(c), U. S.-Brazil, Extradition Treaty, Jan. 13, 1961, 44 *Dept. of State Bulletin* 164, 166 (1961). This treaty was ratified by the United States on May 29, 1961, but was not in force as of November, 1962.

<sup>6</sup> Fernández, *Do Asilo Diplomático* 103 (1961).

<sup>7</sup> P.L. 85-559, 72 Stat. 419; *New York Times*, Nov. 13, 1956, p. 21, col. 1 (late city ed. The city ed. of the *New York Times* is used unless otherwise indicated).

<sup>8</sup> *I.C.J. General List*, 1949, No. 7, at 5; *New York Times*, Sept. 21, 1955, p. 1, col. 8.

pediency may provide the motivation, as in the award of 1,000 ounces of gold, and asylum, to a Communist Chinese pilot who brought a Soviet-made jet fighter into Taipei.<sup>9</sup>

The asylum state cannot ignore internal policy in arriving at the decision to grant a plea for asylum. That political refugees can be a source of danger to the peace and good order of the asylum state has been attested to, for example, in the Petrov investigation in 1955, which showed that refugees were used in Soviet espionage activities in Australia.<sup>10</sup> Furthermore, the anomalous status of the political fugitive, a "stateless" person whose statelessness may be revocable at the will of his former country, engenders additional problems for the asylum state. Although the refugee, for example in the United States, enjoys the Constitutional rights and guarantees assured to citizens and aliens alike,<sup>11</sup> the circumstances of his coming to the country, together with his "statelessness," may necessitate the asylum state's assuring him of special protection against intrusion upon his privacy or other harassment by his state of origin, as was graphically illustrated by the repatriation campaigns of the Soviet-bloc states in the mid-1950's.<sup>12</sup> Whether such protection constitutes "greater rights" for the political refugee than are accorded other persons in the state is a debatable point, but if nothing else, it does represent a form of self-protection on the part of the asylum state.<sup>13</sup> The strategic location of certain states, such as Switzerland, West Germany, or the Crown Colony of Hong Kong, puts heavy pressure on them to accept refugees, but in the face of limited facilities for the absorption of large numbers of these people, it has been necessary at times to grant temporary haven or to turn the refugees back.<sup>14</sup>

Self-protection becomes a matter of even greater concern when the neutrality of the asylum state is affected by the activities of political fugitives, a situation which the United States has been facing lately in its rôle as state of first asylum relative to Cuba. The methods of control in use here have included the enforcement of the laws against raising hostile military expeditions, as well as arms and flight controls, but enforcement has been haphazard because of the pressures of conflicting policy considerations.<sup>15</sup>

<sup>9</sup> *Ibid.*, March 5, 1962, p. 17, col. 3.

<sup>10</sup> Commonwealth of Australia, Royal Commission on Espionage, Report, Aug. 22, 1955 (1955).

<sup>11</sup> 1 Hyde, *International Law* 729-731 (2d rev. ed., 1947), 2 *ibid.* 871 ff.; 3 Hackworth, *Digest of International Law* 562-565 (1940-1944).

<sup>12</sup> Hearings before the Subcommittee on the Scope of Soviet Activities in the United States of the Senate Judiciary Committee, 84th Cong., 2d Sess., Pt. 33, at 1792-1795, 1856 (1956), Pt. 24, at 1256 (1956), Pt. 19, at 1000 (1956); U. S. Senate, Report on the Inquiry into the Tuapse Affair, 84th Cong., 2d Sess. (1956).

<sup>13</sup> The Argentine Supreme Court, for example, has pointed out "that the status of refugee cannot confer greater rights on an individual than those enjoyed by the citizen of the state of asylum seems too elementary for discussion." *Re Martínez Vasquez*, July 14, 1955, 232 *Fallos de la Corte Suprema* 247, 1955 *Int. Law Rep.* 474.

<sup>14</sup> I. Guggenheim, *Traité de Droit International* 356, note 4 (1953-1954); *New York Times*, May 16, 1962, p. 15, col. 1.

<sup>15</sup> For a brief account of the conflict between law enforcement and problems of policy, see Evans, "Observations on the Practice of Territorial Asylum in the United States,"

The control of the political activities of refugees by internment is provided for in many conventions, but resort to this measure by an asylum state either on its own initiative or at the request of the state of the fugitives requires careful balancing of the effect upon public opinion within the country with possible international repercussions, together with the problems of administering such a program.<sup>16</sup> The problems of protection and control of political offenders are multiplied when the disposition of the individual is at stake, particularly in the grant of diplomatic asylum where the territorial state is adamant in its refusal of a safe-conduct to the refugee, as in the classic case between Colombia and Peru regarding Haya de la Torre, or the current one between the United States and Hungary regarding Cardinal Mindszenty. It may be recalled that the disposition of prisoners of war was an issue which prolonged the negotiations for the Korean Armistice.<sup>17</sup>

### B. *The Plea of the Political Offense as a Defense*

The plea of fear of persecution for a political offense may be offered as a defense in exclusion, expulsion, or extradition proceedings. The difference between exclusion and expulsion turns upon the matter of the "presence" of the alien, whether he is on the threshold or inside the country. By resort to a legal fiction, as egregious as any which aroused Bentham's ire, an alien who is physically within a country may be constructively outside it, as in United States practice whereby persons in the country under "parole" are not deemed to have been "admitted" and are, therefore, excludable, not expellable aliens; indeed, it can be argued that the status of being "in transit" provides a degree of constructive non-presence which lies beyond the reach even of exclusion proceedings.<sup>18</sup>

56 A.J.I.L. 148, 155-157 (1962). On the obligations of refugees toward the asylum state, see Convention Relating to the Status of Refugees, July 28, 1951, Art. 2, 189 U.N. Treaty Series 150.

<sup>16</sup> See Hague Convention V on Rights and Duties of Neutrals in War on Land, Oct. 18, 1907, Ch. II, Art. XI, 36 Stat. 2310, 2324, 2 A.J.I.L. Supp. 117, 120 (1908), and *Ex parte Toscano*, 208 Fed. 938 (S.D.Calif., 1913); Montevideo Convention on International Penal Law, 1889, Art. 16, in Republic of Uruguay, *Anexo a la Memoria del Ministerio de Relaciones Exteriores, Actas y Tratados Celebrados por el Congreso Internacional Sud-Americano de Montevideo* 936 (1889); *Marineros de "La Pilcomaya,"* Supreme Court, April 23, 1891, 43 Fallos de la Corte Suprema 321, 327-329 (Argentina); *Re Berreta*, Supreme Court, Nov. 8, 1933, 169 *ibid.* 255, 1933-1934 Annual Digest 259 at 260-261. Cf. Peru-Brazil, Treaty of Asylum and Extradition, Aug. 6, 1898, Art. 2, Republic of Peru, *Memoria del Ministerio de Relaciones Exteriores*, 1899, p. 240. At the request of Argentina, the Government of Paraguay, after granting territorial asylum to Juan Perón, interned him at a point 75 miles from the border of Argentina. *New York Times*, Oct. 11, 1955, p. 1, col. 7; Oct. 13, 1955, p. 1, col. 4. Cf. [European] Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, Art. 16, 213 U.N. Treaty Series 221; 45 A.J.I.L. Supp. 24, 29 (1951).

<sup>17</sup> *Baxter*, "Asylum to Prisoners of War," 30 *Brit. Yr. Bk. of Int. Law* 489-498 (1953); *Gutteridge*, "The Repatriation of Prisoners of War," 2 *Int. and Comp. Law Q.* 207-216 (1953).

<sup>18</sup> 8 U.S.C., sec. 1182(d)(5); the distinction between "excludable" and "deportable" is treated in *U. S. ex rel. Milanovic v. Murff*, 253 F. 2d 941 (2d Cir., 1958). See

Both exclusion and expulsion fall within the ambit of the internal law of the asylum state, and both processes may be severe to the point of arbitrariness in their application to the alien. Although the protection of the alien in these matters by his state of origin is not uncommon, *e.g.*, the classic *Boffolo* case between Italy and Venezuela,<sup>19</sup> the political offender, because of his ambivalent status, has little expectation of such protection; consequently, in view of the high degree of administrative discretion which attaches to these proceedings, it would seem incumbent upon the asylum state to provide such a person with ample opportunity to present his defenses. In the United States the scope of review of the legality of an exclusion order includes an action for a declaratory judgment as well as the more usual habeas corpus proceeding.<sup>20</sup> Judicial review of administrative procedures affords some protection of the individual's interests, but the hurdle of proving that political persecution awaits him upon his return to his home state is not easily surmounted, and this is not an area for judicial innovation. The political history of China between 1948, when the validity of an exclusion order against a Chinese national was challenged, and 1959, when it was finally upheld, did not deter a Federal District Court from stating that

In any event, changes in foreign governments, whether peaceful or cataclysmic, do not create immunity for excludable aliens from the provisions of our exclusion laws. Aliens do not thereby gain a right of asylum in our country. Nothing in the sparse legislative history of the exclusion provisions of the various immigration acts warrants the construction that an inadmissible alien can be returned to the country from which he departed for the United States only when its government is ideologically the same as when he left it.<sup>21</sup>

The Immigration and Nationality Act of 1952 authorized the Attorney General

to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to physical persecution and for such period of time as he deems to be necessary for such reason.<sup>22</sup>

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Petition of Martinez, 202 F. Supp. 153 (N.D.Ill., 1962), in which the physical presence of an alien in the United States on parole status was deemed "presence" for the purpose of naturalization through military service. *Cf. Medina v. Hartman*, 260 F. 2d 569 (9th Cir., 1958), in which certain Spanish sailors who deserted a Spanish naval vessel while on shore leave at San Diego, Calif., and fled to Mexico, were deemed not to have "entered" the United States so as to be liable to exclusion as deserters. Expulsion may be distinguished from deportation by limiting the latter to the enforcement of immigration laws, *e.g.*, 2 Hyde, *International Law* 285; however, given the scope of governmental control over aliens which can be exercised under the terms of contemporary immigration laws, the distinction is not significant.

<sup>19</sup> Ralston, *Venezuelan Arbitrations of 1903*, p. 696.

<sup>20</sup> *Brownell v. Tom We Shung*, 352 U. S. 180 (1956).

<sup>21</sup> U. S. ex rel. *Tom We Shung v. Murff*, 176 F. Supp. 253, 259 (S.D.N.Y., 1959). *Cf.*, however, the late Judge Frank's strictures in U. S. ex rel. *Fong Foo v. Shaughnessy*, 234 F. 2d 715 (2d Cir., 1955).

<sup>22</sup> Sec. 243(h), 66 Stat. 163, 214; 8 U.S.C., sec. 1253(h). The constitutionality of this section was questioned by Frank, J., in the case of *Fong Foo*, cited above, note 21.

It follows from this provision that the plea of physical persecution would figure as a defense to expulsion proceedings and that it would inevitably give rise to a clash of opinion as to the definition of the term and the scope of the Attorney General's discretion in applying this section of the Act. Fear of reprisals from members of a rival political organization in the home state, apprehension of maltreatment for practicing a religion in the face of the state's anti-religious policy, an expressed antipathy to a Communist regime, unwillingness to perform military service in a Communist country, or the prospect of imprisonment in the home state for jumping ship or for violation of military law have been unsuccessfully pleaded as evidence of physical persecution in actions to stay the expulsion of their proponents.<sup>23</sup> For its part the Immigration and Naturalization Service, holding in 1958 that "physical persecution contemplates incarceration or subjection to corporal punishment, torture, or death based usually on one's race, religion or political opinions," found on the basis of this definition that "economic sanctions applied against those not members of the controlling clique in a country whose economic system is completely and rigidly state-controlled is not physical persecution."<sup>24</sup> This view was cited favorably in 1961 by the Court of Appeals for the Second Circuit in *Diminich v. Esperdy* as grounds for refusing to stay an expulsion order, where the alien pleaded that he would be subject to physical persecution in the form of pressure to join the Communist Party in his home state as well as interference with the practice of his religion, but also admitted that he could probably earn a living in that state.<sup>25</sup> In the same year, however, the Court of Appeals for the Third Circuit, facing a similar situation in *Dunat v. Hurney*, arrived at a different conclusion by applying the yardstick of the "net effect" which expulsion to his Communist state of origin would have upon the life and career of a would-be political refugee.<sup>26</sup> The distinction between the *Diminich* and *Dunat* cases appears to lie in the fact that the plaintiff in the latter case was able to submit direct evidence in support of his contention that he would be subject to physical persecution, whereas the plaintiff in the former case failed for want of adequate proof.<sup>27</sup> The immi-

<sup>23</sup> *Lavdas v. Holland*, 139 F. Supp. 514 (E.D.Pa., 1955), concerning sec. 4 of the Displaced Persons Act of 1948, 50 U.S.C.A. App., sec. 1953; *Sunjka v. Esperdy*, 182 F. Supp. 599 (S.D.N.Y., 1960); *Petrovic v. Pilliod*, 282 F. 2d 877 (7th Cir., 1960); *Blazina v. Bouchard*, 286 F. 2d 507 (3d Cir., 1961); *Chao-ling Wang v. Pilliod*, 285 F. 2d 517 (7th Cir., 1960). In the *Blazina* case the court noted that "At worst, it appears that he will be 'looked down upon' and will encounter some 'complications'," 286 F. 2d at 511. Cf. the case of Wang Chou-kang, a Nationalist Chinese naval officer, who was expelled from the United States and successfully sought asylum in the United Kingdom rather than return to Taiwan. *New York Times*, July 27, 1961, p. 3, col. 4; Aug. 10, 1961, p. 17, col. 7; Nov. 21, 1961, p. 20, col. 3 (late city ed.); 645 H.C. Deb. (5th ser.) 428-429 (1961).

<sup>24</sup> *Matter of Kale*, Immigration and Naturalization Service Administrative Decision A 9-555-532 (May, 1958), quoted in *Diminich v. Esperdy*, 299 F. 2d 244, 246 (2d Cir., 1961).

<sup>25</sup> *Ibid.*

<sup>26</sup> 297 F. 2d 744 (3d Cir., 1961).

<sup>27</sup> In the *Dunat* case the court summarized seven recent cases in which inadequate evidence of physical persecution was submitted by would-be refugees, *ibid.*, note 3, at 748.

gration authorities in dealing with this kind of plea enjoy a certain advantage because of the discretionary nature of the proceedings. As the Supreme Court stated in *Jay v. Boyd*, "grant . . . [of an application for suspension of deportation] is manifestly not a matter of right under any circumstances, but rather is in all cases a matter of grace."<sup>28</sup> In such circumstances the plaintiff must be able to convince a court that the conduct of these officials has been "arbitrary or capricious," so as to constitute a denial of procedural due process of law.<sup>29</sup> Furthermore, it has been commonly held by courts that the evidence upon which the refusal of a stay of expulsion has been based need not be disclosed to the plaintiff.<sup>30</sup> Courts hesitate to intrude upon the exercise of executive discretion in these matters which impinge upon foreign policy;<sup>31</sup> upon occasion, however, full scrutiny of exclusion proceedings has been asserted as a proper judicial function where the protection of individual rights is at stake.<sup>32</sup>

These same problems of balancing the protection of the alien's rights against protection of the state's right to determine who shall be admitted into its territory, and executive discretion against judicial responsibility, are common to the expulsion process in general, whether the individual concerned is a political offender or an ordinary alien. It is obvious that such elements will be weighted differently in different jurisdictions and will be affected by the political climate obtaining at the time when they are invoked. Several cases involving a refugee or a stateless person against whom local authorities had issued an expulsion order because of the alien's criminal record in the community have been heard before the Federal Ad-

<sup>28</sup> 351 U. S. 345, 354 (1956). Cf. *Cheng Fu Sheng v. Barber*, 269 F. 2d 497 (D.C.Cir., 1959) for a discussion of the distinction between "fear of persecution" as used in sec. 6 of the Refugee Relief Act of 1953, 67 Stat. 403, and sec. 243(h) of the Immigration and Nationality Act of 1952. See *Milutin v. Bouchard*, 299 F. 2d 50 (3d Cir., 1962).

<sup>29</sup> *Chi Sheng Liu v. Holton*, 297 F. 2d 740 (9th Cir., 1961); *Chao-ling Wang v. Pilliod and Blazina v. Bouchard*, note 23 above.

<sup>30</sup> *Namkung v. Boyd*, 226 F. 2d 385, 889 (9th Cir., 1955); *Granado Almeida v. Murff*, 159 F. Supp. 484 (S.D.N.Y., 1958); *U. S. ex rel. Dolenz v. Shaughnessy*, 200 F. 2d 288 (2d Cir., 1952), cert. denied, 345 U. S. 928 (1953).

<sup>31</sup> *Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp.*, 333 U. S. 103, 111 (1948); *U. S. ex rel. Cantisani v. Holton*, 248 F. 2d 737 (7th Cir., 1957). Cf. *Ex parte Duke of Chateau Thierry*, [1917] 1 K.B. 922; *Abdou v. Att'y Gen. of Kenya*, High Court, April 24, 1951, [1951] 24(2) K.L.R. 13 (Kenya), 1951 Int. Law Rep. 282. The jurisprudence of the Mexican Supreme Court confirms the exclusive power of the President, acting under Art. 33 of the Constitution, to expel undesirable aliens without resort to judicial proceedings and without the possibility of judicial intervention. 97 *Semanario Judicial de la Federación*, 5<sup>a</sup> Epoca, *Jurisprudencia de la Suprema Corte*, 1917-1948, apéndice, Vols. 2-3, p. 904.

<sup>32</sup> The Court of Appeals for the 9th Circuit, criticizing the decisions in the *Dolenz* and *Granado Almeida* cases (note 30 above) among others, stated: "We do not believe that section 243(h) is to be read in such a loose and unrestrictive fashion. Physical persecution involves a grave challenge to those personal rights so fundamental to our constitutional scheme; if the likelihood of this challenge rested entirely in executive hands, it is conceivable that those rights would be violated without due process of law." *Chi Sheng Liu v. Holton*, note 29 above, at 741. See dissenting opinion of Staley, J., in the *Milutin* case, note 28 above, p. 54. Cf. *Ex parte Sacksteder*, [1918] 1 K.B. 578; *Re Morphy*, Conseil d'Etat, March 14, 1884, *Dalloz*, 1885, Pt. 3, at 9.



ministrative Court of West Germany. Working within the framework of Article 16 of the Basic Law, which assures asylum to political offenders, and the terms of Articles 32 and 33 of the Geneva Convention on the Status of Refugees, which authorizes the expulsion of refugees only for reasons of public order and security, and of the Law of April 25, 1951, which anticipated the terms of this convention,<sup>33</sup> the court took a liberal view of each case, remanding for reconsideration the question whether expulsion was warranted by the facts or whether the lower court had carefully examined the possibility that the accused would be persecuted if returned to his country of origin or to neighboring countries, if these were in "Eastern Europe."<sup>34</sup> These cases reflect the concatenation of constitutional, statutory, and treaty law which, together with the experience of West Germany with the problems of political asylum, tend to give the benefit of the doubt to the political offender. In 1958, after the downfall of the Peronista regime in Argentina, an expulsion law was enacted which forbade expulsion for political reasons and which authorized the President to take action so as to enable aliens who had been expelled on such grounds under the previous regime to return to the country.<sup>35</sup>

The extradition process, unlike expulsion or exclusion, falls within the ambit of international law in that the practice is governed by a complex development of customary and conventional law. In extradition the political offense has come to be an established defense to the surrender of a fugitive to a requesting state. Although it can be argued that the right of the asylum state to surrender a political offender is as discretionary as its right to grant asylum,<sup>36</sup> states generally refrain from extraditing a fugitive where there is a possibility of his persecution for political reasons, or, upon occasion, they may resort to conditional extradition, surrendering the fugitive for a penal offense, but with the proviso that he may not be tried or punished for any concurrent political offense or for his previous political beliefs or activities.<sup>37</sup> The principle of specialty commonly appears in extradition treaties as a duty upon the requesting state to prosecute the fugitive only for the offense for which he was extradited, but where political factors enter the picture, as Donnedieu de Vabres has pointed out, this principle does not suffice to protect the individual against "methods of

<sup>33</sup> 2 Peaslee, *Constitutions of Nations* 33; 189 U.N. Treaty Series 150; [1951] *Bundesgesetzblatt*, I, 269, sec. 23 (German Fed. Rep.).

<sup>34</sup> *Yugoslav Refugee (Germany) Case*, June 28, 1956, 10 *Neue Juristische Wochenschrift* (hereinafter cited as N.J.W.) 762; 1956 *Int. Law Rep.* 386; *French Refugee (Germany) Case*, Jan. 17, 1957, BVerwG I C, 65/56, 54 A.J.I.L. 424 (1960); *Hungarian Refugee (Germany) Case*, Sept. 30, 1958, BVerwG I C, 172/57 (Munich), 54 A.J.I.L. 419 (1960).

<sup>35</sup> Ley 14.445/1958, *Jurisprudencia Argentina*, 1958, III, sec. leg. 16.

<sup>36</sup> *Re Viscusi*, Supreme Court, Dec. 28, 1907, 108 *Fallos de la Corte Suprema* 181 at 203 (Argentina); *Chandler v. U. S.*, note 5 above; *The State (Duggan) v. Tapley*, Supreme Court, Dec. 12, 1960, [1952] *Irish Rep.* 62, 1951 *Int. Law Rep.* 336.

<sup>37</sup> See decisions of the Swiss Federal Tribunal in *Re Wyrobnik*, Sept. 24, 1952, 78 *Arrêts du Tribunal Fédéral Suisse* (hereinafter cited as *Trib. Féd. Suisse*) (1952), I, 235, 1952 *Int. Law Rep.* 379; *Re Ktir*, May 17, 1961, 87 *Entscheidungen des Schweizerischen Bundesgerichts* (hereinafter cited as S.B.G.), I, 134, 56 A.J.I.L. 224 (1962).

'administrative' repression," for under conditions obtaining in many countries, the term "political" is susceptible of the broadest interpretation, so that a court in an asylum state faced with an extradition proceeding would do well to examine the merits of the charges, a view which has been expressed in West Germany by both the Federal Constitutional Court and the Federal Supreme Court.<sup>38</sup> As a general rule the burden of proof of the nature of the charges in an extradition proceeding rests upon the requesting state, although there are instances of the shift of the burden to the accused where he has advanced political persecution as a defense to extradition on a charge of fraud or embezzlement.<sup>39</sup>

The use of expulsion as a less "cumbrous" alternative to extradition, as the Supreme Court of India put it,<sup>40</sup> is not unheard of; for the political fugitive this procedure can be a matter of serious concern because the plea of the political offense carries greater weight as a defense to extradition than to expulsion proceedings. This argument of expulsion *qua* extradition, and for espionage, an offense which can be characterized as political,<sup>41</sup> was advanced on behalf of Robert Soblen in his efforts to avoid exclusion and later expulsion from Great Britain. The case is of interest because of its dramatic circumstances and the politico-legal issues which it involved.

After the United States Supreme Court refused on June 25, 1962, to review Soblen's conviction and life sentence on espionage charges, he fled the United States for Israel and sought admission as an immigrant under the terms of the Israeli Law of Return. The Israeli Government expelled him on the grounds of his illegal entry and previous criminal record and placed him on board an Israeli plane bound for the United States.<sup>42</sup>

<sup>38</sup> *Traité de Droit Criminel et de Législation Pénale Comparée* 985 (3d ed., 1947). Cf. *French Refugee (Germany) Case*, Jan. 11, 1961, 14 N.J.W. 738 (German Fed. Rep.), 56 A.J.I.L. 221 at 222-223 (1962); *Yugoslav Refugee (Germany) Case*, Feb. 4, 1959, 1 BvR 193/57, 54 A.J.I.L. 416 at 418-419 (1960).

<sup>39</sup> *Re Van Lierde*, Supreme Court, June 16, 1954, 229 Fallos de la Corte Suprema 124 (Argentina), 1954 Int. Law Rep. 238 at 239; *Re Mylonas*, 187 F. Supp. 716, 721 (N.D. Ala., 1960). In the Colombian-Peruvian Asylum Case concerning the termination of diplomatic asylum, the Interpational Court of Justice dismissed the Peruvian counterclaim that Haya de la Torre was a common criminal on the ground that Peru had failed to prove that military rebellion was a common crime. [1950] I.C.J. Rep. at 281-282. Ex parte Stenger, Court of Cassation, Sept. 3, 1951, *Foro Italiano* 1952, II, 1 (Italy), 1951 Int. Law Rep. 325 at 329-330; *Re D'Emilia*, Supreme Court, May 28, 1957, 54 *Revista de Derecho, Jurisprudencia y Ciencias Sociales y Gaceta de los Tribunales* Nos. 3-4 (May-June, 1957) 72 (Chile), [1957] Int. Law Rep. 499, at 501.

<sup>40</sup> *Muller v. Supt., Presidency Jail, Calcutta*, [1955] Sup. Ct. Rep. 324 (India), 1955 Int. Law Rep. 497 at 500; *Re Esposito*, Fed. Sup. Ct., July 25, 1932, 111 *Revista de Direito* 73 (Brazil), 1933-1934 Annual Digest 332.

<sup>41</sup> *E.g.*, *Re Timmerman*, Supreme Court, Oct. 17, 1944, *Gaceta de los Tribunales*, Año 1944, Pt. 2, 163 (Chile).

<sup>42</sup> *U. S. v. Soblen*, 199 F. Supp. 11 (S.D.N.Y., 1961), motion for new trial denied, 203 F. Supp. 542 (S.D.N.Y., 1961), aff'd. 301 F.2d 236 (2d Cir., 1962), cert. denied, 370 U. S. 944 (1962). By his action, Soblen forfeited his bail of \$100,000. The Law of Return, as amended, provides for the denial of an immigrant's visa "to a person with a criminal past, likely to endanger public welfare." Badi (ed.), *Fundamental Laws of the State of Israel* 156, 332 (1961); 5 *The Israel Digest* 8 (July 6, 1962); 8 (Aug. 3, 1962); 8 (Aug. 17, 1962); *New York Times*, Nov. 10, 1962, p. 26, col. 3.

*En route* he wounded himself in order to gain admittance into Great Britain when the plane made a scheduled stop at London. He was hospitalized there, and for the next two months Soblen was the center of controversy as to whether he had been "admitted" into the United Kingdom, whether he could be excluded or expelled, whether, if he were ousted, the Israeli airline which had brought him to the United Kingdom were obligated, or could be persuaded, to remove him, and what his destination should be. In a habeas corpus action brought to test his alleged illegal detention, Soblen failed to shake the Home Office's contention that under the Aliens Order, 1953, he did not have permission to land, and, being in a "transit" status, he could be compelled to proceed to his original destination as soon as his condition permitted. After the Court of Appeal affirmed the order of the Queen's Bench Division discharging the writ of habeas corpus, the Home Secretary denied Soblen's request for political asylum, stating in the House of Commons that "he is not in danger of persecution in his own country for his political opinions or on racial grounds. Dr. Soblen is a convicted spy, a fugitive from a sentence imposed on him by the courts of a country whose life is based on democratic institutions and constitutional guarantees."<sup>43</sup> During these proceedings, the United Kingdom and Israel were engaged in a colloquy over the latter's responsibility to transport Soblen to the United States. Israeli authorities, who had been placed in a defensive position because of local charges that Soblen's expulsion from Israel had been unduly summary and was tantamount to extradition because of the presence of a United States marshal on the plane on which he departed, finally conceded their obligation to remove Soblen but, maintaining that they had no duty to send him to the United States, announced that he would be taken back to Israel whence, under the expulsion order, he would be allowed to go wherever he could be admitted.<sup>44</sup> The Home Office disputed this view, but on the day which it set for his departure from the United Kingdom, no planes left Israel for London. Acting under the provisions of the Aliens Order, 1953, which empower him to deport an alien if "he deems it to be conducive to the public good," the Home Secretary then ordered Soblen's departure on any ship or plane leaving the country.<sup>45</sup> In applying for a writ of habeas corpus, Soblen contended that this order was invalid because the Home Office was using the process of deportation for the "collateral

<sup>43</sup> New York Times, July 2, 1962, p. 16, col. 3; Aliens Order, 1953, Stat. Instr. 1953, No. 1671, Arts. 1(1), 8(4); New York Times, July 7, 1962, p. 1, col. 8; July 9, 1962, p. 7, col. 2; Regina v. Secretary of State for Home Affairs, Ex parte Soblen (Q. B. Div., C.A.), [1962] 3 W.L.R. 1145; 664 H. C. Deb. (5th ser.) 805-806 (1962).

<sup>44</sup> New York Times, July 26, 1962, p. 8, col. 3; July 30, 1962, p. 1, col. 3; Aug. 5, 1962, p. 22, col. 1; Aug. 6, 1962, p. 5, col. 3. Art. 8 of the Aliens Order, 1953 (note 43 above), requires the removal of an excluded alien on the ship or plane which brought him into the country to the state of origin, the state of embarkation, or to a state where he will be admitted.

<sup>45</sup> New York Times, Aug. 7, p. 1, col. 4; Aug. 8, p. 15, col. 1; The Times (London), Aug. 11, 1962, p. 6, col. 4; Aliens Order, 1953, Art. 20(2)(b) and Art. 21(1), note 43 above. Cf. Ex parte Sugarman, (1922) 127 L.T. 27; New York Times, Aug. 12, 1962, p. 1, col. 5.

purpose" of extraditing him on a charge of espionage, an offense which was not included in the extradition agreements between the United States and the United Kingdom. The Queen's Bench Division, finding no abuse of power in the issuance of the order, refused the writ, a decision sustained by the Court of Appeal on grounds that there was no evidence to support the charge that the order had been made for an ulterior purpose. After the rejection of his final appeal to the Home Secretary, Soblen frustrated deportation by committing suicide.<sup>46</sup>

State practice makes the grant of political asylum permissive on the part of the asylum state and restricts in many ways the individual's enjoyment of asylum. Article 14(1) of the Universal Declaration of Human Rights expresses what is, in effect, a narrow right, especially in the light of the further limitation provided by the terms of paragraph two, which deny political asylum for "non-political crimes" or "acts contrary to the purposes and principles of the United Nations." This latter statement is, however, a necessary corollary to the grant of asylum, for it is an implicit recognition of the abuses to which asylum is susceptible. As the plea of political persecution is a strong defense to extradition, and one which will be taken into consideration even in exclusion and expulsion proceedings, the definition of the term "political offense" is a matter of interest in any analysis of this plea.

## II. THE PROBLEM OF DEFINING THE POLITICAL OFFENSE

### A. *Concurrency of Political and Common Crime Elements*

Disregarding for purposes of discussion the fact that the grant of political asylum is predicated in substantial part upon considerations of public policy, the thrust of the problem of defining "political offense" goes to the degree of political coloration of a given offense, increasingly so, for, as the West German Federal Constitutional Court pointed out in a 1959 decision:

The "politization" of large spheres of life and the utilization of criminal law for securing and carrying out social and political revolutions have blurred the boundary line between "criminal" and "political" offenses in many states.<sup>47</sup>

The matter of degree is self-evident and is recognized in Article 14(2) of the Universal Declaration of Human Rights; rarely is an offense "purely" political—treason, perhaps, as defined in the ancient terms of 25 Edward III, c. 2, sedition, or espionage, although courts in the United States and Chile have cast doubt on the political character of the latter.<sup>48</sup>

<sup>46</sup> *Regina v. Governor of Brixton Prison ex parte Soblen*, [1962] 3 W.L.R. 1154, 1181 (Court of Appeal). The deportation order then issued, followed by Soblen's death within the week. *The Times* (London), Sept. 6, 1962, p. 10, col. 2; Sept. 12, 1962, p. 8, col. 6.

<sup>47</sup> *Yugoslav Refugee (Germany) Case*, *loc. cit.* note 38 above, at 418.

<sup>48</sup> *U. S. v. Sobell*, 142 F. Supp. 515, 520 (S.D.N.Y., 1956); *Re Timmerman*, note 41 above.

Political offenses are usually affected with common crime elements, at least from the point of view of the state from which the offender fled, and this argument will be urged in an extradition request as one overriding any political defense offered by the fugitive.<sup>49</sup> Granting that "every political offense presumes an attack on law, but not every attack on law is a political offense,"<sup>50</sup> the asylum state must weigh the requesting state's charge against the fugitive's defense in determining whether to grant asylum.

If the notion of the "pure" political offense were fully accepted in the early nineteenth century, by the end of that century it had been subjected to certain modifications, such as a general acceptance by states of the Belgian *attentat* clause in extradition treaties, which was designed to eliminate the plea of political murder when the act was directed against the head of a state, a clause which was often expanded to include the family of the head of state, members of the government, heads of foreign states, or even the taking of life in general, unless the act were committed in open combat, or where "the man was acting as one of a number of persons engaged in acts of violence of a political character with a political object, and as part of the political movement and rising in which he was taking part."<sup>51</sup> The prevalence at this time of syndicalist movements in Europe subscribing to the political anarchism of Bakunin and Sorel led to another limitation, the denial of the political defense to anarchists on the ground that, as they opposed all government, they did not meet the test succinctly stated by Cave, J., in the *Meunier* case:

<sup>49</sup> Soon after Vladimir Petrov asked for asylum in Australia, the Soviet Government requested his surrender on charges of embezzlement, but it made no effort to offer proof of these charges. Royal Commission on Espionage, Report 24, note 10 above. In a newspaper report of the request for asylum in Cuba made by a deserter from the U. S. Army, American military authorities were quoted as saying that he was under investigation for "passing bogus checks and for forgery." New York Times, March 25, 1962, p. 39, col. 1.

<sup>50</sup> Granados, *La Extradición de los Refugiados Españoles* 43 (1946).

<sup>51</sup> *Re Castioni*, [1891] 1 Q.B. 149, 159; *Re Ezeta*, 62 Fed. 972, 999 (N.D.Calif., 1894); *of. Ornelas v. Ruiz*, 161 U. S. 502, 511-512 (1896). See Beauchet, *Traité de l'Extradition* 207 ff. (1899). Alcindor distinguished three periods in the history of political asylum: pre-1830, when the political fugitive was fair game for extradition; 1830-1856, when there was a general acceptance of political asylum; and post-1856, which marked the beginning of the restrictive view following an attempt upon the life of Napoleon III, which led Belgium to adopt a law excluding this offense from the political category. *Répertoire de Droit International* 53-55, note 2 above. See Harvard Research in International Law, *Draft Convention and Comments on Extradition* 114-115, and treaties cited therein, note 4 above. The Department of State, in a memorandum to the Supreme Court in *Karadzole v. Artukovic*, stated that it was "... of the view that the offense of murder, even though committed solely or predominantly with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, is none the less 'murder' within the meaning of the Extradition Treaty [between the United States and Yugoslavia] here involved, and is not thereby rendered an offense of a 'political character' within the meaning of Article VI of the above-mentioned treaty." Memorandum for the United States, Record, p. 8, 365 U. S. 393 (1958). The Supreme Court of Palestine stated the matter simply: "We know of nothing in the criminal law of this country or of England that creates a special offence called political murder." *Yousef Said Abu Dourrah v. Att'y. Gen.*, Jan. 20, 1941, 8 Law Rep. Palestine (1941) 43, 1941-1942 Annual Digest 331 at 332.

... in order to constitute an offence of a political character, there must be two or more parties in the State, each seeking to impose the Government of their own choice on the other, and ... if the offence is committed by one side or the other in pursuance of that object, it is a political offence, otherwise not.<sup>52</sup>

This ideological test has in some instances been extended to Communists in accordance with a strict interpretation of Marxism, if not of later glosses thereon.<sup>53</sup>

The effort to define the politico-common crime by the exception of certain offenses has been rendered more complex by attempts to exclude acts of terrorism, war crimes, crimes against humanity, or genocide, from the category of political offenses. The revulsion against terrorism following the assassinations of King Alexander of Yugoslavia and French Foreign Minister Barthou in Marseilles in 1934, and Italy's grant of political asylum to two participants in the act, led to a movement in the League of Nations to provide a control in the form of two conventions, one outlawing terrorism and the other establishing an international criminal court for the impartial trial of persons accused of such acts.<sup>54</sup> Although the coming of the second World War terminated the League's efforts in this direction, the war itself, through the systematic efforts of the Allied Powers, developed the concept of the "war crime" (taking this as a generic term), and the commitment of these states to the prosecution of war criminals, traitors, and collaborationists was predicated upon the assumption that the plea of the political offense must not be allowed as a defense to their acts (a position which is reflected in Article 14(2) of the Universal Declaration of Human Rights) as "acts contrary to the purposes and principles of the United Nations," in the efforts of the International Law Commission to develop a code of offenses against the peace and security of mankind, and in studies which have been made under the auspices of the U.N. General Assembly looking to the establishment of an international criminal court.<sup>55</sup>

<sup>52</sup> [1894] 2 Q.B. 415, 419.

<sup>53</sup> The Swiss Federal Tribunal has opposed the extradition of anarchists, Harvard Research in International Law, *loc. cit.* note 4 above, at 117. The provision regarding anarchism continues to be found in extradition treaties, e.g., U. S.-Brazil, Extradition Treaty, Jan. 13, 1961, Art. V(6)(b), note 5 above.

<sup>54</sup> Re Pavelic and Kwaternik, Court of Appeals of Turin, Nov. 23, 1934, Rivista Penale, 1934, p. 1383 (Italy), 1933-1934 Annual Digest 372; League of Nations, Proceedings of the International Conference on the Repression of Terrorism, Nov. 1-16, 1937 (1938). Cf. Re Kaphengst, Fed. Trib., Oct. 17, 1930, 56 S.B.G., I, p. 457 (Switzerland), 1929-1930 Annual Digest 292 at 293; Torres Gigena, Asilo Diplomático, Su Práctica y Teoría 141-143 (1960).

<sup>55</sup> Lauterpacht, "The Law of Nations and the Punishment of War Crimes," 21 Brit. Yr. Bk. of Int. Law (1944) 58; Schwelb, "The United Nations War Crimes Commission," 23 *ibid.* (1946) 363; 2 Oppenheim-Lauterpacht, International Law 588, 589 (7th ed., 1952); Pella, "Draft Code of Offences against the Peace and Security of Mankind," 1950 I.L.C. Yearbook (II) 278; Carjeu, "Quelques Aspects du Nouveau Projet de Statut des Nations Unies pour une Juridiction Criminelle Internationale,"

<sup>60</sup> Revue Générale de Droit International Public 401 (1956); see U.N. Committee on International Criminal Jurisdiction, Draft Statute for an International Criminal Court, U.N. Doc. A/AC.48/4, Sept. 5, 1951, 46 A.J.I.L. Supp. 1 (1952).

Although requests for the extradition of war criminals, made not long after the war, appear to have been granted without regard to the political motivation of the accused, there existed, at the same time, some uneasiness about the essentially political character of war crimes charges and their liability to abuse for purposes of political reprisals, a point made by the United States in the United Nations General Assembly during a debate in 1947 on the commitment to surrender war criminals:

In this connexion, the United States surrenders no one for trial as a war criminal who, we believe from the evidence, is wanted simply as a political opponent of the Government making the request, and where evidence of complicity in crime is lacking. In our own country and elsewhere, we recognize the fundamental right of political opposition to the Government in power. Such opposition in itself cannot make a person a war criminal or a quisling or a traitor.

But at the same time it was admitted that the United States would "surrender quislings and traitors for trial under the law of the countries which were occupied by the enemy and where those persons actively aided the enemy . . ." if the United States were satisfied by the evidence offered in support of the request.<sup>56</sup> On the other hand, the Supreme Court of Brazil, in denying requests from Denmark, Norway, and France for the extradition of alleged war criminals, made clear its view of the political character of the charges in a 1947 case: "The crime of assisting the enemy in time of war is a political one *lato sensu* because it is a crime against the State in its supreme function, namely, its external defence and its sovereignty."<sup>57</sup> In 1954, a Guatemalan request for the extradition from Mexico of two supporters of the regime of ex-President Arbenz Guzmán on various charges, including genocide, had to be amended to exclude genocide, an offense which the District Court for the Federal District found to be unknown to Mexican law.<sup>58</sup> The position of the United States regarding war criminals was put to the test during eight years of litigation over the extradition of Andrija Artukovic to Yugoslavia on charges of committing war crimes while serving as Minister of the Interior in the short-lived Pavelic Government during 1941-1942. Extradition was ultimately denied on grounds that the offenses charged were political in character.<sup>59</sup>

<sup>56</sup> U.N. General Assembly, 2d Sess., Official Records, Vol. I, p. 481. See Resolutions of Feb. 16, 1946, and Oct. 31, 1947, 1946-1947 U.N. Yearbook 66; 1947-1948 *ibid.* 222.

<sup>57</sup> Denmark (Collaboration with the Enemy) Case, May 21, 1947, 4 Boletim da Sociedade Brasileira de Direito Internacional 128 (Jan.-June, 1948), 1947 Annual Digest 146-147. See also the following decisions of the Federal Supreme Court of Brazil: *Re Kahra*, May 12, 1948, 87 *Arquivo Judiciário* (July-Sept., 1948), 1948 Annual Digest 301; *Re De Bernonville*, Sept. 28, 1955, 117 *Arquivo Judiciário* 246 (Jan.-March, 1956), 1955 Int. Law Rep. 527.

<sup>58</sup> *Re Rosenberg and Cruz Wer*, 1954, discussed by Rovira Pleitez, *El Asilo Diplomático y Territorial en América* 75 ff. (1956).

<sup>59</sup> *Karadzole v. Artukovic*, 170 F. Supp. 383 (S.D. Calif., 1959), on remand from the Supreme Court, 355 U. S. 393 (1958). Cf. *Extradition of Greek National (Germany) Case*, Fed. Sup. Ct., July 12, 1955, 8 N.J.W. (1955) 1365 (German Fed. Rep.), 1955 Int. Law Rep. 520. More recently a Czech request to Argentina for the extradition of a fugitive on charges of war crimes was denied on grounds that the Argentine statute of

Despite the presumption that political motivation can be attached to such acts as the commission of international aggression, fomentation of civil war, violations of the laws of war, terrorism, and genocide, and may be advanced as a defense to extradition on such charges, and some substantiation thereof in practice, the trend of postwar opinion has been hostile to this view. As Pella pointed out in his memorandum for the International Law Commission on crimes against the peace and security of mankind, any of these acts or "super-crimes" is distinguishable from the political offense in the usual sense of the term by reason of its international impact and its "massive scale"; consequently, the political defense should not be available to its perpetrators.<sup>60</sup> The Genocide Convention of 1948 provides specifically that "Genocide and other acts enumerated in article III [conspiracy, incitement, attempt, and complicity] shall not be considered as political crimes for the purpose of extradition," while the four Geneva Conventions of 1949 on the protection of armed forces, prisoners of war and civilians in wartime, obligate the contracting states to prosecute violators, and make no exception for any possible political motivation for such violations.<sup>61</sup>

#### B. *The Political Offense in Treaty and Statute*

Although the term "political offense" is used in extradition treaties and in extradition and immigration statutes, it is usually not defined or, at best, it will be defined by implication. Typical of the usage in extradition treaties is the statement that "the provisions of the present Treaty shall not import a claim of extradition for any crime or offense of a political character, nor for acts connected with such crimes or offenses," or "there shall be no extradition for political offences."<sup>62</sup> A dimension may be added to this kind of clause by the denial of extradition where "the person sought would have to appear, in the requesting State, before an extraordinary tribunal or court."<sup>63</sup> Usually, however, "political offense" is qualified by the exclusion of certain acts from this category, either in general terms, such as an act which "essentially consists of an offense under ordinary law if the offender should plead a political motive or purpose," or with some specificity, such as the attempt upon the life of a head of state, the

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limitations had run on offenses committed in 1944-1945, *Re Durcansky*, July 18, 1960, *Juzgado Nacional de Primera Instancia en lo Criminal y Correccional Federal, Jurisprudencia Argentina*, 1960, IV (July-Aug., 1960), pp. 542, 543. The Soviet Union requested the extradition of Karl Linnaas from the United States in October, 1961, on charges of the commission of war crimes in Estonia in 1944. Considering the decision in the Artukovic case, together with the views expressed by the American Government in 1946, on the matter of extraditing war criminals, and the absence of an extradition treaty, there seems little likelihood that the request will be granted. *New York Times*, Oct. 18, 1961, p. 9, col. 1; 13 *Current Digest of the Soviet Press* 27 (No. 41, Nov. 8, 1961).

<sup>60</sup> Note 55 above, pp. 301-302.

<sup>61</sup> Art. VII, 78 U.N. Treaty Series 277, 282; 75 *ibid.* 31, 85, 135, 287.

<sup>62</sup> Art. 3, U. S.-Liberia, Extradition Treaty, Nov. 1, 1937, 201 L. N. Treaty Series 156; Art. 3(1), U. S.-Saudi Arabia, Agreement for the Extradition of Offenders, April 20, 1942, 10 U.N. Treaty Series 99.

<sup>63</sup> Art. V(4), U. S.-Brazil, Extradition Treaty, Jan. 13, 1961, note 5 above.



profession of anarchism, commission of insurgency, acts of brigandage or of plunder.<sup>64</sup>

Statutory references do not usually define the political offense *per se*; e.g., the United States Immigration and Nationality Act of 1952 exempts the person convicted of a "purely political offense" from the category of the excludable alien.<sup>65</sup> The American and British extradition laws simply provide that no person shall be surrendered for a political offense.<sup>66</sup> In 1957 the Supreme Court of Chile ruled in an extradition case that, as neither Chilean law nor the pertinent multilateral conventions to which Chile was party provided a definition of the political offense, the court would have to make its own determination in the light of the general principles of international law.<sup>67</sup> The case was a colorful one which affected both foreign and domestic politics. Argentina requested the extradition of six high Peronista officials who had sought political asylum in Chile after fleeing from a prison in southern Patagonia. There were numerous charges, ranging from misappropriation of government property and extortion to arson and homicide. The Supreme Court found that five of the fugitives were charged with political offenses or with offenses which did not meet the requirements of double criminality or adequate proof, but that the charges against the sixth fugitive, Guillermo Patricio Kelly Varela, former chief of a storm-trooper appendage of the Peronista Party, were extraditable offenses. Before the extradition order could be carried out, however, Kelly escaped in disguise from his Chilean prison and disappeared. The resulting furor in Chile led to impeachment charges against two cabinet ministers and their subsequent resignation from office.<sup>68</sup>

An examination of criminal codes or statutes will readily produce a list of inherently "political" offenses, such as treason, rebellion, sedition, insurrection, sabotage, espionage, offenses of opinion, or military offenses, as well as more exotic ones, such as treachery or defection to a foreign state.<sup>69</sup> Publicists have tried to classify such offenses in various ways in

<sup>64</sup> Art. 6, Netherlands-Italy, Convention for the Extradition of Criminals, May 28, 1897, revived by exchange of notes, 98 U.N. Treaty Series 84; Art. 3(1), Denmark-Czechoslovakia, Treaty of Extradition and Judicial Assistance in Criminal Matters, Oct. 7, 1931, 127 L. N. Treaty Series 107; Art. V(6)(b), U. S.-Brazil, Extradition Treaty, Jan. 13, 1961, note 5 above; Art. 6(b), Iraq-Jordan, Treaty of Brotherhood and Alliance, April 14, 1947, 23 U.N. Treaty Series 147; Art. 4(3), Iraq-Turkey, Extradition Convention, March 29, 1946, 37 *ibid.* 369; Art. 3(2), U. K.-Saudi Arabia, Agreement for the Extradition of Offenders, April 20, 1942, note 62 above. See Harvard Research in International Law, *loc. cit.* note 4 above, pp. 114-118.

<sup>65</sup> 8 U.S.C., sec. 1182(a)(9)(10).

<sup>66</sup> 18 U.S.C., sec. 3185; 33 and 34 Vict., Ch. 25, Art. 3. For other extradition laws, see Harvard Research in International Law, *loc. cit.* note 4 above.

<sup>67</sup> *Re Cámpora*, Sept. 24, 1957, 54 Revista de Derecho, Jurisprudencia, Ciencias Sociales y Gaceta de los Tribunales, Nos. 7-8 (Sept.-Oct., 1957), Pt. 2, sec. 4, at 197; 1957 Int. Law Rep. 518, at 519-521; 53 A.J.I.L. 693 (1959).

<sup>68</sup> New York Times, March 19, 1957, p. 1; March 20, 1957, p. 21, col. 3; Sept. 27, 1957, p. 7, col. 1; Oct. 4, 1957, p. 2, col. 6.

<sup>69</sup> E.g., 18 U.S.C., secs. 792-794, secs. 2152-2156, secs. 2381-2382, secs. 2383-2385; Argentina, Código Penal (1961 ed.), Tit. XI, Art. 244; Australia, Commonwealth Crimes Act, 1914-1960, sec. 24 AA, 1960 Cumulative Supp. to the Acts of the Parliament of

order to establish some kind of rule-of-thumb definition: *e.g.*, there is Stephen's distinction between political offenses "committed by open force," such as treason, and those "not committed by open force," such as sedition, or Billot's classification, widely accepted among European and Latin American publicists, of isolated political offenses, *délits complexes*, which comprehend attacks upon the public or social order and upon private rights, and *délits connexes*, or the joinder of the political and common crime elements in one offense.<sup>70</sup> Criminal codes and statutes may classify offenses; *e.g.*, the Argentine Penal Code provides for offenses against the security of the state (treason), offenses which compromise the peace and dignity of the nation (unneutral conduct), and offenses against public authority and the constitutional order (rebellion and sedition); the Soviet Law of 1958 on Criminal Liability for State Crimes includes as two classes of offenses especially dangerous state crimes (treason, espionage, terrorism) and other state crimes (violation of national and racial equality, divulging a state secret, banditry).<sup>71</sup> Although such categories are not necessarily designed to separate political from common crimes, especially for purposes of extradition, this assumption may be admitted in the light of specific state practice, bearing in mind, as Torres Gigena has pointed out, that none of these offenses in itself provides a definition of "political offense," for each is a common crime in terms of internal law and will be so regarded for purposes of prosecution, in spite of an awareness on the part of authorities of the inherently political coloration of such offenses.<sup>72</sup>

The asylum state makes the determination of the political character of an offense, whether it is pleaded as a defense to extradition, expulsion, or to exclusion. The principle of double criminality is not commonly considered where the political charge is under examination in the extradition process, although an occasional exception will be found in an extradition treaty, but the inclusion of such offenses as treason or rebellion in most

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the Commonwealth of Australia, 1901-1950 (1961); U.S.S.R., Law on Criminal Liability for State Crimes, Dec. 25, 1958, Art. 1, 11 Current Digest of the Soviet Press 3 (No. 5, March 11, 1959).

<sup>70</sup> Stephen, A General View of the Criminal Law of England 85, 89 (2d ed., 1890); Billot, *Traité de l'Extradition* 104 (1874). For a concise discussion of the classification of political offenses, see 1 Oppenheim-Lauterpacht, *International Law* 707 ff. (8th ed., 1955).

<sup>71</sup> Argentina, *Código Penal* (1961 ed.), Tit. IX, X; *Re Schneider*, July 18, 1945, *Cámara Federal de la Capital, Jurisprudencia Argentina*, 1945, IV, p. 30; Art. 145, Tit. II, Ch. I, of the Penal Code for the Federal District of Mexico does not define political offenses as such, but lists as examples rebellion and sedition.

<sup>72</sup> *E.g.*, Denmark (Collaboration with the Enemy) Case, Supreme Court, May 21, 1947 (Brazil), note 57 above; *Re Pavelic and Kwaternik*, Court of Appeals of Turin, Nov. 23, 1934 (Italy), note 54 above; *Asilo Diplomático, Su Práctica y Teoría* 141, note 54 above; *Re Bustos Nufiez*, Supreme Court, March 28, 1958, *Jurisprudencia Argentina*, 1958, II, p. 401 (Argentina); Pritchett, "The Political Offender and the Warren Court," 38 *Boston University Law Rev.* 53, 65 (1958). The Supreme Court of Guatemala stated in 1929 that "Universal law qualifies as political crimes sedition, rebellion and other offences which tend to change the form of Government or the persons who compose it. . . ." *Re Eckermann*, May 28, 1929, 26 *Gaceta de los Tribunales* (n. 85) 992, 1929-1930 Annual Digest 293.

criminal codes or statutes affords some standard for judgment which is, moreover, necessarily affected by the experience of the asylum state with political pleas.<sup>73</sup> States which have developed a familiarity with violence as a technique for domestic political change are likely to adopt a latitudinarian view of the political offense as pleaded by aliens.

### C. *The Political Offense in Judicial Terms*

An examination of some fifty extradition cases, apart from war crimes cases, decided by the courts of fourteen states in Europe and the Americas, in which the plea of political offense was offered as a defense, permits some generalizations on the subject. Where the fugitive was charged with homicide or with being an accessory thereto, the political defense was sustained in those instances in which it could be shown that the act had been committed in the course of a revolt or uprising or during a disturbed political situation in the state of origin, that the act had a political objective, or that the fugitive feared political persecution if he were extradited. But where homicide was committed as an isolated act, as an act of terrorism, treachery, or of personal revenge, or without a logical relationship to a political objective, the plea of political defense was rejected and extradition granted. The political defense failed in a majority of cases in which the offenses charged were arson, bombing, or kidnaping; it was pleaded successfully, however, against charges of military offenses, malfeasance in office, illegal association, and mutiny aboard ship. In cases involving larceny, cheating (*escroquerie*), embezzlement, forgery, or fraud, the political defense failed in more than half the instances. In three cases embezzlement and robbery committed in the course of furthering revolts were treated as political offenses, and in another case extradition was denied where there was reason to believe that a charge of embezzlement actually disguised a prospective trial for a political offense. The theft of an airplane as a means of escape to asylum was mitigated by reason of the political motive inspiring the act.

The decisions in these cases rest essentially upon two theories: the strict and the relative interpretations of the political offense. The prototype of the strict view is the rule of *Castioni*, that is, that the act, in order to be characterized as "political," must be directed against the state, the constitutional order, or be otherwise "inextricably involved in conditions disturbing the constitutional life" of the country.<sup>74</sup> This approach presumes

<sup>73</sup> Art. 3 of the Extradition Treaty between Mexico and Panama of Oct. 23, 1928, provides that "The State to which application is made shall decide whether the offence for which the extradition of an accused person is applied for is of a political character in accordance with whichever law is the more favourable to the fugitive." 194 L. N. Treaty Series 143. The issuance of amnesty by the requesting state to certain political elements, while ignoring the group to which a political fugitive belongs, has been regarded as prima facie evidence of the political character of the offense charged, *Re Ragni*, Fed. Trib., July 14, 1923, 49 S.B.G., I, p. 266 (Switzerland), 1923-1924 Annual Digest 286.

<sup>74</sup> *Re Castioni*, note 51 above; see also *Regina v. Governor of Brixton Prison ex parte Schtraks*, [1962] 3 W.L.R. 1013, at 1033; *Re Pavan*, Fed. Trib., June 15, 1928, 54 S.B.G.

an organized movement to secure power in the state, that any rights injured will be political rights, and that the act must be a direct, not an ostensible, means to the alleged political objective.<sup>75</sup> Terrorist acts, acts of personal vengeance or gain, and acts having an entirely local impact are excluded from the category of political acts according to this interpretation.<sup>76</sup> The main difficulty with the strict definition lies in taking the organized political movement as its frame of reference, so that the political offender must actively associate himself with it in order to be able to use this plea. The rigidity of this view would bar Kavie and his fellow "hijackers" of an airplane from asylum in Switzerland, or Koleczynski and his fellow mutineers from asylum in the United Kingdom, both of which groups received asylum, while allowing asylum to Ktir on grounds of his activities in the Algerian F.L.N., which, in fact, did not bar his extradition from Switzerland to France in 1961.<sup>77</sup>

Following the relative interpretation, an act which is pleaded as a political offense will be analyzed in terms of the motives and the objectives of the offender, together with the circumstances surrounding the commission of the act, but all of these elements must be predominantly political. In taking this approach, the Swiss Federal Tribunal has required the presence of all three elements; courts in other states have been satisfied by an emphasis upon intent alone, intent considered in terms of motive and objective, or upon circumstances.<sup>78</sup> In both the relative and strict interpretations, the notion of proportionality is important to the consideration of

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I, p. 207 (Switzerland), 1927-1928 Annual Digest 347; *Re Banegas*, Supreme Court, June 30, 1948, 88 *Archivo Judiciário* 34 (Oct.-Dec., 1948) (Brazil), 1948 Annual Digest 300; *Re Cámpora*, note 67 above.

<sup>75</sup> *Re Mariaca Pando*, Supreme Court, Feb. 26, 1926, 145 *Fallos de la Corte Suprema* 394 (Argentina), 1925-1926 Annual Digest 310; *Re Fabijan*, Supreme Court, March 9, 1933, 67 *Entscheidungen des Reichsgerichts in Strafsachen* 150 (Germany), 1933-1934 Annual Digest 360; *Re Gatti*, Court of Appeals of Grenoble, Jan. 13, 1947, *Sirey*, 1947, II, p. 48 (France), 1947 Annual Digest 145; *Re Ficorilli*, Fed. Trib., Feb. 14, 1951, 77 *Trib. Fed. Suisse* (1951), I, pp. 57-65, 1951 *Int. Law Rep.* 345.

<sup>76</sup> *Re Pavan*, note 74 above; *Re Kaphengst*, note 54 above; *Re Peyre*, Cámara Nacional Especial, Dec. 20, 1955, 81 *Revista Argentina Jurídica La Ley* 648 (Jan.-March, 1956), 1955 *Int. Law Rep.* 525.

<sup>77</sup> *Re Kavie*, *Bjelanovic* and *Arsenijevic*, Fed. Trib., April 30, 1952, 78 *Trib. Fed. Suisse* (1952), I, p. 39, 1952 *Int. Law Rep.* 371; see Guggenheim's note on this case in 10 *Annuaire Suisse de Droit International* 218 (1953); *Ex parte Koleczynski*, [1955] 1 *Q.B.* 540; 1954 *Int. Law Rep.* 240; 49 *A.J.I.L.* 411 (1955); *Re Ktir*, note 37 above. The U. S. Immigration and Naturalization Service, in one of the few published decisions in which the political offense is discussed, adhered to the strict view: "... in order for an offense to constitute a political one, there must be concerted action for a political purpose." In the Matter of K—(Family), A-7421321,2,&3, Aug. 16, 1950, 4 *Administrative Decisions under Immigration & Nationality Laws* 108, 118 (Feb. 1950-Jan. 1953).

<sup>78</sup> *E.g.*, *Re Camporini*, Fed. Trib., Sept. 19, 1924, 50 *S.B.G.* I, p. 299 (Switzerland), 1923-1924 Annual Digest 288; *Re Ficorilli*, note 75 above; *Re Kavie*, note 77 above; *Re Cámpora*, note 67 above; *Re Fabijan*, note 75 above; *French Refugee* (Germany) Case, note 34 above; *Ramos v. Diaz*, 179 *F. Supp.* 459 (S.D.Fla., 1959). See 1 *Moore A Treatise on Extradition and Interstate Rendition* 308 (1891).

intent and circumstances,<sup>79</sup> that is, a court must weigh the validity of a plea that an act, for example, a homicide, is a "justifiable homicide," justifiable for political reasons; consequently, if the act involves mayhem, excessive brutality, treachery, or obvious personal revenge, it is not justified by its alleged political motivation. There is latent, however, in the relative interpretation the same limitation found in the strict interpretation, *i.e.*, that the political offense must bear some active relation to the internal or external political *milieu* of the offender's country. This condition does not, however, meet the circumstances of the *Kavic* or *Kolczynski* case.

A modification of the relative interpretation was offered by the Swiss Federal Tribunal in its opinion in the *Kavic* case:

That restrictive interpretation . . . does not meet the intention of the law, nor take account of recent historical developments, such as the growth of totalitarian States. In such States all political opposition is suppressed and a fight for power is, if not impossible from the start, at least practically without any chance of success. Those who do not wish to submit to the régime have no alternative but to escape it by flight abroad. . . . This more passive attitude for the purpose of escaping political constraint is no less worthy of asylum than active participation in the fight for political power used to be in what were earlier considered to be normal circumstances. The spirit of justice undoubtedly ascribes a political character to such a flight abroad, and a liberalization of the practice of the Court, with a view to adjusting it to recent developments, appears justified. In matters of extradition in particular, the Court must not abandon that spirit in favour of legalistic constructions, and must take account of historical and political developments . . . Recent practice has been too restrictive in making the relative political character of an offence dependent on its commission in the framework of a fight for power.<sup>80</sup>

This passive theory presents a realistic view which takes into account the massive defection of political refugees which has been characteristic of the post-World War II period, that is, defection not motivated by political offenses *per se* (unless defection itself is a political offense), but by political disillusionment and despair. The passive theory does conflict with the notion of proportionality, which provides that a "political" act cannot in terms be committed for private ends, and it could be argued that flight to escape an untenable political situation is a personal choice, so that common crimes committed in the course thereof could not be justified as political. On the other hand, there is a substantial difference between *Kolczynski's* mutiny and such acts as the seizure of hostages during a strike, murder by treachery, or the carnage wreaked by the French O.A.S. in Algeria.<sup>81</sup> In legalistic terms, the distinction may be tenuous; in political

<sup>79</sup> *Ramos v. Diaz*, note 78 above; *Re Kavic*, note 77 above. In *Rosenberg and Cruz War*, the District Court for the Federal District of Mexico denied extradition for homicide on the grounds that this act had as its objective the suppression of ideological or *de facto* opposition to the incumbent régime in Guatemala. *Rovira Pleitez*, note 58 above.

<sup>80</sup> 1952 Int. Law Rep. 373-374.

<sup>81</sup> The Swiss Federal Tribunal, noting that the seizure of hostages was an extreme measure in wartime, held that it could not be justified as a political offense in a peace-

terms it is vital. Nevertheless, the court's decision as to the justification of the political defense rests heavily, as Cassels, J., pointed out in the *Kolczynski* case, upon "the circumstances existing at the time when . . . [it has] to be considered."<sup>82</sup>

#### CONCLUSION ✓

In the foregoing discussion it has been suggested that the distinction between the political offense and the non-political offense in Article 14(2) of the Universal Declaration of Human Rights is not easily arrived at; that the bases for such a distinction comprise an amalgamation of political and legal considerations; and that there are conflicting trends discernible in the various attempts to define the terms. In the first place, the concept of the political offense is ambiguous: treason may be justified in terms of high principles of patriotism or condemned as a despicable attack upon the commonweal itself. "*Les conspirateurs vaincus sont des brigands, victorieux ils sont des héros.*"<sup>83</sup> There is no doubt that in periods of political stress in a country or where political opposition is denied or persecuted, acts, which in the ordinary terms of criminal law are punishable as common crimes, will be committed for political ends. If the perpetrators of such acts become parties to exclusion or expulsion proceedings in the asylum state, the responsibility of weighing their political defense against known or supposed aggravating conditions within their state of origin is assumed by the political branch of the government of the asylum state, the decision is made in the light of its own policy considerations and experience, and its courts will closely follow such a determination, for these are administrative rather than judicial proceedings. Where the plea of political persecution is made as a defense to extradition, the burden of the decision may fall upon the judicial branch of government of the asylum state. It must be borne in mind that the extradition process itself is not a criminal proceeding; it is not an adjudication but rather a hearing to determine whether adequate grounds exist to warrant returning the fugitive to the custody of the requesting state. ✓ Although the court will have before it whatever documentation of the charges the requesting state sees fit to supply, and if this evidence is deficient in the opinion of the court, extradition can be denied,<sup>84</sup> yet the court is in the position of making a decision which involves the weighing of the political motivations not only of the accused, but also of the requesting state; indeed, the court of the asylum state is essentially sitting in judgment on the judicial process of the requesting

time situation. *Re Vogt*, Jan. 26, 1924, 50 S.B.G., I, p. 249, 1923-1924 Annual Digest 285; cf. *Re Eckermann*, note 72 above. The French O.A.S. justified its course of murder and pillage in Algeria in the name of patriotism. See *New York Times*, March 21, 1962, p. 1, col. 5.

<sup>82</sup> [1955] 1 Q.B. 547, 549.

<sup>83</sup> Balzac, quoted by Pella, note 55 above, p. 290

<sup>84</sup> *E.g.*, *Re Van Lierde*, note 39 above.

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state, for the refusal of extradition on political grounds casts aspersions upon the requesting state and its courts.<sup>85</sup>

Courts in both the common law and civil law systems are reluctant to involve themselves in political questions. A court cannot avoid this involvement, however, where the political defense is offered in an extradition proceeding. Although the political branch of the government may be asked by the court to supply its views about the *bona fides* of the extradition request, the decision rests with the court. This was evident, for example, in the *Artukovic* case, where the Department of State's memorandum to the Supreme Court suggested some doubt about the political coloration of the offenses of which the fugitive was accused:

[I]t does not appear on the face of the pleadings that all of the offenses which Artukovic is . . . alleged to have committed were necessarily connected with such struggle for power. . . .

. . . [I]t is the opinion of the Department that some of the murders alleged to have been committed might constitute "murder" within the terms of the Extradition Treaty here involved, under the circumstances alleged, particularly in the absence of any suggestion of tactical or strategic considerations motivating each of the alleged crimes.<sup>86</sup>

But the District Court, on remand, decided for the fugitive.<sup>87</sup> On the other hand, a court also has to consider the fact that the offense charged may be a criminal act for which extradition would normally be granted. In refusing extradition the court is placed in the unenviable position of condoning the fugitive's commission of an otherwise extraditable crime for which he would be liable to prosecution had it been committed in the asylum state, the political motive notwithstanding. The dilemma is obvious.

Two conflicting trends are discernible in the several definitions of the political offense which have been considered above. On the one hand the trend since the mid-nineteenth century has been toward restriction of the resort to the political defense in order to avoid abuse of what is admittedly an exception to the commitment of states to prosecute common crimes in the interest of the maintenance of law and order. Such restrictions can be seen in the texts of extradition treaties, in the efforts of the League of Nations to exclude terrorism, and in the efforts of the United Nations to exclude war crimes from the category of political offenses. Given present international conditions and the vulnerability of those states, which are afflicted by disturbed political conditions, inexperienced in popular government, or economically underdeveloped, to espionage, terrorism, fomentation

<sup>85</sup> Contrast the view expressed in *Re Arton*, [1896] 1 Q.B. 108, 115, that a court in an asylum state cannot question the good faith of the requesting state, with the position of the West German Federal Supreme Court in *French Refugee (Germany) Case*, note 38 above, that the court has a duty to examine closely the possible political nature of the charges against the accused.

<sup>86</sup> Note 51 above, p. 9.

<sup>87</sup> *Karadzole v. Artukovic*, 170 F. Supp. 383 (S.D. Calif., 1959). The Supreme Court decision turned on a procedural issue. The final decision was essentially the same as that in *Karadzole v. Artukovic*, 247 F. 2d 198 (9th Cir., 1957).

of civil war, or acts of international aggression, a strong argument can be made for further restricting the scope of the political offense by excluding these acts from its purview. On the other hand, there is the trend toward the broadening of the defense of the political offense by recognition of the "passive" political offense as illustrated in the *Kavic* and *Kolczynski* cases. Although the legal implications of this trend may not be clear, it represents a realistic reaction to the practice of political asylum at present. The "passive" doctrine does not simplify a court's problem of arriving at a decision in an extradition proceeding; and in making such a decision a court cannot be oblivious of the climate of public opinion.<sup>88</sup> In order to resolve the conflict between these two trends and to protect the interests of the fugitive as well as those of the states concerned, there must be provision for impartial adjudication of both charges and defenses, which argues for granting jurisdiction over these cases to a regional tribunal.

Taking the political offense in international practice in broad perspective, a point made by Edmond Cahn comes to mind. In reviewing a book on political trials, Professor Cahn asked:

In scientific terms, what can one hope to demonstrate by narrating and classifying a variety of politically motivated trials held in a variety of times, places, cultures and legal orders? Even if the instances you collect happen by some miracle to point in the same direction, you still have no means of proving that there are no other cases that point just the opposite way.<sup>89</sup>

This is a sound question and one which must always haunt the student of international law or comparative law. Considering the *Kavic* and *Kolczynski* cases, it may be asked whether two cases decided by two courts working in two different systems of law can be said to portend a trend. But what of conflicting decisions from the same court? A survey of the decisions of the Swiss Federal Tribunal in regard to political offenses does not reveal an unbroken adherence to one point of view; the same court, which enunciated the "passive" doctrine in the *Kavic* case, did not hesitate to order the extradition of Ktir eight years later, with the hopeful proviso that his Algerian F.L.N. connections would be overlooked by the French courts. Would the decision reached in the *Artukovic* case have been made by the Queen's Bench Division, the Federal Supreme Court in West Germany, the High Court of Australia, or the Supreme Court of Argentina? The answer is probably yes, considering motive, objective, circumstances surrounding the commission of the allegedly political offense, and the weight of the evidence offered by the requesting state and the accused. By endeavoring to accumulate as much material as possible illustrative of state practice in these matters, one can hope to arrive at a mean—a standard for the guidance of foreign offices, courts, and practitioners.<sup>90</sup>

<sup>88</sup> See Harlan, J., in *U. S. ex rel. Hintopoulous v. Shaughnessy*, 353 U. S. 72, 78 (1957); Torres Gigena, cited note 54 above, p. 140.

<sup>89</sup> New York Times Book Review, Jan. 14, 1962, p. 12, col. 4.

<sup>90</sup> This is an argument for more rapid development of such useful sources as the International Law Reports and the official and unofficial surveys of state practice which are published in a very few countries.



The value of an examination of the problem of definition of the political offense in its international ramifications lies in the possible clarification of a difficult and omnipresent problem which comes from delineating its scope and exploring the solutions to the problem and their rationale arrived at by various courts in various systems of law. No one solution is more likely for the problem of the political defense in international practice than it is for the problem of the defense of insanity in national practice. But the plea of the political offense, which is central to the request for political asylum, must be open to constant re-examination in the light of experience and with due regard to current conditions, for both are part of the fabric of contemporary international law.

# THE LEGAL STATUS OF FORMOSA

## A STUDY OF BRITISH, CHINESE AND INDIAN VIEWS

By J. P. JAIN

### *Indian School of International Studies*

Formosa (Taiwan) and the Pescadores (Penghu) were Chinese territory for several centuries before they were ceded to Japan by the Treaty of Shimonoseki of April 18, 1895. During the second World War the Allies decided to strip Japan of all her islands (other than her home territories) in the Pacific. At the Cairo Conference on December 1, 1943, a joint declaration was made by the President of the United States, the Prime Minister of the United Kingdom and the President of China that "all the territories Japan has stolen from the Chinese, such as Manchuria, Formosa, and the Pescadores, shall be restored to the Republic of China."<sup>1</sup> In the Potsdam Proclamation of July 26, 1945, the Allies, President Truman of the United States, Prime Minister Attlee of the United Kingdom, and Marshal Stalin of the Soviet Union undertook to carry out the terms of the Cairo Declaration as one of the conditions for the Japanese peace.<sup>2</sup> On August 14, 1945, the Japanese Government announced its acceptance of the Potsdam terms as a basis for surrender. General Order No. 1 of the Japanese Imperial Headquarters, issued pursuant to the terms of surrender, provided for the surrender of the Japanese forces in China (excluding Manchuria) and Formosa to Generalissimo Chiang Kai-shek. This took place on October 25, 1945, and ever since that date the Chinese Nationalist authorities have been exercising control over Formosa and the Pescadores.

In the Peace Treaty with Japan,<sup>3</sup> the signatories made Japan formally renounce "all right, title and claim to Formosa and the Pescadores."

<sup>1</sup> 9 Dept. of State Bulletin 393 (1943). See also Foreign Relations of the United States, Diplomatic Papers, The Conferences at Cairo and Tehran, 1943, p. 448 (Dept. of State Pub. 7187, 1961). For text of Treaty of Shimonoseki, see 1 A.J.I.L. Supp. 378 (1907).

<sup>2</sup> 13 Dept. of State Bulletin 137 (1945). The Potsdam Proclamation, issued by the Heads of the Governments of the U.S.A., the U.K. and China on July 26, 1945, stated: "The terms of the Cairo Declaration shall be carried out and Japanese sovereignty shall be limited to the islands of Honshu, Hokkaido, Kyushu, Shikoku and such minor islands as we determine." On Aug. 8, 1945, the Soviet Union declared war on Japan and, "faithful to its obligations to its Allies," adhered to the statement of the Allied Powers of July 26, 1945. Foreign Relations of the United States, Diplomatic Papers, The Conference of Berlin (The Potsdam Conference), 1945, Vol. II, pp. 1474-1475 (1960).

<sup>3</sup> 25 Dept. of State Bulletin 349 (1951); 136 U.N. Treaty Series 45; T.I.A.S., No. 2490; 46 A.J.I.L. Supp. 71 (1952); signed at San Francisco by 49 nations, including Japan, and effective from April 28, 1952. The Soviet Union, though invited to the

The Peace Treaty thus did not transfer sovereignty over these territories to either the People's Republic of China, the Chinese Nationalist authority or to any other authority or government, Chinese or non-Chinese. The Treaty of Peace between the (Nationalist) Republic of China and Japan, signed on April 28, 1952,<sup>4</sup> did not alter in any way the position in regard to the disposition of Formosa. Article II of the treaty simply recognizes the renunciation by Japan of "all right, title and claim to Taiwan (Formosa) and Penghu (the Pescadores)" under Article 2 of the San Francisco Peace Treaty. Nor did the Treaty of Mutual Defense between the United States and the Republic of China, signed in December, 1954, modify or affect the legal status of Formosa and the Pescadores.<sup>5</sup>

The Cairo and Potsdam Declarations were "made at a time when there was only one entity claiming to represent China," as the British Foreign Secretary put it.<sup>6</sup> Then there was not an iota of doubt in the minds of the Allies about the binding nature of these declarations and the retrocession of Formosa to China. The dispute arose after the Chinese Nationalist administration moved to Taipei on December 8, 1949, and the Peking regime failed to "liberate" Taiwan at a time when the United States was in no way committed to the defense of the island. The non-recognition of the People's Republic of China by the United States and the interposition of the Seventh Fleet by President Truman's order of June 27, 1950, two days after the outbreak of the Korean war, to prevent either the seizure of Formosa by the Mao regime or the invasion of mainland China from Formosa, further complicated the issue. Different interpretations came to be put upon the binding effect of the Cairo Declaration and the nature of the taking over of the administration or possession of the island by Chiang Kai-shek on October 25, 1945. Conflicting opinions came to be held in regard to the provision of the San Francisco Peace Treaty respecting the renunciation of all right, title and claim to Formosa and the Pescadores by Japan. Professor Quincy Wright observes:

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Conference, refused to sign the document while both Communist China and Nationalist China were excluded from participation in the San Francisco Peace Conference, as no agreement could be reached between the countries responsible for framing the San Francisco treaty documents, the United States and the United Kingdom, on which particular China to invite to the Conference.

<sup>4</sup> China Handbook, 1952-53, p. 154 (Taipeh, 1952); 138 U.N. Treaty Series 3.

<sup>5</sup> Art. V of the Treaty of Mutual Defense between the United States and the Republic of China says: "Each Party recognizes that an armed attack in the West Pacific Area directed against the territories of either of the Parties would be dangerous to its own peace and safety and declares that it would act to meet the common danger in accordance with its constitutional processes." 31 Dept. of State Bulletin 899 (1954); T.I.A.S., No. 3178; 248 U.N. Treaty Series 213. Commenting on it in the Senate Committee on Foreign Relations, the Secretary of State, Mr. Dulles, observed that reference in the treaty to "the territories of either of the Parties" was language carefully chosen to avoid denoting anything one way or another as to sovereignty over Taiwan. American Foreign Policy, 1950-1955, Basic Documents, p. 963 (Department of State, 1957).

<sup>6</sup> Great Britain, Parl. Deb. (Hansard), House of Commons, Official Report, Vol. 595, Nov. 19, 1958, Col. 1140.

By that instrument Japan renounced title but without specifying the recipient. This seems to mean, as both the United States and the United Kingdom have subsequently affirmed, that the formal transfer of the islands to China has not yet been effected, although both the Chiang and Mao Governments claim that it has.<sup>7</sup>

#### THE BRITISH VIEW

The British contend that the Cairo Declaration of 1943 "contained merely a statement of common purpose," and as such it was not binding upon the parties to the Declaration.<sup>8</sup> It is further contended on the British side that the exercise of authority by Marshal Chiang over Formosa was only provisional in nature. The assumption of an interim administrative control in Formosa, at the direction of the Supreme Commander, Allied Powers, in no way constituted the retrocession of the island to China or the transfer of sovereignty from Japan to China. *De jure*, Formosa remained Japanese territory until the conclusion of the peace settlement with Japan.<sup>9</sup> On the juridical position concerning Formosa, the British Foreign Secretary, Sir Anthony Eden, said on February 4, 1955:

The Cairo Declaration . . . was a statement of intention that Formosa should be retroceded to China after the war. This retrocession has, in fact, never taken place because of the difficulties arising from the

<sup>7</sup> Quincy Wright, "The Status of Communist China," 11 *Journal of International Affairs* 181 (No. 2, 1957). See also *idem*, "Non-Recognition of China and International Tensions," 34 *Current History* 153 (1958).

<sup>8</sup> Statement by Prime Minister Churchill. Great Britain, Parl. Deb. (Hansard), House of Commons, Official Report, Vol. 548, Feb. 1, 1955, Col. 602. It is held by British experts on international law that, since the Allies were not in possession of the island in 1943, they could not transfer sovereignty over Formosa to anybody or any Power. The Cairo Declaration could thus be only a promise to retrocede Formosa to China at the end of the war. The Cairo "Declaration," asserts E. Lauterpacht, "is not couched in form of a legal instrument." Although he considers it doubtful whether even the Potsdam "Declaration," couched in more formal language, "was intended to create binding obligations between the signatories," he at the same time emphasizes that "there is no warrant for the assumption that merely because a collective instrument is called 'Declaration' it lacks any legal binding force." E. Lauterpacht, "The Contemporary Practice of the United Kingdom in the Field of International Law—Survey and Comment," 8 *Int. and Comp. Law Q.* 186-187 (1959).

<sup>9</sup> The British Under-Secretary of State for Foreign Affairs, Mr. Mayhew, said: "Any change in the legal status of Formosa can only be formally effected in a treaty of peace with Japan." Great Britain, Parl. Deb. (Hansard), House of Commons, Official Report, Vol. 469, Nov. 14, 1949, Col. 1679. Mr. Younger, Minister of State in the Foreign Office, stated: "Formosa is still *de jure* Japanese territory and there is no Government of Formosa as such. Following on the surrender of Japan, the Chinese Government of the day assumed, with the consent of the remaining Allies, the provisional administration of the territory pending the final determination of its status at a peace settlement. Not all the remaining Allies have recognized the Central People's Government as the Government of China, and for this reason, and because of the provisional nature of the present administration of Formosa, it is the hope of His Majesty's Government that the disposal of Formosa will be decided, as has always been contemplated, in connection with the peace settlement with Japan." *Ibid.*, Vol. 478, July 26, 1950, Col. 60, Written Answers.

existence of two entities claiming to represent China and the differences among the powers as to the status of these entities. . . . In September 1945, the administration of Formosa was taken over from the Japanese by Chinese forces at the direction of the Supreme Commander of the Allied Powers; but this was not a cession, nor did it in itself involve any change of sovereignty. The arrangements made with Chiang Kai-shek put him there on a basis of military occupation pending further arrangements and did not of themselves constitute the territory Chinese. Under the peace treaty of April 1952, Japan formally renounced all right, title and claim to Formosa and the Pescadores; but again this did not operate as a transfer to Chinese sovereignty, whether to the People's Republic of China or to the Chinese Nationalist authorities. Formosa and the Pescadores are therefore, in the view of Her Majesty's Government, territory the *de jure* sovereignty over which is uncertain or undetermined.<sup>10</sup>

On May 4, 1955, Mr. R. H. Turton, Joint Under-Secretary of State for Foreign Affairs, said, in reference to the argument that it was unnecessary for a defeated Power expressly to cede territory in order to constitute a valid transfer, that this argument was undoubtedly correct, but that, for sovereignty to pass without cession or retrocession, there would have to be circumstances so strong as to constitute an implied transfer. In the case of Formosa, he added:

The sovereignty was Japanese until 1952. The Japanese treaty came into force, and at that time Formosa was being administered by the Chinese Nationalists, to whom it was entrusted in 1945, as a military occupation. In 1952 we did not recognise the Chinese Nationalists as representing the Chinese State. Therefore, this military occupancy could not give them legal sovereignty nor, equally, could the Chinese People's Republic, which was not in occupation of Formosa, derive any rights from occupation of that territory.<sup>11</sup>

If we are to accept the line of this argument, then the United States, which recognizes the Chinese Nationalists as representing the Chinese state, could with justification admit the claim of Chiang Kai-shek to legal sovereignty over Taiwan. But the United Kingdom could not admit the claim of Chiang Kai-shek to the legal title over Formosa, because in its opinion his regime does not represent the Government of China.<sup>12</sup> The

<sup>10</sup> *Ibid.*, Vol. 536, Feb. 4, 1955, Col. 159, Written Answers.

<sup>11</sup> *Ibid.*, Vol. 540, May 4, 1955, Cols. 1870-1871.

<sup>12</sup> The Chiang Kai-shek regime in Formosa could be, in British eyes, a provincial authority at best and a bandit or rebel group at worst. The Foreign Office stated, in a certificate issued in connection with legal proceedings in the English courts, that "Her Majesty's Government did not recognise that any government was located in Formosa in July and August, 1953." Since conditions in Formosa have remained materially unchanged since 1949, this statement may be taken as applicable to the whole period of administration in Formosa by the Nationalist authorities ever since the date on which they ceased to be recognized by the United Kingdom as the Government, either *de jure* or *de facto*, of the Republic of China. Nevertheless, Her Majesty's Government has maintained a consul at Tamsui during this period and has presented through him to the Nationalist authorities a number of claims arising out of damage done to British vessels by Nationalist forces based in Formosa. In two instances, Nationalist

United Kingdom, at the same time, is reluctant to support the claim of Peking, because the effective control of the territory in question, which, as Georg Schwarzenberger observes, "is of central importance for purposes of both the acquisition and maintenance of title" to territory,<sup>13</sup> does not hold good in case of Communist China. In the British view, therefore, the status of Formosa still remained to be settled by multilateral international agreement either within or outside the United Nations. Since the San Francisco Peace Treaty with Japan did not assign the islands of Formosa and the Pescadores to any Power, it is contended that:

The co-signatories of the San Francisco Treaty, other than Japan, are all by law exercising a sort of condominium over Formosa and the Pescadores, with Chiang Kai-shek acting de facto as their agent. Marshal Chiang thus exercises only a delegated authority in Formosa. It is exercised by him on behalf of those parties to the San Francisco Treaty who recognize his Government either as that of China or at least in relation to Formosa. These States are free agents to decide collectively on the future of Formosa and Pescadores outside the United Nations, or with the consent of the latter, to transfer their condominium to the United Nations.<sup>14</sup>

The idea of condominium over Formosa might perhaps be the best argument from the point of view of the Western Powers, but it is, to say the least, "unreal," as Philip C. Jessup, Judge of the International Court of Justice, put it,<sup>15</sup> primarily because the Powers concerned did not exercise that condominium in fact. Actual possession and control of the island lay in the hands of Chiang Kai-shek. While stating that condominium implied legal sovereignty, not by one state but by two or more states, Professor Quincy Wright added that, if one assumed that the Japanese Peace Treaty conferred sovereignty on the other parties to the treaty, then these other Powers had a condominium over Formosa, even though they had acquiesced in the actual government of the territory by the Chinese Nationalist authorities.<sup>16</sup> As to the condominium Powers being free agents to dispose of Formosa, Professor Wright had this to say in July, 1955:

The parties to the Japanese Peace Treaty, most of whom are Members of the United Nations, are free under the Charter, which would legally prevail over the Cairo Declaration [according to Art. 103 of the Charter], to dispose of Formosa and the Pescadores according to the

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authorities have paid compensation. E. Lauterpacht, 6 Int. and Comp. Law Q. 507 (1957). While signing the International Sugar Agreement on Oct. 16, 1953, the British representative declared that the United Kingdom could not regard "signing of the Agreement by a Nationalist Chinese representative as a valid signature on behalf of China." Cmd. No. 9815 at 223.

<sup>13</sup> Georg Schwarzenberger, "Title to Territory: Response to a Challenge," 51 A. J. I. L. 315 (1957).

<sup>14</sup> An analysis of the legal status of Formosa and other islands by Dr. Schwarzenberger, an expert on international law, and others. Lok Sabha Secretariat, Brochure on Formosa, Pescadores and Other Islands 18 (New Delhi, 1955).

<sup>15</sup> Interview with the author on Dec. 6, 1960.

<sup>16</sup> Prof. Wright's interview with the author, Feb. 21, 1962.

principle of self-determination rather than to restore them to China according to the policy declared at Cairo.<sup>17</sup>

In his talk with the author on February 21, 1962, Professor Wright observed:

Since the condominium Powers are all Members of the United Nations, they are bound to apply the principles of the Charter, which include the principle of self-determination of peoples and therefore they are not, strictly speaking, free agents.

He made reference to Articles 1 and 55 of the Charter in this connection and added:

Since the United Nations Charter is a more recent treaty, it would seem to supersede the obligations undertaken by Great Britain and the United States in the Cairo Declaration of 1943.<sup>18</sup>

The British Government regards the question of Formosa as an international problem and has often suggested the consideration of the issue by the United Nations.<sup>19</sup> Speaking after the beginning of the Korean war, Mr. Ernest Davies, Under-Secretary of State for Foreign Affairs, observed:

The main aim of His Majesty's Government is to help in securing a generally acceptable and peaceful solution of the Formosan problem. . . . We shall take advantage of any opportunity which may arise within the United Nations to bring about a solution.<sup>20</sup>

The joint statement of President Truman and Premier Attlee of December 8, 1950, declared:

On the question of Formosa, we have noted that both Chinese claimants have insisted upon the validity of the Cairo Declaration and have expressed reluctance to have the matter considered by the United Nations. We agreed that the issues should be settled by peaceful means and in such a way as to safeguard the interests of the people of Formosa and the maintenance of peace and security in the Pacific, and that consideration of this question by the United Nations will contribute to these ends.<sup>21</sup>

In this statement, made after the [Communist] Chinese intervention in the Korean war, the British Government, perhaps for the first time, spoke of taking into account the interests of native Formosans. This was in effect the first step in the direction of such proposals as United Nations trusteeship of the island, plebiscite, and an independent Taiwan, or a neutralized

<sup>17</sup> Quincy Wright, "The Chinese Recognition Problem," 49 A. J. I. L. 333 (1955).

<sup>18</sup> Interview with the author, Feb. 21, 1962.

<sup>19</sup> The United States submitted the question of Formosa for consideration of the United Nations on Sept. 20, 1950. The First Committee decided to postpone its consideration on Nov. 15, 1950. On Feb. 7, 1951, it adopted a British proposal to adjourn discussion *sine die*.

<sup>20</sup> Great Britain, Parl. Deb. (Hansard), House of Commons, Official Report, Vol. 478, Sept. 15, 1950, Col. 174, Written Answers.

<sup>21</sup> Cmd. No. 8110 at 4.

Formosa. In a policy statement on Formosa in the House of Commons, the Secretary of State for Foreign Affairs, Mr. Herbert Morrison, observed on May 11, 1951:

In fact, the problem of Formosa has now become an international problem in which a number of nations apart from those signatory to the Cairo and Potsdam Declarations are closely concerned. In the view of His Majesty's Government this is a question which could usefully be considered by the United Nations at the appropriate time . . . I think it is clearly desirable that the wishes of the inhabitants of Formosa should be taken into account.<sup>22</sup>

While speaking in defense of the government policy, Major Beamish, Labor, M.P., pointed out that Article 73 of the U.N. Charter had relevance to the case of Formosa. That article, he said, lays down clearly that territories detached from enemy states come under the trusteeship section, where "the principle is laid down that the interests of the inhabitants of these territories are paramount."<sup>23</sup> Prime Minister Churchill set the seal of official approval to the idea of a United Nations trusteeship over Formosa on July 14, 1954, when he told the Opposition Leader, Clement Attlee, that he saw no reason "why at some subsequent date Formosa should not be . . . placed in the custody of the United Nations." "I do not want to harm our relations with the United States," he added.<sup>24</sup>

A comparison between the views of Great Britain and the United States on the subject will not be out of place here. For Washington, which recognizes the Nationalist regime in Formosa as the Government of China, it would not be difficult to admit the sovereign rights of the *de facto* occupant, the Government of Chiang Kai-shek, over the island. For London, which recognizes the People's Republic of China, it is not so easy to think that the military occupation of the Chinese Nationalists can give them legal sovereignty over Formosa. The British are not only reluctant to consider the Nationalist administration in Taiwan as the Government of China or even as the Government of Formosa, but are also anxious to emphasize the point that the *de jure* sovereignty over Formosa is in suspense, uncertain or undetermined. Despite this difference of opinion, which springs primarily from their recognition of different entities claiming to represent China, one finds close similarity between the British and American views. Both London and Washington consider Formosa an international problem, to be settled by multilateral action, and not an internal affair of China, as is claimed by Peking. Both of them think that they are not bound by

<sup>22</sup> Great Britain, Parl. Deb. (Hansard), House of Commons, Official Report, Vol. 487, May 11, 1951, Cols. 2311-2312. In proposing the settlement of the question of Formosa by the United Nations, the Western Powers probably try to make use of Art. 107 of the Charter, which says: "Nothing in the present Charter shall invalidate or preclude action, in relation to any state which during the Second World War has been an enemy of any signatory to the present Charter, taken or authorized as a result of that war by the Governments having responsibility for such action."

<sup>23</sup> Great Britain, Parl. Deb. (Hansard), House of Commons, Official Report, Vol. 496, Col. 1027.

<sup>24</sup> *Ibid.*, Vol. 530, July 14, 1954, Col. 496.



the Cairo Declaration of 1943. In their opinion the surrender of Japanese forces in Formosa to Chiang Kai-shek did not constitute formal transfer of the island to China. Holding that the Cairo Declaration is superseded by the more recent international agreement, the United Nations Charter,<sup>25</sup> the United States and the United Kingdom lay stress on the question of Formosa being considered by the United Nations and a solution of the problem arrived at in accordance with the Charter. Neither London nor Washington is opposed to the idea of a United Nations trusteeship or a plebiscite being held in the island to determine its future.

In this connection it is worth recalling that the idea of "consideration by the United Nations" as a means of determining the future status of Formosa was first broached by President Truman of the United States on June 27, 1950, when he stated:

The determination of the future status of Formosa must await the restoration of security in the Pacific, a peace settlement with Japan, or consideration by the United Nations.<sup>26</sup>

In a letter to the U.N. Secretary General, the United States representative, Mr. Austin, said on August 25, 1950:

The United States would welcome United Nations consideration of the case of Formosa. We would approve full United Nations investigation here or on the spot. We believe that United Nations consideration would contribute to a peaceful, rather than a forceable solution of that problem.<sup>27</sup>

While requesting the inclusion of the question of Formosa on the agenda of the General Assembly, the United States Secretary of State stated on September 21, 1950: "The United States believes . . . that the future of Formosa and of the nearly 8 million people inhabited there should be settled by peaceful means in accordance with the Charter of the United Nations."<sup>28</sup> In its memorandum on the draft peace treaty with Japan, Washington suggested, on October 26, 1950, that if the four Powers—the United Kingdom, the United States, the Union of Soviet Socialist Republics and Nationalist China—were unable to agree on the disposition of Formosa within one year after the coming into force of the Peace Treaty, the matter should be referred to the General Assembly of the United Nations for decision.<sup>29</sup> Needless to say, Great Britain and the Soviet Union, who recognize the People's Republic of China as representing the government and state of China, could not agree to the inclusion of Nationalist China among the four Powers that were being asked to decide the future of Formosa under the United States' proposal.

<sup>25</sup> While replying to Soviet questions on principles for Japanese peace, Washington stated, on Dec. 27, 1950, that the Cairo Declaration "must necessarily be considered in the light of the United Nations Charter, the obligations of which prevail over any other international agreement." 24 Dept. of State Bulletin 65-66 (1951).

<sup>26</sup> See American Foreign Policy, *op. cit.* note 5 above, at 2468.

<sup>27</sup> *Ibid.* at 2477.

<sup>28</sup> *Ibid.* at 2479.

<sup>29</sup> 23 Dept. of State Bulletin 881 (1950).

## THE CHINESE STAND

A. *Communist China*

Peking holds that the Cairo Declaration, confirmed at Potsdam, was not simply a statement of intentions, but had unquestionable legal binding force,<sup>30</sup> and that when China accepted the surrender in the Taiwan area from Ando, the Japanese Governor-General and Commander in Taiwan, Formosa was reunited with the motherland both in law and in fact.<sup>31</sup> Thus Mr. Wu Hsiu-chuan, the representative of the People's Republic of China, in his speech before the U.N. Security Council on November 28, 1950, pointed out:

When the Chinese Government accepted the surrender of the Japanese armed forces in Taiwan and established sovereignty over the island, Taiwan became, not only de jure, but also de facto, an inalienable part of Chinese territory. And this has been the situation as regards Taiwan since 1945. Hence, during the five post-war years from 1945 to June 27, 1950, no one ever questioned the fact that Taiwan, de jure and de facto, is an inseparable part of Chinese territory.<sup>32</sup>

It is further claimed that all rights which Marshal Chiang Kai-shek possessed in Taiwan from October 25, 1945, onwards have since passed to the People's Republic of China.

The basic argument which Peking advances in support of its claim to Formosa is, however, the one based on conquest and annexation. Formosa, it is asserted, is Chinese territory in law, independently of the Cairo, Potsdam and San Francisco agreements. It is so by virtue of the fact that the Treaty of Shimonoseki, which was the legal basis for Japanese occupation, was solemnly and formally abrogated, together with other treaties with Japan, by a proclamation when China declared war on Japan on December 8, 1941. From that date, it is claimed, China recovered her sovereign rights in Taiwan, although she did not come to exercise those

<sup>30</sup> The Cairo and Potsdam Declarations, observed Chou En-lai, in his cable to the U. N. Secretary General on Aug. 24, 1950, were "both binding international agreements which the United States Government has pledged itself to respect and observe." U. N. Doc. S/1715; U. N. Security Council, 5th Year, Official Records, 490th Sess., p. 9 (Aug. 25, 1950); Foreign Languages Press, Important Documents Concerning the Question of Taiwan 22 (Peking, 1955). Replying to the invocation of the Cairo Declaration by Communist China, one British newspaper wrote: "As the Peking Government has declared null and void all arrangements made with foreign powers by the 'traitor' Chiang, it can hardly invoke in one case principles it spurns in others." 159 London Economist 203 (1950).

<sup>31</sup> Commenting on President Truman's statement on June 27, 1950, Premier Chou En-lai observed: "The fact that Taiwan is part of China will remain unchanged forever. This is not only a historical fact; it has also been confirmed by the Cairo and Potsdam Declarations and the situation since the surrender of Japan." Important Documents Concerning the Question of Taiwan, *op. cit.* note 30 above, at 14. This view was reiterated by Chou En-lai subsequently in his cables to the U. N. Secretary General on July 6, Aug. 24, and Oct. 17, 1950. *Ibid.* at 19, 21-22 and 24.

<sup>32</sup> *Ibid.* at 34; U. N. Security Council, 5th Year, Official Records, 527th Sess., p. 6 (Nov. 28, 1950).

- rights till October 25, 1945.<sup>33</sup> Thus Mei Ju-ao, former Judge of the Far East International Military Tribunal, and member of the Executive Council of the Political Science and Law Association of China, in an article in the *People's Daily* of January 31, 1955, observed:

Simultaneously with its formal proclamation of war on Japan on December 8, 1941, China solemnly declared the abrogation of all treaties between China and Japan. Since the Shimonoseki Treaty, on the basis of which Japan occupied Taiwan, was among the treaties abrogated, Japan's rule over Taiwan naturally became groundless from that day. It is true that Taiwan was in fact under Japan's occupation during the war against Japan. But legally speaking, China has every right to consider that it had recovered its sovereign rights over Taiwan as from that day. . . . Taiwan has always been China's territory. It had been stolen by Japan for 50 years. Following the termination of the Second World War, China exercised the right conferred on it by international law as a nation victorious over Japan. On the basis of the proclamation it issued on December 8, 1941, China recovered Taiwan on October 25, 1945. This action by China is perfectly lawful. It is consistent with the terms of the Cairo Declaration and Potsdam Proclamation and Japan's instrument of surrender.<sup>34</sup>

While the validity of the assertion that the unilateral abrogation of the Treaty of Shimonoseki in 1941 restored Chinese sovereignty over Taiwan is questionable, the theory of conquest or annexation invoked by Peking in support of its claim over Formosa has been generally recognized in international law as one of the methods of effecting transfer of sovereignty.<sup>35</sup> But here again the difficulty is that, had China been successful in defeating Japan unaided by her allies, she could be justified in imposing single-handed a victor's peace terms on the defeated enemy according to her wishes. But since the defeat of Japan was "principally wrought by the efforts and sacrifices of the United States," as the United States Secretary of State, Mr. John Foster Dulles, claimed,<sup>36</sup> and since Japan surrendered not solely to China but to the Allied Powers as a whole, the Island of Formosa may not properly be said, on that basis, to have been conquered or annexed by any one Power.

However, if the assumptions of Peking that Formosa has already become a part of China both *de facto* and *de jure* are accepted, then there can be

<sup>33</sup> Referring to the formal proclamation of the Chinese Government at Chungking on Aug. 30, 1945, that Formosa was a new province of China, Mr. Turton, Joint Under-Secretary of State for Foreign Affairs, said: "Unilateral declarations could not affect the legal status of Formosa." Great Britain, Parl. Deb. (Hansard), House of Commons, Official Report, Vol. 536, Feb. 9, 1955, Col. 216, Written Answers.

<sup>34</sup> Embassy of the People's Republic of China in New Delhi, News Bulletin 8 (No. 6, 1955). Mei Ju-ao also refutes arguments advanced by the United States and "their accomplices, among whom are the British politicians and propagandists in particular," to justify the U. S. "aggression" under the "legal cloak" of "such nonsense" as the "neutralisation" of Taiwan, placing it under the U. N. "trusteeship," making Taiwan an "independent State" or recognizing two "Chinas." *Ibid.* at 8.

<sup>35</sup> See 1 Hyde, International Law 356-358 (Boston, 1951).

<sup>36</sup> Address before the Foreign Policy Association, New York, Feb. 16, 1955. 5 Free China Review 61 (No. 3, 1955).

no question of sovereignty over Taiwan being in abeyance, suspense or undetermined. The status of Formosa, according to the leaders of Communist China, was decided long ago,<sup>37</sup> i.e., on December 8, 1941, when China abrogated the Treaty of Shimonoseki. In their opinion, the point at issue, if any, is the assertion of administrative control by the People's Republic of China over Taiwan, a Chinese province, by the extermination of the "Chiang Kai-shek traitorous clique," as they call it. Whether Peking will accomplish that task by peaceful means or by the use of force and when it will do it—all these are entirely a matter for the Chinese people, they assert.<sup>38</sup> It is an internal affair of China in which no other country, not even the United Nations Organization, has any right to interfere.<sup>39</sup> If the United Nations has anything to do with the matter, they say, it is to discuss and set right the Communist Chinese complaint of what they call United States "armed aggression on Taiwan" resulting from the interposition of the Seventh Fleet and the shielding of Chiang Kai-shek by the U. S. Navy.<sup>40</sup> Peking goes further and asserts that:

<sup>37</sup> As early as Nov. 28, 1950, i.e., before the signing of the San Francisco Peace Treaty, the Communist Chinese representative, Mr. Wu Hsiu-chuan, observed: "The status of Taiwan was determined long ago. The question of the status of Taiwan simply does not exist. . . . To argue that because the Peace Treaty with Japan is yet to be concluded the status of Taiwan remains undetermined and must await consideration by the United Nations—to argue thus is to make a mockery of history, of realities, of human intelligence, of international agreements. To argue thus is to make a mockery of the United Nations Charter." Important Documents Concerning the Question of Taiwan, *op. cit.* note 30 above, at 41-42. Secretary of State Dulles' statement that Taiwan and Penghu Islands occupy "a specific juridical status" was characterized by the People's Daily as "preposterous nonsense" and an attempt "to deny the Chinese people's authority over Taiwan and the Penghu Islands." News Bulletin 7-8 (No. 63, 1954). "The status of Taiwan," remarked the People's Daily, in an editorial on Dec. 5, 1954, "was fixed long ago. Taiwan was, is and will be Chinese territory." Embassy of the People's Republic of China in India, China Will Liberate Taiwan 69 (New Delhi, 1955).

<sup>38</sup> "It is the Chinese people's own internal concern," said Mr. Wang Yun-sheng, Editor-in-Chief of the Tientsin Ta Kung Pao, "how and when they will liberate Taiwan and dispose of the Chiang Kai-shek clique." *Ibid.* at 89. On June 28, 1956, Premier Chou En-lai observed: "There are two possible ways for the Chinese people to liberate Taiwan, that is, by war or by peaceful means, and that the Chinese people would seek to liberate Taiwan by peaceful means so far as it is possible. . . . The question of the return of Taiwan to the motherland, regardless of the means by which it is realized . . . is a question which can only be settled and definitely can be settled by us Chinese people, and no foreign interference will be tolerated." People's China, Supp. 12-3 (July 16, 1956).

<sup>39</sup> In his statement on Jan. 24, 1955, Premier Chou En-lai observed: "Neither the United Nations nor any foreign country has the right to intervene in the Chinese people's liberation of Taiwan." *Ibid.* Supp. No. 4 (1955).

<sup>40</sup> The Chinese complaint regarding "armed invasion of Taiwan by the United States" was submitted by Chou En-lai in his cable to the United Nations on Aug. 24, 1950. See Important Documents Concerning the Question of Taiwan, *op. cit.* note 30 above, at 21-22. In a letter addressed to the President of the General Assembly (U.N. Doc. A/1375), dated Sept. 20, 1950, the Secretary General of the Delegation of the Soviet Union requested, "as a matter of importance and urgency," the inclusion of the item "United States aggression against China" in the agenda of the

To maintain international peace and security and uphold the dignity of the United Nations Charter, the United Nations Security Council is obliged as its bounden duty to condemn the United States Government for its criminal act of armed invasion of the territory of China, and to take immediate measures to bring about the complete withdrawal of all the invading armed forces of the United States from Taiwan and other territories belonging to China.<sup>41</sup>

According to Peking the United Nations has no right to consider the question of Taiwan in any other way or to decide the status of Formosa.<sup>42</sup> Any such attempt would be intervention in China's internal affairs and in violation of Article 2, paragraph 7, of the Charter.<sup>43</sup> For similar reasons Peking could not entertain such ideas as trusteeship, neutralization or independence of Taiwan. In his speech before the first session of the First National People's Congress on September 23, 1954, Premier Chou En-lai observed:

All proposals to place Taiwan under United Nations trusteeship or under neutral mandate, or to "neutralize" Taiwan or to create a so-called "independent Taiwan state," are attempts to carve up China's territory, enslave the Chinese people on Taiwan and legalize United States occupation of Taiwan. None of this will be tolerated by the Chinese people.<sup>44</sup>

General Assembly. During the debate Sir Gladwyn Jebb, the British delegate, observed that it was not clear what document A/1875 referred to. He seemed to differ from, or at least to cast doubt about, the Soviet representative's view that China included Formosa, "an assumption," Mr. Spender of Australia said, "which prejudged the issue." General Assembly, 5th Sess., Official Records, General Committee, 69th Meeting, Sept. 21, 1950, pp. 5-6. On Nov. 30, 1950, the Security Council rejected by a 9-1-1 vote the Soviet resolution which would have condemned the United States.

<sup>41</sup> Important Documents Concerning the Question of Taiwan, *op. cit.* note 30 above, at 22. People's Daily said on Jan. 29, 1955: "The United Nations has the duty to take action to stop U. S. aggression against China and to make all U. S. armed forces withdraw from Taiwan and the Taiwan Straits," and thereby facilitate the return of Taiwan, and other islands to Communist China. Embassy of the People's Republic of China in India, Causes of Tension in Taiwan Area 9 (New Delhi, 1955).

<sup>42</sup> Premier Chou En-lai characterized the decision of the General Assembly to include the "Question of Formosa" on its agenda as "an unjustified decision in violation of the United Nations Charter and international law . . . in violation of the sovereignty and independence of China." Important Documents Concerning the Question of Taiwan, *op. cit.* note 30 above, at 25. The Communist Chinese representative, Mr. Wu Hsiu-chuan, in his speech before the Security Council on Nov. 28, 1950, stated that any decision by the United Nations about "trusteeship" or "neutralisation" or even procrastination by way of "investigation" would in substance mean "stealing China's legitimate territory and supporting United States aggression against Taiwan." This, he added, "will in no way shake the resolve of the Chinese people to liberate Taiwan." *Ibid.* 41; U. N. Security Council, 5th Year, Official Records, 527th Sess., p. 10. (Nov. 28, 1950).

<sup>43</sup> People's Daily, in its editorial on Jan. 29, 1955, declared that neither the United Nations nor any other state has "any right to intervene in the liberation of Taiwan which is by its nature within the domestic jurisdiction of China." Causes of Tension in Taiwan Area, *op. cit.* note 41 above, at 8.

<sup>44</sup> Important Documents Concerning the Question of Taiwan, *op. cit.* note 30 above, at 41.

This attitude on the part of Communist China is again based on the assumption that Formosa has already become an integral part of China and that the Government of Chiang Kai-shek is not a sovereign government.

### B. *Nationalist China*

The views held by the Nationalist administration in Taiwan concerning the legal status of Formosa have more in common with the stand taken by Peking than that taken by Washington or London. Like Peking, Taipeh maintains that the validity of the Cairo Declaration is unquestionable under international law. "Therefore when Japan surrendered," observes Chiang Kai-shek, "the Government of the Republic of China repossessed Taiwan and Penghu and constituted them as Taiwan Province." Since that date, he adds, "Taiwan and Penghu have regained their status as an integral unit of the territory of the Republic of China." President Chiang Kai-shek goes further and contends that in the San Francisco Peace Treaty and the Sino-Japanese Peace Treaty "Japan renounced her sovereignty over Taiwan and Penghu, thereby completing the process of restoring these areas to our country."<sup>45</sup> That Japan renounced her sovereignty over Formosa is no doubt clear, but to maintain that by this renunciation the process of restoring Taiwan to China was completed hardly seems justified. Professor Quincy Wright, who thinks that by not stating the beneficiary of this renunciation in the San Francisco Peace Treaty "the claims of the *de facto* occupant, the government of Chiang Kai-shek, were acquiesced in," qualifies his opinion by adding these words: "perhaps subject to ultimate validation by the Allied Powers with whom Japan concluded the treaty."<sup>46</sup> Thus Professor Wright casts doubt upon the assertion that the formal transfer of sovereignty over Formosa to China has, in fact, taken place. If that assertion were true, then there could be no ground for the Western Powers to maintain that the future status of Formosa should be decided by multilateral action, either within or outside the United Nations. The theory of condominium of the Allied Powers over Formosa falls to the ground the moment it is conceded that Taiwan has already become, both *de facto* and *de jure*, part of China. That seems to be the reason why, in spite of its inclination to support the case of Chiang Kai-shek on the basis of his *de facto* occupation of the island, Washington cannot entertain the idea that legal sovereignty over Taiwan rests with the President of the Republic of China.

Nationalist authority in Formosa is in accord with Peking in criticizing those who hold that the status of Taiwan has not been determined. Again like Mao Tse-tung, Chiang Kai-shek also considers the talk of "two

<sup>45</sup> "If the Democracies repudiate the Cairo Declaration, which they signed themselves, how, either now or in the future, can they criticize the Communist aggressive bloc for tearing up treaties and agreements? Those who play fast and loose with the status of Taiwan do so against their own conscience." Address by President Chiang Kai-shek, Feb. 8, 1955. 5 Free China Review 52-53 (No. 3, 1955).

<sup>46</sup> Quincy Wright, *loc. cit.* note 17 above, at 332.

Chinas" as "ridiculous" and "absurd."<sup>47</sup> Both of them are likewise opposed to such ideas as cease-fire, trusteeship, plebiscite or consideration of the status of Taiwan by the United Nations.<sup>48</sup> If Taipeh invokes the United Nations Charter in this regard, it is only for the purpose of asking the United Nations Organization to impose sanctions against the so-called "aggressors"<sup>49</sup> for their encroachment upon the territorial integrity and political independence of a Member state, *i.e.*, the Republic of China.<sup>50</sup> If at any time the Nationalist authorities in Formosa speak of a plebiscite, it is not for the purpose of ascertaining the views of the inhabitants of Taiwan concerning the future status of the island, but for the purpose of finding out "whether the 450,000,000 people there (on the Chinese mainland) want or do not want Communism."<sup>51</sup>

Article IV of the Treaty of Peace between the Republic of China and Japan, signed on April 28, 1952, states:

It is recognized that all treaties, conventions and agreements concluded before December 9, 1941, between China and Japan have become null and void as a consequence of the war.<sup>52</sup>

From this article it appears that, like Peking, Taipeh also tries to make use of the argument of conquest in support of the assertion that *de jure*, though not *de facto*, sovereignty over Taiwan passed from Japan to China from the day China declared war on Japan (*i.e.*, December 8, 1941) and repudiated the Treaty of Shimonoseki of 1895. The objection to this contention has been noted earlier.

<sup>47</sup> Address by Chiang Kai-shek, Feb. 8, 1955, *loc. cit.* note 45 above. To the leaders of Communist China, Taiwan, though under the occupation of what they call the "Chiang Kai-shek traitorous clique," is a province of China which Peking is bound to "liberate." To Nationalist China, the Chinese mainland, though under the control of what it calls the "Peiping puppet regime, a mere tool of Soviet imperialistic aggression," is still "a part of the territory of the Republic of China which the people and Government of the Republic of China are determined to recover." *Ibid.* at 56.

<sup>48</sup> The suggestions about a United Nations Trusteeship over Taiwan or that of the replacement of the Republic of China by the "Republic of Formosa," said Dr. Tingfu F. Tsiang, the Nationalist Chinese representative, "are proposals devised to destroy the legal and moral position of my Government. They are meant to liquidate the Republic of China." Speech by Dr. Tsiang before the Commonwealth Club of San Francisco, June 17, 1955. 5 *Free China Review* 52-53 (No. 8, 1955).

<sup>49</sup> To Chiang Kai-shek the leaders of Communist China are rebellious Communist bandits and traitors and the Mao regime a puppet government set up by Moscow. The shelling of the offshore islands of Quemoy and Matsu is likewise taken as "a continuation and an extension of Soviet Russian aggression in China."

<sup>50</sup> *Free China Review*, *loc. cit.* note 45 above, at 51-52. The author wishes here to point out that he is in total disagreement with the views of President Chiang Kai-shek about the so-called "Soviet Russian aggression in China." See J. P. Jain, "Chinese Reaction to British Recognition of the People's Republic of China," 4 *International Studies* (No. 1, 1962).

<sup>51</sup> Address by Tingfu F. Tsiang before the University Club, New York City, on Feb. 5, 1955. *Free China Review*, *loc. cit.* note 45 above, at 7. "The idea of a plebiscite on the island of Formosa is, of course, a fellow-traveler idea," Mr. Tsiang added. *Ibid.*

<sup>52</sup> *Loc. cit.* note 4 above.

## INDIAN ATTITUDE

The Indian Government has expressed its views on the problem of Formosa, especially its legal position, on a few occasions. Speaking before the United Nations General Assembly on September 27, 1950, Benegal N. Rau, the Indian representative, considered Formosa as a "former Japanese" territory "regarding whose disposal there have been certain declarations in the past, but whose actual disposal still remains to be made." In this connection he observed:

It will be remembered that we had a somewhat similar problem to deal with last year—the disposal of certain former Italian colonies. The big four had been unable to agree on this matter and had therefore turned over the problem to the General Assembly.<sup>53</sup>

This statement makes clear three points. First, in disposing of Formosa, due attention should be paid to the Cairo and Potsdam Declarations. Secondly, the question of sovereignty over Formosa is to be finally decided by the Peace Treaty with Japan. Lastly, the competence of the United Nations to deal with the matter ought to be recognized in case the Powers concerned, in making peace with Japan, are unable to come to an agreement about the disposal of Formosa.

When a fierce battle was raging in Korea, Premier Nehru did not consider that Formosa was "an immediate issue in the sense that it must be settled immediately," yet he recognized that it remained one of the "danger spots" in the world, and stressed the need "to find some way for peaceful negotiation and consideration of these problems of Korea and Formosa." In this connection he referred to the Cairo and Potsdam Declarations and to the "very forthright declaration" by President Truman on January 5, 1950, and added: "I feel that it is only on the general basis of these declarations that we can proceed. How to proceed, in what manner is something for careful consideration."<sup>54</sup> The Commonwealth Prime Ministers, in their declaration of January 12, 1951, urged "the great Powers concerned" to compose their differences "around the conference table."<sup>55</sup> The three-man Cease-Fire Group on Korea, of which an Indian was a member, adopted on January 13, 1951, a set of Five Principles that were approved on the same day by the Political Committee of the General Assembly. In the Fifth Principle it was said:

As soon as agreement has been reached on a cease-fire, the General Assembly shall set up an appropriate body which shall include representatives of the Governments of the United Kingdom, the United States of America, the Union of Soviet Socialist Republics, and the People's Republic of China with a view to the achievement of a settlement, in conformity with existing international obligations and the provisions of the United Nations Charter, of Far Eastern Problems,

<sup>53</sup> U. N. General Assembly, 5th Sess., Official Records, 286th Plenary Meeting, Sept. 27, 1950, p. 133.

<sup>54</sup> India, Parl. Deb., Parliament of India, Vol. 6, Pt. 2, Dec. 6, 1950, Cols. 1263-1266.

<sup>55</sup> Cmd. No. 8366, at 33.



including, among others, those of Formosa (Taiwan) and of representation of China in the United Nations.<sup>56</sup>

Commenting on these principles, "which should govern a negotiated settlement in the Far East," Prime Minister Nehru observed:

These principles were carefully drafted and tried to meet, as far as possible, the legitimate demands of the various parties concerned. They provided for a cease-fire, for foreign armies to withdraw from Korea, and for four or five Powers, including the People's Government of China, to meet to discuss the terms of a settlement in the Far East in accordance with the international agreements and the U.N. Charter. Formosa was specially mentioned in this context. It was clear that the international agreements referred to would include the Cairo agreement regarding Formosa and Korea.<sup>57</sup>

India has neither held that the Cairo Declaration is of unquestionable legal binding force nor asserted that the Declaration has been superseded by the United Nations Charter. All that India has said is that, while discussing or settling the problem of Formosa, there should be taken into full consideration the international agreements, such as the Cairo agreement, as well as "the provisions of the United Nations Charter." India declined to participate in the San Francisco Conference, convened in September, 1951, to conclude a treaty of peace with Japan, mainly because of its objection to the treaty provisions regarding territorial adjustments. Expressing the inability of the Indian Government to sign the San Francisco Peace Treaty, New Delhi, in a note to the United States Government (August 23, 1951), observed:

The Government of India attach the greatest importance to the Treaty providing that the Island of Formosa should be returned to China. The time and manner of such return might be the subject of separate negotiations but to leave the future of the Island undetermined, in spite of past international agreements, in a document which attempts to regulate the relations of Japan with all Governments that were engaged in the last war against her does not appear to the Government of India to be either just or expedient. *Mutatis mutandis* the same argument applies to the Kurile Islands and to South Sakhalin.<sup>58</sup>

The crisis in the Formosa Straits at the beginning of 1955 was the subject of discussion in the Indian Parliament. Referring to the dangerous situation "endangering the peace of the world," the President of India, in his address before the Parliament on February 21, 1955, stated that the claims of the People's Republic of China, the only Government of China India recognized, "are justified." But he expressed the hope that the problem "will be solved peacefully and by negotiation."<sup>59</sup> Explaining further, Premier Nehru said that the "Chinese claims are justified according to our thinking" because "we cannot recognize two Chinas," because

<sup>56</sup> *Ibid.* at 34.

<sup>57</sup> Statement in Parliament, Feb. 12, 1951. Jawaharlal Nehru, *India's Foreign Policy* 422 (Government of India, Publications Division, 1961).

<sup>58</sup> 25 Dept. of State Bulletin 385-386 (1951).

<sup>59</sup> India, Parl. Deb., Lok Sabha, Vol. 1, Pt. 2, Feb. 21, 1955, Col. 11.

Formosa has been part of the Chinese state "for hundreds and hundreds of years . . . except for a little less than half a century when the Japanese occupied it," and also because it was "clearly stated" in the Cairo and Potsdam Declarations that "Formosa should go to China." He, too, stressed the need of negotiating a "settlement peacefully."<sup>60</sup> For the same reasons Premier Nehru characterized as a "wholesome development" the Chinese Prime Minister's statement at the Afro-Asian Conference (Bandung) announcing his readiness to enter into direct negotiations with the United States. Premier Nehru added: "If this is availed of by all concerned, it can lead to an approach towards peaceful settlement."<sup>61</sup>

The position taken by Mr. Krishna Menon, the Indian representative at the 13th Session of the General Assembly, seems inconsistent, to a certain extent, with the stand taken earlier by Mr. B. N. Rau on the matter. Mr. Menon pointed out that Formosa and also Manchuria, "the colonial territories of Japan," were not placed under "trusteeship" but "liberated" and "made part of China." The United States, he added, was even prepared at the time of the defeat of Japan "to assist China in . . . the assumption of adequate control over the liberated areas of China, including Manchuria and Formosa" (quoting here from the statement made by the United States President to Dr. T. V. Soong in regard to China). The question as to Formosa, Mr. Menon continued, arose after the establishment of the People's Republic of China, but "the whole problem or the remainder of it is the unfinished part of the revolution."<sup>62</sup> Mr. Menon thus seems to be in total agreement with Peking in recognizing the state of civil war between the Chinese Communists and the Chinese Nationalists and in treating the matter as an internal affair of China. Although he did not speak for or against the consideration of the question by the United Nations, and did not question the competence of that organization to deal with the matter, he yet expressed his doubts about the feasibility, the desirability or the usefulness of United Nations intervention in the affair. He remarked:

My Government . . . pleads not for any intervention by the United Nations, because I do not see how that is possible. For one thing, the United Nations has tied its hands for a year by refusing to discuss it. But over and above that, it is not an international problem.<sup>63</sup>

Mr. Menon would like to confine international negotiations on the matter to the two Powers most directly concerned with it, that is, the United States of America and the People's Republic of China.<sup>64</sup> He also seems to

<sup>60</sup> *Ibid.*, Feb. 25, 1955, Cols. 511-512.

<sup>61</sup> Statement in Lok Sabha, April 30, 1955. India's Foreign Policy, *op. cit.* note 57 above, at 278.

<sup>62</sup> U. N. General Assembly, 13th Sess., Official Records, 774th Plenary Meeting, Oct. 7, 1958, p. 369.

<sup>63</sup> *Ibid.* at 370.

<sup>64</sup> "The problem today," observed Mr. Menon, "concerns only the United States and China—and no<sup>o</sup> anybody else. . . ." He repudiated the claim of Nationalist China to be represented at any international discussion of the problem by saying that "Chiang Kai-shek is not an international entity except in a legal sense." *Ibid.* at 369-370.

- be indifferent to the right of the Formosan people to self-determination. To quote him:

The eight million people of Formosa have no part in the Government of Taiwan and are by and large only members of local bodies. They do not enjoy the advantages of a government of their own. They would come into the larger State with all that goes with it. Then if we had to criticize China, it would be here and would criticize us too. This would be a more realistic position.

Although Mr. Menon would like to see the solution of the Formosan problem and the problem of Chinese representation in the United Nations "take place speedily and peacefully," he did not think that that would be possible "by seeking to intervene or in any way trying to disregard or ignore the rightful claims of China to be united and to come here." He concluded his statement on China with these words:

I hope that advantage will be taken of the present situation in order to arrive at a more peaceful solution recognizing the realities, and also the constitutional position, the position conceded, the position established by the declarations of Cairo (1943) and Potsdam (1945), by the statements of the parties mainly concerned and by the willingness shown by the Chinese Government to negotiate at Warsaw—to negotiate not on the internal issues of China, but on issues that are of international concern.<sup>65</sup>

#### CONCLUSION

The problem of Formosa is, indeed, a very complicated problem both in international law and in international politics. Since various Powers have taken irreconcilable positions publicly on this matter, it also creates a highly dangerous situation. As long as a settlement of this question is not arrived at, the situation in East Asia can only be described as one of "prolonged truce,"<sup>66</sup> about which one cannot feel happy. The chances of the Formosan problem being resolved by the application of the principles of international law may be remote, but that does not prevent one from making a legal analysis of the problem. A discussion of the legal status of Formosa is, in fact, important because it helps in understanding the viewpoints of various interested governments and also in determining the political means that should be employed in settling the difficult question.

The spokesmen of the British Government have emphatically stated that the problem of the status of Formosa could not be "solved merely by reference to the Cairo and Potsdam Declarations,"<sup>67</sup> nor could any "useful purpose . . . be served in the circumstances of this case" by suggesting to the United States "joint submission of the legal aspects of [conflict of views as to title over Formosa] to the International Court

<sup>65</sup> *Ibid.* at 370.

<sup>66</sup> Tang Tsou, "Mao's Limited War in the Taiwan Strait," 3 *Orbis* 246 (1959).

<sup>67</sup> Statement by Foreign Secretary. Great Britain, Parl. Deb. (Hansard), House of Commons, Official Report, Vol. 595, Nov. 19, 1958, Col. 1141.

of Justice.”<sup>68</sup> The leaders of Communist China likewise are not inclined to accept “demilitarization or referring the matter to the International Court of Justice.”<sup>69</sup> But while both London and Peking are agreed in not treating the matter as a justiciable question, they hold quite different opinions on whether or not the question is an internal affair of China or “an international problem in which a number of nations are concerned,”<sup>70</sup> and on how it should be resolved.

The British hold that the question of Formosa should be decided by international negotiation and not by the use of force. To say that the conflict between the Chinese Communists and the Chinese Nationalists “is of the nature of a civil war,” said the British Foreign Secretary on October 30, 1958, “is a very dangerous argument, particularly when we remember that one participant in the civil war is closely allied to the Soviet Union and the other participant has a defence treaty with the United States of America.”<sup>71</sup> What the British want is a negotiated settlement that would take into account and tend to allay the mutual fears and suspicions existing in the minds of both the Americans and the Chinese. In their opinion an independent Taiwan or a United Nations trusteeship over Formosa might well serve that purpose. Peking, on the contrary, is not only averse to the United Nations or any other international conference discussing, much less determining, the status of Formosa, but is also opposed to the idea of a cease-fire or the renunciation of the use of force against the Nationalist authorities. In fact, Peking seems to be actively preparing “for the liberation of Taiwan,” as General Chu Teh of Communist China put it, by modernizing its national defense and standing up “in battle readiness.”<sup>72</sup> Peking is not prepared to admit the separate existence of Taiwan as a state, nor is it willing to accept a United Nations trusteeship over Formosa.

It would seem only appropriate here to relate the contrasting views of various governments to the principles of international law applicable in the case. The point of dispute among the Powers is whether or not the transfer of sovereignty from Japan to China in respect of Formosa has been effected as a result of the Cairo Declaration, the unilateral abrogation of the Treaty of Shimonoseki by China in 1941, or the provisions of the San Francisco Peace Treaty with Japan. That the signatories of the Cairo Declaration are at least morally committed to carry out the provisions of that declaration is quite obvious. But how far the parties to that declaration are legally bound to do so may be questionable. To argue

<sup>68</sup> Statement by Lord Lansdowne, Joint Parliamentary Under-Secretary of State for Foreign Affairs. Great Britain, Parl. Deb. (Hansard), House of Lords, Official Report, Vol. 213, Dec. 11, 1958, Col. 216.

<sup>69</sup> Statement by the Foreign Minister of the People's Republic of China, Mr. Chen Yi. See Gerald Clark, *Impatient Giant: Red China Today* 46 (London, 1960).

<sup>70</sup> Statement by the British Foreign Secretary. Great Britain, Parl. Deb. (Hansard), House of Commons, Official Report, Vol. 595, Nov. 19, 1958, Col. 1141.

<sup>71</sup> *Ibid.*, Vol. 594, Oct. 30, 1958, Cols. 327-328.

<sup>72</sup> Statement on the 27th anniversary of the founding of the Chinese People's Liberation Army, Aug. 1, 1954. News Bulletin 2-3 (No. 39, 1954).

- that the Allies transferred sovereignty over Formosa to China by signing the Cairo Declaration in 1943, when indeed the island was not in the actual possession of the Allied Powers, is, to say the least, largely unreal, to use the phrase employed by Philip C. Jessup in regard to the theory of the Allied Powers exercising condominium over Formosa without having the island in their actual control or occupation. As the United States continues to recognize the government of Chiang Kai-shek as the Government of the Republic of China,<sup>73</sup> to whom the signatories of the Cairo Declaration promised the restoration of sovereignty over Formosa, it might not be difficult for Washington to admit as legally binding the provisions of the Cairo Declaration and the retrocession of Taiwan to China on that basis without in any way prejudicing its national interests. (India and the United Kingdom, which recognize the People's Republic of China as the Government of China, cannot entertain the claims of Chiang Kai-shek to the island on that ground.) The reason why the United States does not subscribe to that argument seems to be based on the ground that it will be increasingly difficult, if it is not so already, for Washington to maintain the fiction that the government of Chiang Kai-shek is the Government of China.

That the unilateral repudiation of the Treaty of Shimonoseki by China in 1941 cannot affect the rights which the other Allied Powers might also have come to possess by virtue of their being victors over Japan in the second World War has been noted earlier. In the absence of any positive clause in the San Francisco Peace Treaty about the retrocession of Formosa to China, the claim of President Chiang Kai-shek that the Allied Powers, by making Japan renounce her rights over Formosa, formally and finally decided the question of sovereignty over Formosa in favor of China, more particularly Nationalist China, seems to be too far-fetched.

International law generally recognizes three different ways in which transfer of sovereignty over a piece of territory from one nation to another can take place. These are: by conquest, annexation or treaty. Besides these, the *de facto* occupation of territory, if acquiesced in for a long period of time, is also generally recognized as a means by which good title to a territory may be acquired. The argument advanced by Peking rests solely on conquest and annexation on the basis of the unilateral abrogation of the Treaty of Shimonoseki by China in 1941. The comments of the writer on this point have been noted earlier and need not be repeated. The government of Chiang Kai-shek seeks to justify its claims to possession of sovereignty over Formosa on all the three principles of international law governing the transfer of sovereignty from one country to another. But, as discussed earlier, there is little substance in the arguments based on conquest or annexation and the San Francisco Treaty as

<sup>73</sup> The Chinese Nationalist representative, Dr. Tingfu F. Tsiang, reminded his audience in San Francisco that the Treaty of Mutual Defense was signed (on Dec. 2, 1954) between the United States on one side and the "Republic of China" on the other. "It was not a treaty," he added, "between the United States of America and Formosa. The distinction is very important." Address before the Commonwealth Club of San Francisco, June 17, 1955. *Free China Review*, *loc. cit.* note 48 above, at 53.

interpreted by Taipeh. The only argument that could be profitably adduced in favor of Nationalist China is that of *de facto* occupation. Thus, it is often asserted that *de facto*, if not *de jure*, sovereignty over Formosa rests with the government of Chiang Kai-shek. The reliance of the Western Powers (the United Kingdom and the United States) is based solely on the San Francisco Peace Treaty with Japan, which relieved Japan of her sovereignty over Formosa without reposing it anywhere else. It is contended on that basis that legal sovereignty over Taiwan remained with all the Allied Powers, including the Soviet Union, and that, if the Allied Powers were unable to come to some agreement over the disposition of Formosa, then the matter should be referred to the United Nations.

Some observations about the relationship of the United Nations with the problem under discussion may not be out of place here. If the Cairo Declaration is superseded by the United Nations Charter, which recognizes the principle of self-determination, and if Formosa is not legally integrated into China, as the Western Powers assert, then "the status of Formosa may best be settled by the parties to the Japanese Peace Treaty applying the principle of self-determination by a plebiscite in Formosa," to use the words of Professor Quincy Wright.<sup>74</sup> But if, on the contrary, Formosa has already become, both *de facto* and in law, an integral part of China, as both Peking and Taipeh assume, then the whole question of Formosa is rendered an internal affair of China. Another question that may be asked is whether, even if it is conceded that a state of civil war exists between the two Chinese parties, Peking and Taipeh are justified in using force to accomplish their aims without any interference by the United Nations. Here it may be pointed out that a civil war which threatens international peace, and any large-scale use of force in the Taiwan Straits, likely to lead to very grave international repercussions, could properly be called the legitimate concern of the United Nations. The situation in Lebanon in 1958 and the present situation in the Congo could well be cited as examples in this regard. It is hoped that restraint will be used by all concerned and the matter settled by peaceful means. Otherwise the pledge solemnly undertaken by the peoples of the United Nations in the Preamble of the Charter "to ensure, by the acceptance of principles and the institution of methods, that armed force shall not be used, save in the common interest," would be rendered quite useless. But as long as Peking is excluded from the United Nations it will continue to disregard the obligations under the Charter. Any decision taken in the absence of the representative of the People's Republic of China would naturally give the impression of an imposed solution which could hardly prove enduring in the circumstances. A compromise and peaceful settlement, either within or outside the United Nations, between the Chinese Communists and Chinese Nationalists or between Peking and Washington, would be most desirable, as it would not only amicably settle the problem of Formosa but would also reduce tension in the Taiwan Straits, restore stability in the Far East, and further the cause of international peace.

<sup>74</sup> Quincy Wright, *loc. cit.* note 7 above, at 181.

## PEACE-KEEPING AND DISARMAMENT

A REPORT OF THE DISCUSSIONS AT THE CONFERENCE OF THE EIGHTEEN-NATION  
COMMITTEE ON DISARMAMENT

BY ALAN F. NEIDLE

*Member of the U. S. Delegation \**

### INTRODUCTION

Pursuant to agreement between the Soviet Union and the United States,<sup>1</sup> endorsed by General Assembly resolution of December 20, 1961,<sup>2</sup> representatives of the following countries took part in the Conference of the Eighteen-Nation Committee on Disarmament: Brazil, Bulgaria, Burma, Canada, Czechoslovakia, Ethiopia, India, Italy, Mexico, Nigeria, Poland, Rumania, Sweden, the Soviet Union, the United Arab Republic, the United Kingdom and the United States. The Conference opened on March 14, 1962, and held 56 plenary meetings of about three hours' duration each, before recessing for a month beginning June 15, 1962.<sup>3</sup> As used in the debates of the Conference and in this article, the word "peace-keeping" refers generally to measures for the pacific settlement of disputes as well as for the enforcement of the peace, including establishment of a United Nations Peace Force.<sup>4</sup>

Discussions on the subject of peace-keeping took place in the plenary meetings,<sup>5</sup> and centered upon the relevant provisions of the Joint State-

\* Any views expressed or implied herein represent the personal views of the author and not necessarily those of the U. S. Arms Control and Disarmament Agency.

<sup>1</sup> See statements of Mr. Stevenson and Mr. Zorin to the First Committee of the General Assembly on Dec. 13, 1961. U. N. Doc. A/C.1/P.V. 1218, pp. 4-12.

<sup>2</sup> U. N. Doc. A/RES/1722 (XVI), Jan. 3, 1962. The resolution, which was approved unanimously, also endorsed the composition of the 18-Nation Disarmament Committee.

<sup>3</sup> This article only covers the period from March 14 to June 15, 1962. No substantial discussions took place concerning the subject of peace-keeping between July 16 and Sept. 7, when the second recess began.

<sup>4</sup> Peace-keeping measures were proposed by Secretary of State Herter in his speech of Feb. 18, 1960, prior to the opening of the 1960 Ten-Nation Committee on Disarmament; see Documents on Disarmament (1960) 44, 50 (Dept. of State Pub. No. 7172 (1961)). At the Ten-Nation Conference, the Western proposals of March 16, April 26, and June 27, 1960, called for the establishment of peace-keeping measures. *Ibid.* 68, 81, and 126.

<sup>5</sup> There were also meetings of a Committee of the Whole, meetings of a Subcommittee on a Treaty for the Discontinuance of Nuclear Weapons Tests, informal meetings, and meetings of the Co-Chairmen of the Conference (the delegations of the Soviet Union and the United States). See the Report to the United Nations Disarmament Commission, ENDC/42 (May 31, 1962), for a general description of the work of the Conference up to June 1, 1962. All records of the Conference of the Eighteen-Nation Committee on Disarmament begin with the letters "ENDC."

ment of Agreed Principles for Disarmament Negotiations of September 20, 1961,<sup>6</sup> the Draft Treaty on General and Complete Disarmament submitted by the Soviet Union on March 15, 1962,<sup>7</sup> and the United States Outline of Basic Provisions of a Treaty on General and Complete Disarmament in a Peaceful World of April 18, 1962.<sup>8</sup> Even though a great majority of the Committee's time was occupied with questions relating to the reduction of armaments, armed forces, other disarmament measures and the means of verification, the Committee devoted considerable time to debate on the subject of peace-keeping and its relationship to disarmament.<sup>9</sup>

The purpose of this article is to set forth the basic viewpoints and issues which emerged in the debates. Extensive use of quotations has been made so that the reader, in addition to understanding the logical elements of issues, may appreciate the manner and strength of presentation of various views.<sup>10</sup> Two sets of proposals of the United States, those pertaining to indirect aggression and subversion and to the United Nations Peace Force, have been dealt with in some detail, since the debates concerning these proposals appeared to the author to highlight the basic viewpoints of the participants. Failure to set forth here other United States peace-keeping proposals should not be interpreted as implying that these proposals are of less significance than those discussed.<sup>11</sup>

<sup>6</sup> U. N. Doc. A/4879 (Sept. 20, 1961); 45 Dept. of State Bulletin 589 (1961); ENDC/5 (March 19, 1962); U. S. Arms Control and Disarmament Agency, Documents on Disarmament, 1961, p. 439. (Throughout this paper when multiple citations exist for one document, reference will be made only to the Eighteen-Nation Conference document after the initial citation.) The Joint Statement of Agreed Principles for Disarmament Negotiations resulted from an extensive bilateral exchange of views in 1961 between the United States and the Soviet Union. The two countries recommended the eight agreed principles "as the basis for future multilateral negotiations on disarmament."

<sup>7</sup> ENDC/2 (March 19, 1962); 56 A.J.I.L. 926 (1962).

<sup>8</sup> ENDC/30 (April 18, 1962); 46 Dept. of State Bulletin 747 (1962); Blueprint for the Peace Race (U. S. Arms Control and Disarmament Agency Pub. No. 4, General Series No. 3, May, 1962); 56 A.J.I.L. 899 (1962).

<sup>9</sup> It is difficult to estimate the exact amount of time devoted to peace-keeping, since the subject never occupied the entirety of particular plenary meetings. However, the following summary may give some idea of the extent of the discussion: the U. S. Delegation made four, the British Delegation two, and the Indian Delegation one, major statements on peace-keeping; the Soviet Delegation made lengthy rebuttals of most of these statements; the Soviet-bloc delegations echoed in numerous statements the points made by the Soviet Delegation; miscellaneous observations were made by practically all delegations; and general conference discussions took place on questions relating to peace-keeping in connection with the negotiation of the Preamble and Part I of the Disarmament Treaty.

<sup>10</sup> The author has not attempted to quote or mention every view on peace-keeping expressed by each delegation.

<sup>11</sup> In addition to the two proposals particularly discussed, the United States made proposals concerning: obligation to refrain from the use or threat of force; utilization of appropriate processes for the peaceful settlement of disputes; support in Stage I of a U.N. General Assembly study to make existing arrangements for peaceful settlement of disputes more effective, and the institution of new arrangements where needed;



BASIC VIEWPOINTS CONCERNING THE RELATIONSHIP BETWEEN  
DISARMAMENT AND PEACE-KEEPING

*The Joint Statement of Agreed Principles*

Principle 1 of the Joint Statement of Agreed Principles for Disarmament Negotiations of September 20, 1961, sets forth a relationship between disarmament and peace-keeping:

The goal of negotiations is to achieve agreement on a programme which will ensure that (a) disarmament is general and complete and war is no longer an instrument for settling international problems, and (b) such disarmament is accompanied by the establishment of reliable procedures for the peaceful settlement of disputes and effective arrangements for the maintenance of peace in accordance with the principles of the United Nations Charter.<sup>12</sup>

In addition, the first sentence of Principle 7 provides:

Progress in disarmament should be accompanied by measures to strengthen institutions for maintaining peace and the settlement of international disputes by peaceful means.<sup>13</sup>

*The United States View*

Mr. Dean expressed the thinking of the United States Delegation:

If we achieve our goal of general and complete disarmament we will rid ourselves of great national armies and the threat they have posed to the peace. But other forms of power will remain and that power will be centered mainly in the hands of those States which were formerly great military Powers. Obviously the economic strength of different nations, despite our efforts to improve the material well-being of peoples everywhere, will remain for some time unequal. We will still be faced with conflicting ideologies and with political struggles. . . . Nations, however much we try to develop a cooperative atmosphere, will remain competitive, and we cannot reasonably expect that all statesmen and all politicians will conduct their international relations unfailingly with wisdom and generosity.

\* \* \* \* \*

. . . Our vision is of a world without war, but if this vision is to be realized we must have an alternative realistic system for coping with such differences and disputes as will inevitably arise.

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agreement in Stage II to such new arrangements as might be necessary; submission in Stage I of all unresolved disputes concerning the Disarmament Treaty to the International Court of Justice; acceptance in Stage II of the compulsory jurisdiction of the International Court of Justice to decide all international legal disputes; support of measures strengthening the ability of the United Nations to maintain international peace; support of the establishment in Stage I of a U. N. Peace Observation Corps and its expansion in Stage II; and enactment of national legislation by the end of Stage II in support of the treaty. See Stage I, Sec. H, Stage II, Sec. G, and Stage III, Sec. H, of the U. S. Outline, ENDC/30, pp. 17-18, 25-26, 32 (April 18, 1962).

<sup>12</sup> ENDC/5, p. 1 (March 19, 1962).

<sup>13</sup> *Ibid.* 3.

So, general and complete disarmament on the one hand and improved peace-keeping machinery on the other are but two sides of the same coin. We cannot have one without the other. Either we develop effective institutions for settling international differences and keeping the peace, or we in effect abandon our hopes for general and complete disarmament.<sup>14</sup>

### *The Soviet View*

Mr. Zorin criticized the emphasis placed by the Western delegations on the relationship between disarmament and peace-keeping and expressed the Soviet philosophy:

... In the statements of the Western representatives a definite distortion of view is discernible. The fact that disarmament itself will be the surest and most certain means of securing peace and the security of States is disregarded. When the means of waging war are destroyed, when States dispose of neither armies nor armaments, no one will be able to start a war and no one will be able to apply force or the threat of force in international relations.<sup>15</sup>

Article 40 of the Soviet draft treaty provides, in part:

... All questions connected with the safeguarding of international peace and security, which may arise in the course of the implementation of the present Treaty, including preventive and enforcement measures, shall be decided on by the Security Council in conformity with its powers under the United Nations Charter.<sup>16</sup>

Mr. Zorin explained this article:

The discussion on the second stage of disarmament further highlighted our differences regarding the peace and security measures which should accompany disarmament. The Soviet Union is in favour of strengthening the United Nations and its main organ, the Security Council, as a basic instrument for maintaining general peace and security.<sup>17</sup>

<sup>14</sup> ENDC/P.V. 40, pp. 9, 10, 11 (May 21, 1962). Sir Michael Wright, for the United Kingdom, likened a disarmament plan to a three-legged stool—the first leg, disarmament, the second, verification, and the third, strengthened peace-keeping machinery: “The stool cannot rest on one leg or on two legs only, it must rest on all three.” ENDC/P.V. 43, p. 12 (May 28, 1962).

<sup>15</sup> ENDC/P.V. 51, p. 12 (June 7, 1962). Similar statements were made by Mr. Zorin on a number of occasions, e.g., see ENDC/P.V. 27, p. 29 (April 25, 1962). The philosophy stated by the Soviet Delegation was reflected in the Soviet draft treaty of March 15, 1962, which, compared to the United States outline of April 18, 1962, contains relatively few specific provisions for peace-keeping measures; the only provisions, in addition to those discussed below, requiring placement of forces at the disposal of the Security Council are Arts. 3 and 40. Art. 40 is quoted in the next paragraph below. Art. 3 provides, in effect, (1) that states “confirm their resolve” to base their relations on principles of peaceful co-existence, to refrain from resorting to the threat or use of force to settle international disputes, and to strengthen the United Nations as “the principal institution” for maintaining peace, and (2) that states undertake not to use their “police (militia)” remaining after general and complete disarmament except to safeguard internal security and to discharge obligations for maintaining international peace under the U. N. Charter. ENDC/2, p. 4 (March 15, 1962).

<sup>16</sup> *Ibid.* 25.

<sup>17</sup> ENDC/P.V. 50, p. 29 (July 23, 1962).

*The Preamble—"General and Complete Disarmament in a Peaceful World"*

The divergence between the general concepts of the West and the Soviet Union as to the relationship between peace-keeping and disarmament came clearly into focus in drafting a preamble for the disarmament treaty. The United States proposed the phrase "general and complete disarmament in a peaceful world" for inclusion in the title of the treaty, and in paragraphs 14 and 16 of the preamble.<sup>18</sup> The Soviet Delegation objected to inclusion of the words "in a peaceful world." Consequently, when the preamble was submitted to the Committee for its consideration, parentheses were placed around these words, as well as around paragraph 15,<sup>19</sup> in order to indicate United States proposals not accepted by the Soviet Union.<sup>20</sup>

<sup>18</sup> The draft preamble, ENDC/L. 11/Rev. 1 (April 17, 1962), was approved by the Committee "as so far developed by the co-chairmen [the heads of the U. S. and Soviet delegations]" on April 17, 1962; see press communiqué issued by the Conference, contained in ENDC/P.V. 22, p. 44 (April 17, 1962). Pars. 14 and 16 of the preamble read:

"14. *Affirming* that to facilitate the attainment of general and complete disarmament (in a peaceful world) it is important that all states abide by existing international agreements, refrain from any actions which might aggravate international tensions, and seek settlement of all disputes by peaceful means; . . .

"16. *Have resolved* to conclude the following treaty on general and complete disarmament under strict and effective international control (in a peaceful world)."

<sup>19</sup> Par. 15 is quoted and discussed below.

<sup>20</sup> The device of negotiating texts with passages in parentheses or brackets to indicate preferences of the United States or the Soviet Union not accepted by the other country was also utilized extensively in negotiation of the working draft of Part I of the treaty. "(Outline of) ((General)) Treaty Obligations," ENDC/40/Rev. 1 (May 31, 1962).

The technique of negotiating treaty texts with parentheses or brackets consists more or less of the following. Divergent texts, both as to substance and form, are incorporated into one document by juxtaposing in brackets phrases and clauses preferred by one side or another. Each side may prepare its own bracketed draft. Then, after study of its own and the other side's bracketed drafts, each side may offer to alter certain phrases in its own draft so as to "bring the two drafts closer together." Instructions may be sought as to substantive changes. New bracketed drafts will be prepared and exchanged. Discussions will follow. Then, more alterations and more bracketed drafts—and so forth, possibly through half a dozen or more drafts, until finally a draft is presented for the scrutiny of the entire Committee.

It is interesting to contrast this practice with the traditional mode of negotiation in which, for the most part, points of policy are agreed upon first, and subsequently the task of drafting is turned over to specialists. Sir Harold Nicolson, a member of the British Delegation at the Paris Peace Conference of 1919, made the following entry in his diary several days after the subcommittee dealing with Czechoslovak questions had ironed out points of policy and had approved its report to the Supreme Council:

"March 18, Tuesday—More drafting of the Treaty. The Legal experts, Hurst and Fromageot, are marvelous. Impassive and quick. Like electricians fixing a circuit." Nicolson, *Peacemaking*, 1919, p. 285 (1933).

Those who labor to produce agreed treaty texts with the Soviet Union before points of policy have been agreed upon, can be likened, in the view of this author, not to electricians quickly fixing a circuit, but to piano movers hauling a Steinway grand up the stairs to the second story.

Mr. Dean found it

... difficult to understand just why the representative of the Soviet Union should object to "general and complete disarmament in a peaceful world" in the title and in paragraph 16 of the preamble. I find it even more surprising that the representative of the Soviet Union wishes to remove this phrase from paragraph 14 of the preamble. This paragraph, as I am sure representatives will recognize, is a direct quotation of the fourth paragraph of the preamble to the Joint Statement of Agreed Principles of 20 September 1961. . . .<sup>21</sup>

Mr. Zorin explained the Soviet aversion to inserting the words "in a peaceful world":

The USSR delegation considers it undesirable to include these words in the preamble to the Treaty, since that would create the impression that general and complete disarmament can be carried into effect only when all outstanding controversial issues have been settled. To qualify disarmament by imposing such conditions would quite obviously place obstacles in the path of the actual practical settlement of the disarmament problem, since there are always some outstanding controversial issues in the world. The whole problem is to create conditions for the peaceful settlement of these issues. If we await the settlement of all controversial issues before solving the problem of general and complete disarmament, we may create a situation in which a solution of the disarmament problem will meet with unnecessary and artificial obstacles.

... These words were admittedly used in the Joint Statement of Agreed Principles, but that does not purport to be a final draft of the treaty.<sup>22</sup>

#### *The Preamble—Peaceful Change*

The United States Delegation proposed the following clause, which was not acceptable to the Soviet Union, for inclusion in the preamble:

15. *Declaring* their goal to be a free, secure, and peaceful world of independent states adhering to common standards of international conduct, a world where change takes place in accordance with the principles of the United Nations Charter;<sup>23</sup>

In supporting this clause Mr. Dean said:

... it is important to make reference to the problem of change. Certainly, we neither expect, nor want, the world to remain static. We would hope that man would continue to strive to improve his material, cultural, and spiritual well-being. In these efforts we would expect to see change take place. No one, of course, can foresee the direction of such change, but no one can deny that in the very nature

<sup>21</sup> ENDC/P.V. 22, p. 7 (April 17, 1962). The fourth paragraph of the Joint Statement of Agreed Principles reads: "Affirming that to facilitate the attainment of general and complete disarmament in a peaceful world it is important that all States abide by existing international agreements, refrain from any actions which might aggravate international tensions, and that they seek settlement of all disputes by peaceful means." ENDC/5 (March 19, 1962).

<sup>22</sup> ENDC/P.V. 22, p. 11 (April 17, 1962).

<sup>23</sup> ENDC/L.11/Rev. 1, p. 2 (April 17, 1962).

of things, change is inevitable, and it must be foreseen, for even with general and complete disarmament no one expects the world to remain as it is today.

As the representative of India indicated, there is no intent in our inclusion of this reference to "change" to suggest interference in the domestic affairs of nations. Indeed, it is for that reason that we have suggested as the criterion that change be "in accordance with the principles of the United Nations Charter." That Charter gives full and adequate protection against any fear of internal interference which my colleague from the Soviet Union may harbor. As representatives know, Article 2, paragraph 7 of the United Nations Charter states:

"Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state . . ."<sup>24</sup>

The representative of the Soviet Union opposed including in the preamble the concept that change take place in accordance with the principles of the United Nations Charter. His line of reasoning was:

. . . As we know, far-reaching changes are taking place throughout the world as a result, on the one hand, of the liberation of former colonial peoples from colonial dependency and the creation of new independent States and, on the other, of major social and economic changes caused by the natural historical process of the revolutionary transformation of society in accordance with the interests and wishes of the popular masses struggling for national and social emancipation.

These changes vary from country to country, depending on historical, national and economic conditions, and it would be quite unrealistic to believe that this many-sided historical process can be contained within any predetermined framework. To do so would be to attempt to impose on each country or nation, from outside and by means of interference in its domestic affairs, a framework, laws and principles which may be unsuitable to that country or nation, which is the master of its own fate. The political purpose of such external regulation of the whole varied process of the historical development of individual nations and countries can only be to delay the progressive development of society and to impede the national liberation movement and the far-reaching social and economic changes which are in progress and which must inevitably come about in the different countries of the world.<sup>25</sup>

#### RULES OF INTERNATIONAL CONDUCT AND INDIRECT AGGRESSION AND SUBVERSION

##### *United States Proposals*

The United States outline proposes that in Stage I of the disarmament process:

<sup>24</sup> ENDC/P.V. 22, p. 8 (April 17, 1962). In the 17th meeting, the representative of India had said:

" . . . I think that this [the clause in question] has reference to change not within a country but between States; the former is a matter which is not within the purview of the Charter of the United Nations. Therefore, I do not think it is necessary to have any great apprehension regarding that clause." ENDC/P.V. 17, p. 38 (April 10, 1962).

<sup>25</sup> ENDC/P.V. 17, p. 21 (April 10, 1962). Mr. Zorin made a very similar statement in the 22nd meeting, ENDC/P.V. 22, p. 12 (April 17, 1962).

a. The Parties to the Treaty would agree to support a study by a subsidiary body of the International Disarmament Organization of the codification and progressive development of rules of international conduct related to disarmament.

b. The Parties to the Treaty would refrain from indirect aggression and subversion. The subsidiary body provided for in subparagraph a. would also study methods of assuring states against indirect aggression or subversion.<sup>26</sup>

In Stage II:

a. The Parties to the Treaty would continue their support of the study by the subsidiary body of the International Disarmament Organization initiated in Stage I to study the codification and progressive development of rules of international conduct related to disarmament. The Parties to the Treaty would agree to the establishment of procedures whereby rules recommended by the subsidiary body and approved by the Control Council would be circulated to all Parties to the Treaty and would become effective three months thereafter unless a majority of the Parties to the Treaty signified their disapproval, and whereby the Parties to the Treaty would be bound by rules which had become effective in this way unless, within a period of one year from the effective date, they formally notified the International Disarmament Organization that they did not consider themselves so bound. Using such procedures, the Parties to the Treaty would adopt such rules of international conduct related to disarmament as might be necessary to begin Stage III.

b. In the light of the study of indirect aggression and subversion conducted in Stage I, the Parties to the Treaty would agree to arrangements necessary to assure states against indirect aggression and subversion.<sup>27</sup>

And in Stage III:

The Parties to the Treaty would continue the codification and progressive development of rules of international conduct related to disarmament in the manner provided in Stage II and by any other agreed procedure.<sup>28</sup>

In elaborating how these proposals relate to disarmament, Mr. Dean said:

I am sure that no one here is naive enough to believe that, just because armies and armaments have been eliminated, all forms of external interference directed against the sovereignty and independence of one State by another will cease. It is true that the means of mass destruction and devastating wars will be eliminated by general and complete disarmament. However, one State can still send into the territory of another subversive agents, persons who can instigate strikes, terrorists who can use home-made bombs, persons who can agitate groups of people into angry mobs, or who can advocate work stoppages or otherwise interfere in the domestic life of the other country. If States engage in such practices during the process of disarmament, there is considerable doubt that we can succeed in reaching the goal for which we are all striving, that is, general and complete disarmament. I will go even further: If States indulge in such practices after general and complete disarmament is reached, it is

<sup>26</sup> ENDC/30, Sec. H, par. 2, p. 17 (April 18, 1962).

<sup>27</sup> *Ibid.*, Sec. G, par. 2, pp. 25-26. . . . <sup>28</sup> *Ibid.*, Sec. H, par. 2, p. 32.

entirely possible that the condition of general and complete disarmament will not endure, that the scope and frequency of such violence as I have described will increase and that the United Nations force, despite our very best planning, will be unable to cope with the situation.<sup>29</sup>

Mr. Dean explained that a study was needed concerning the methods of assuring states against indirect aggression or subversion because of the particular difficulty of the task. He commented that some people might wish to try to formulate general definitions of the terms involved, while others might "wish to specify particular rules, which we have referred to as rules of international conduct and which will cover particular aspects of what everybody thinks of as indirect aggression or subversion."<sup>30</sup>

As to the procedure by which international rules of conduct would come into force, Mr. Dean said:

... under this paragraph of our proposal [paragraph a. under Stage II quoted above] no State is required to accept any rule of international conduct which it does not wish to accept. If a rule of conduct becomes effective because a majority of the parties do not signify their disapproval, it is still possible for any party which wishes to do so to notify the international disarmament organization that it does not consider itself bound by the rule, and in that event that State will not be bound. Well, if this is true, it may be asked, "Why then have you made this proposal?" The answer is that we have tried to devise the simplest and the easiest procedural means by which desirable new rules of international conduct may come into force, preserving, at the same time, the right of a State not to become bound if it does not wish to.<sup>31</sup>

### *The Soviet View*

The Soviet Delegation saw the United States proposals, not as a means of furthering the prospects of achieving general and complete disarmament, but as a device for frustrating its achievement:

What is intended here is to afford States having the right of veto the opportunity of putting forward as a justification for not wishing to pass on to the third stage the assertion that certain conditions connected with measures of disarmament itself or control have not been fulfilled or that there is no agreement regarding "rules of international conduct" and assurances against "indirect aggression and subversion." There is no need to mention that there are profound differences of interpretation regarding "rules of international con-

<sup>29</sup> ENDC/P.V. 41, p. 13 (May 24, 1962). In explaining the need for an effective and reliable peace force, Mr. Dean again alluded to the fact that "even after general and complete disarmament one State could still interfere, directly and even violently, with the sovereignty and independence of another State." ENDC/P.V. 55, p. 38 (June 13, 1962).

<sup>30</sup> ENDC/P.V. 41, p. 14 (May 24, 1962).

<sup>31</sup> ENDC/P.V. 51, p. 40 (June 7, 1962). Mr. Zorin, when first commenting on the U. S. proposal, saw the United States as proposing the establishment of "... compulsory rules of international conduct that would be dictated by some parties to the treaty to other parties." ENDC/P.V. 27, p. 35 (April 25, 1962).

duct." . . . Everyone interprets these rules in his own way. Thus, the United States, for example, considers it normal to impose all kinds of restrictions on international trade, and it not only does so itself but compels its allies to do likewise. It also interprets "indirect aggression and subversion" in its own way.<sup>32</sup>

The Soviet Delegation also found the United States proposals on rules of international conduct objectionable on the grounds that they would "by-pass" the United Nations Charter. After quoting Article 13 of the Charter,<sup>33</sup> Mr. Zorin stated:

The question that therefore arises is why the United States wishes to entrust the codification and progressive development of rules of international conduct to some subsidiary body of the International Disarmament Organization when, under the United Nations Charter, this function belongs to the General Assembly of the United Nations and to bodies set up by the Assembly? You will say here that you deem it necessary to strengthen the United Nations. But is the organization strengthened if, in place of a body set up by the General Assembly under the terms of the Charter, you want to establish a new body that will replace the other, since it will carry out the same functions and deal with the same questions of codification and progressive development of rules of international behaviour, that is, rules of law? <sup>34</sup>

<sup>32</sup> Statement of Mr. Zorin, ENDC/P.V. 41, p. 44 (May 24, 1962). Under the U. S. plan as originally submitted, the question of transition from Stage I to Stage II or from Stage II to Stage III was to be placed before a special session of the U. N. Security Council if one or more of the permanent Members (the "major signatory Powers") of the Control Council of the International Disarmament Organization declared that certain conditions specified in the treaty had not been met, including whether all the undertakings of the previous stage had been carried out and whether all preparations for the next stage had been made, ENDC/30, Sec. I, p. 19, and Sec. H, pp. 26-27 (April 18, 1962). Under amendments to the U. S. outline submitted to the Conference on Aug. 8, 1962, the decisions concerning transition would be taken without referral to the Security Council, by affirmative vote of two-thirds of the members of the Control Council, including at least the United States and the Soviet Union. ENDC/30/Add. 2 (Aug. 8, 1962).

Mr. Hajek, the representative of Czechoslovakia, suggested that the U. S. Delegation really wished to brand as indirect aggression "strikes or actions resulting from national liberation movements against colonialism"; these "manifestations of peoples trying to fulfill their justified aspirations" should not provide a pretext for intervening, as has been the case in the past. ENDC/P.V. 41, p. 22 (May 24, 1962).

<sup>33</sup> The relevant part of Art. 13 reads: "1. The General Assembly shall initiate studies and make recommendations for the purpose of:

"a. . . . encouraging the progressive development of international law and its codification; . . ." 59 U. S. Stat. 1031; U. S. Treaty Series, No. 993.

<sup>34</sup> ENDC/P.V. 55, p. 54 (June 13, 1962). Mr. Lall, the representative of India, in discussing the relationship of the U. S. proposal to Art. 13 of the U. N. Charter, commented:

"I am not saying that rules of conduct are international law but they impinge upon international law and I think we ought to conform to United Nations procedure where it exists and to approach this matter through United Nations bodies, even if it means expanding a little the interpretation of United Nations Articles, rather than to do things which might conceivably be contradictory to the Charter." ENDC/P.V. 55, p. 20 (June 13, 1962).



### *The View of the Indian Delegation*

The general approach of the Indian Delegation to the question of rules of international conduct was expressed by Mr. Lall:

I am not at all sure that it is really possible to study this matter very effectively in the abstract. I of course believe that the manners of countries in their dealings with each other should be exemplary: If that is what the United States has in mind, then obviously our intentions are entirely identical. However, I do not understand very well how this matter is to be studied in the abstract. Perhaps the United States delegation has in mind the way in which countries treat their neighbors. I should like to refer . . . to the question of Laos. I take it that this is the sort of case that is envisaged. An international agreement has been formulated in respect of a small country that has been having certain difficulties with its neighbors. This agreement . . . sets out the kind of behavior which neighboring States must adopt towards the small country in question.<sup>35</sup>

If that is what is in mind—and I entirely agree that situations like this might, unhappily, develop in the future even after we have general and complete disarmament—then would it not be wiser and more practical to deal with such cases *ad hoc*?<sup>36</sup>

### THE PEACE FORCE

#### *The Joint Statement of Agreed Principles*

The Joint Statement of Agreed Principles for Disarmament Negotiations of September 20, 1961, contains some fundamental clauses concerning establishment of a peace force:

. . . During and after the implementation of the programme of general and complete disarmament, there should be taken, in accordance with the principles of the United Nations Charter, the necessary measures to maintain international peace and security, including the obligation of States to place at the disposal of the United Nations agreed manpower necessary for an international peace force to be equipped with agreed types of armaments. Arrangements for the use of this force should ensure that the United Nations can effectively deter or suppress any threat or use of arms in violation of the purposes and principles of the United Nations.<sup>37</sup>

#### *United States Proposals*

The United States presented peace force proposals for all three disarmament stages. In Stage I:

The Parties to the Treaty would undertake to develop arrangements during Stage I for the establishment in Stage II of a United Nations Peace Force. To this end, the Parties to the Treaty would agree on the following measures within the United Nations:

<sup>35</sup> A Declaration on the Neutrality of Laos and a Protocol were signed at Geneva on July 23, 1962. 47 Dept. of State Bulletin 259-263 (1962).

<sup>36</sup> ENDC/P.V. 55, p. 15 (June 13, 1962).

<sup>37</sup> ENDC/5, par. 7, p. 3 (March 19, 1962).

- a. Examination of the experience of the United Nations leading to a further strengthening of United Nations forces for keeping the peace;
- b. Examination of the feasibility of concluding promptly the agreements envisaged in Article 43 of the United Nations Charter;
- c. Conclusion of an agreement for the establishment of a United Nations Peace Force in Stage II, including definitions of its purpose, mission, composition and strength, disposition, command and control, training, logistical support, financing, equipment and armaments.<sup>38</sup>

In Stage II:

The United Nations Peace Force to be established as the result of the agreement reached during Stage I would come into being within the first year of Stage II and would be progressively strengthened during Stage II.<sup>39</sup>

And, finally, in Stage III:

The Parties to the Treaty would progressively strengthen the United Nations Peace Force established in Stage II until it had sufficient armed forces and armaments so that no state could challenge it.<sup>40</sup>

Mr. Dean explained the basic need for a peace force:

... in the completely disarmed world States cannot entrust the protection of their vital interests solely to negotiations, conciliation, mediation, resolutions and the like. These methods are of course very important and I do not mean in any way to cast the slightest aspersions on these key and most important diplomatic activities. However, the history of international relations shows that they have never been sufficient in themselves to deter a State determined to impose its will upon another State . . .

I would doubt that any country, and I include my own, would actually be prepared to disband its armies and to relinquish all its armaments . . . before it is confident, and can say so to its people, that an effective international peace force exists which could if necessary defend it against aggression and safeguard its legitimate interests.<sup>41</sup>

#### *Relationship between the Peace Force and Verification*

The British Delegation introduced the concept of an interrelationship between verification of disarmament measures and an adequate peace force. Sir Michael Wright pointed out:

... If there were adequate peace-keeping machinery and an adequate peace-keeping force, there would be little, or at least less, incentive for the hidden retention of arms, for hiding arms "under the jacket," and this would surely ease the problem of control. If, on the contrary, there were no adequate peace-keeping machinery and no adequate peace-keeping force, there would be a strong incentive to the ambitious, to the unscrupulous, or to the bad neighbour to hide

<sup>38</sup> ENDC/30, Sec. H, par. 5, p. 18 (April 18, 1962).

<sup>39</sup> *Ibid.*, Sec. G, par. 3, p. 26.

<sup>40</sup> *Ibid.*, Sec. H, par. 3, p. 32.

<sup>41</sup> ENDC/P.V. 55, p. 37 (June 13, 1962).

arms for selfish or aggressive purposes. In that case the control problem becomes immeasurably more difficult.<sup>42</sup>

Subsequently, Mr. Godber, the representative of the United Kingdom, formulated the "clear relationship between the adequacy of peace-keeping machinery in general, and the peace force in particular, on the one hand, and the effectiveness of verification machinery, on the other," as the second of three principles pertaining to the establishment of a United Nations Peace Force.<sup>43</sup>

Mr. Zorin, however, saw Mr. Godber's second principle as the expression of another Western device to frustrate disarmament:

I should remind members of the Committee that in the past the Western delegates have made great play with the question of control in order to slow down a solution of the disarmament problem. Control was turned into a matter of prime importance and decisive significance attached to it. It is evident that these possibilities are now exhausted or becoming exhausted. A more suitable lever is needed to slow down agreement and it is at this point that the intimate correlation between control and security measures appears on the scene.<sup>44</sup>

#### *Examination of the Experience of the United Nations*

In his principal statement concerning the peace force, Mr. Dean explained the object of specific clauses in the Stage I proposals of the United States. As to examination of the experience of the United Nations leading to a further strengthening of United Nations forces for keeping the peace, Mr. Dean pointed out that in the sixteen years of its existence the United Nations had engaged in a substantial number of important operations to keep the peace. He described a number of them to illustrate their variety: the United Nations Commission in Greece in 1947; the Unified Command in Korea, created in 1950; the United Nations Emergency Force in the Middle East, established in 1956; and the United Nations Operation in the Congo, formed in 1961. Mr. Dean concluded that there existed a valuable opportunity, "which it would be difficult to overestimate," to examine the problems and solutions of the various situations, to apply the lessons of the past, and to take important steps to strengthen the ability of the United Nations to keep the peace.<sup>45</sup> Mr. Zorin promptly responded: "In all these cases the armed forces set up were not established in accordance with the United Nations Charter but in violation of it."<sup>46</sup>

<sup>42</sup> Sir Michael expanded on his theme: "We can find analogies for this throughout our ordinary life. There are civilian police, but the fact of their existence means that private citizens do not carry revolvers and do not feel it necessary to search the house of their neighbours; the fire brigade exists, and consequently it is not necessary to exercise control over every house by ensuring that it is built exclusively of fireproof materials, and so on." ENDC/P.V. 43, p. 10 (May 28, 1962).

<sup>43</sup> ENDC/P.V. 54, p. 14 (June 12, 1962).

<sup>44</sup> ENDC/P.V. 55, p. 59 (June 13, 1962). <sup>45</sup> *Ibid.* 39.

<sup>46</sup> *Ibid.* 55. For an analysis of the legality of various types of peace forces, see Sohn, "The Authority of the United Nations to Establish and Maintain a Permanent United Nations Force," 52 A.J.I.L. 229-240 (1958); and Halderman, "Legal Basis for United Nations Armed Forces," 56 *ibid.* 971 (1962). For a full discussion of peace

*Examination of the Feasibility of Concluding Agreements under Article 43 of the United Nations Charter*

The United States also proposed examination of the feasibility of concluding promptly the agreements envisaged in Article 43 of the United Nations Charter.<sup>47</sup> Mr. Dean said there was a "real question" whether conclusion of these agreements would prove feasible. The agreements were to be concluded between the Security Council and Members of the United Nations, which meant that they would be subject to veto by any permanent Member of the Security Council. When the United Nations Military Staff Committee sought to lay the basis for agreements under Article 43, shortly after the founding of the United Nations, it did not prove possible to map out a plan acceptable to all the permanent Members of the Security Council, or even to agree upon the principles which should govern the organization of the forces to be made available to the Security Council under Article 43. Mr. Dean added:

We are quite prepared to try again, but I must ask, in the light of our past experience, whether it is wise to pin all our hopes on agreements pursuant to Article 43 of the United Nations Charter, as is the case in the Soviet draft treaty.<sup>48</sup>

*Agreement to Establish a United Nations Peace Force*

In addition to the possibility of implementing Article 43 of the United Nations Charter, the United States' plan also states that the parties to the

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forces, particularly the United Nations Expeditionary Force, see Frye, *A United Nations Peace Force* (1957).

<sup>47</sup> See quotation on pp. 56-57 above. Art. 43 of the Charter provides:

"1. All Members of the United Nations, in order to contribute to the maintenance of international peace and security, undertake to make available to the Security Council, on its call and in accordance with a special agreement or agreements, armed forces, assistance, and facilities, including rights of passage, necessary for the purpose of maintaining international peace and security.

"2. Such agreement or agreements shall govern the numbers and types of forces, their degree of readiness and general location, and the nature of the facilities and assistance to be provided.

"3. The agreement or agreements shall be negotiated as soon as possible on the initiative of the Security Council. They shall be concluded between the Security Council and Members or between the Security Council and groups of Members and shall be subject to ratification by the signatory states in accordance with their respective constitutional processes." 59 U. S. Stat. 1031; U. S. Treaty Series, No. 993.

<sup>48</sup> ENDC/P.V. 55, p. 40 (June 13, 1962). At the 27th meeting Mr. Zorin had said that the conclusion of a treaty on general and complete disarmament "will radically alter the international situation and establish all the necessary conditions for implementing" the provisions of Art. 43 of the Charter. ENDC/P.V. 27, p. 32 (April 25, 1962).

For a full description of the effort to achieve agreement on the implementation of Art. 43 of the Charter, see Blaisdell, "Arms for the United Nations," 1 Dept. of State Documents and State Papers 141-158 (1948), and Dept. of State Pub. 3203, *International Organization and Conference Series III*, No. 8. For general accounts, see Goodrich and Simons, *The United Nations and the Maintenance of International Peace and Security* 398-405 (1955); and Claude, *The United Nations and the Use of Force* 346-355 (*International Conciliation*, No. 532 (1961)).

disarmament treaty would agree to conclude agreements for the establishment in Stage II of a United Nations Peace Force, including definitions of its purpose, mission, composition and strength, disposition, command and control, training, logistical support, financing, equipment and armaments.<sup>49</sup> Mr. Dean did not offer detailed elaboration of this proposal but indicated that constructive ideas from the other participating delegations would be welcome.<sup>50</sup>

The British Delegation did offer the Committee some specific thoughts about the control, composition and disposition of the proposed peace force. The third of Mr. Godber's three principles concerning the establishment of the peace force stated:

... the United Nations peace force must be as far as possible removed from the influence of individual States which have contributed to it, except such influence as may be legitimately exerted through the United Nations.

This principle suggested several corollaries:

... on the basis of our present views, we should be inclined to recommend ... that contingents of troops should come from as many countries as possible with no one country providing too large a contingent. More important still, we believe that national contingents should not be maintained on the soil of their own countries when they are not engaged on United Nations business: for, I submit, if they were to do so, what possible guarantee could we have that their governments, in case of need, would in fact release them to the United Nations? If the peace force is to be reliable it must surely be a single, united, cohesive body of troops.<sup>51</sup>

#### *Nuclear Weapons for the Peace Force*

Both the United States outline and the Soviet draft treaty have as an objective the complete elimination of nuclear weapons from the arsenals of states;<sup>52</sup> however, the question of whether a possibility should be left open that the peace force be armed with nuclear weapons was one of the most hotly disputed questions of the Conference. The position of the United States and the United Kingdom was that no decision excluding the possibility of arming the peace force with nuclear weapons could be taken prior to consideration of the question of whether nuclear weapons might be needed by the peace force as a deterrent against use or threat of use of

<sup>49</sup> See quotation on pp. 56-57 above. <sup>50</sup> ENDC/P.V. 55, p. 40 (June 13, 1962).

<sup>51</sup> ENDC/P.V. 54, p. 17 (June 12, 1962).

<sup>52</sup> This basic principle is contained in the Joint Statement of Agreed Principles for Disarmament Negotiations of Sept. 20, 1961, principles 2 and 3 b (ENDC/5, March 19, 1962); and U. S.-Soviet agreement on the objective, although not on the language to express it, is revealed in the working draft of Pt. I of the treaty, Art. I, pars. 1(b) and 2(b), ENDC/40/Rev. 1 (May 31, 1962). The basic difference between the two sides relates, therefore, to method rather than objective, since the Soviet Union proposes the complete elimination of nuclear weapons all in Stage II (ENDC/2, Art. 22, pp. 14-15, March 19, 1962), while the U. S. proposes that the elimination of nuclear weapons from the arsenals of states take place throughout all three stages of disarmament (ENDC/30, pp. 8-10, 23-24, 29-30).

nuclear weapons by a state which had hidden some in the course of the disarmament process. Mr. Godber, for the United Kingdom, explained:

... I doubt whether any of us really wants to see the extension of these nuclear weapons in any form after the end of the process of general and complete disarmament.

But the point which we have to face is whether some unscrupulous State would be retaining or seeking to retain some of these weapons. I posed the question yesterday very clearly to show the great difficulties in checking whether in fact it had. If there is a real danger of that happening, we have got to decide at some stage in our discussions here what the extent of that danger is and whether we, the nations round this table, feel on the whole that it would be wise, perhaps for a limited period, to retain within the ambit of the United Nations peace force some deterrent in this form. ... Obviously it is a matter that would require the gravest consideration from us all.<sup>53</sup>

The Soviet Union urged that agreement be reached to limit the arms of the peace force to "agreed types of *non-nuclear* armaments."<sup>54</sup> Mr. Zorin interpreted the United States' position as revealing a wish to preserve the threat of nuclear war:

... you clearly consider that the force may be equipped with nuclear weapons. This, of course, alarms us.

It is not difficult to determine the reasons for this United States position. The United States is anxious to retain nuclear weapons as a deterrent against the peoples. For its own political purposes it wants to keep the world on the brink of nuclear war. Hence the theory of the first, second and further nuclear strikes, echoes of which we have heard in this room. Hence, also, the propaganda for a preventive nuclear war.<sup>55</sup>

Mr. Zorin also argued that, since the United States' plan would leave some nuclear weapons in the hands of states until the end of Stage III, the result would be nuclear war if the peace force were to be armed with nuclear weapons:

... Will they [the international armed forces] be able to halt a militarily powerful State? Obviously not, since they will be opposed by nuclear weapons and the only thing which could happen would be the provocation of a nuclear war. Perhaps it is for this reason that the United States wishes to equip the international armed forces with nuclear weapons. If so, the result is still nuclear war.

Surely this is not the purpose of a disarmament programme. Surely people do not care whether they perish in a nuclear war oc-

<sup>53</sup> ENDC/P.V. 51, p. 17 (June 7, 1962). Similar statements were made by Mr. Dean for the United States, see ENDC/P.V. 46, p. 37 (May 31, 1962) and ENDC/P.V. 51, pp. 35-36 (June 7, 1962).

<sup>54</sup> Pt. I of the draft treaty, Art. 3, par. 3, ENDC/40/Rev. 1, p. 5 (May 31, 1962).

<sup>55</sup> ENDC/P.V. 47, pp. 32-33 (June 1, 1962). Mr. Stelle's rebuttal, on behalf of the United States, emphasized that U. S. proposals provided that, upon and after completion of general and complete disarmament, nuclear weapons would be eliminated from the arsenals of states; as to the need to arm the peace force with nuclear weapons, the U. S. Government was not prepared to take a position for or against until after further thought, discussion and negotiation. *Ibid.* 41.

curring between two or three States or in one fought between some State and international armed forces armed with nuclear weapons.<sup>56</sup>

The Delegation of India also voiced unequivocal opposition to the possibility of arming the United Nations Peace Force with nuclear weapons:

I should like to reiterate that my delegation could not agree to that proposition in any circumstances. We could not agree to these weapons of mass destruction, which in their primitive stage wrought havoc, whose effects are still being felt at Hiroshima and Nagasaki, being ever used again.

We should like to make this position absolutely clear. These weapons, which in a primitive stage of development caused such devastation, must not be used again, and we should not be able to agree to the possession by the United Nations force of such weapons.<sup>57</sup>

Mr. Lall introduced a further argument against the possibility of arming the peace force with nuclear weapons:

. . . It seems to us to be a natural step from saying that no State should have these weapons in its hands to realizing that it would be impossible for the United Nations peace force to have these weapons in its hands. For if no State should have these weapons in its hands, then where would such weapons be stored, manufactured, tested, and so on, if the United Nations peace force were to have them? I am speaking now purely in terms of formal logic, although our objection to these weapons in the hands of the United Nations peace force is much deeper. We do not think that it is really practicable for no State to have these weapons and yet for the United Nations peace force to have them.<sup>58</sup>

#### *Strength of the Peace Force*

The Joint Statement of Agreed Principles for Disarmament Negotiations of September 20, 1961, provides:

. . . Arrangements for the use of this force should ensure that the United Nations can effectively deter or suppress any threat or use of arms in violation of the purposes and principles of the United Nations.<sup>59</sup>

This clause and the concept expressed in it were strongly supported by a number of delegations. Mr. Lall declared that the adherence of the Delegation of India to this part of the Joint Statement was "absolute and unqualified."<sup>60</sup> The first of the three principles for establishing a United

<sup>56</sup> ENDC/P.V. 51, pp. 12-13 (June 7, 1962).

<sup>57</sup> Mr. Lall, *ibid.* 19-20. In his opening statement at the Conference, Mr. Krishna Menon, on behalf of India, had said in a passing remark: ". . . my country would never agree to the idea that there should be an international force which would use nuclear weapons in the future." ENDC/P.V. 5, p. 33 (March 20, 1962).

<sup>58</sup> ENDC/P.V. 49, pp. 18-19 (June 5, 1962). Mr. Lall's argument was subsequently pursued by Mr. Hajek, the representative of Czechoslovakia, *ibid.* 25, by Mr. Zorin, the representative of the Soviet Union, ENDC/P.V. 50, p. 30 (June 6, 1962), and by Mr. Naszkowski, the representative of Poland, ENDC/P.V. 55, p. 2 (June 13, 1962).

<sup>59</sup> Principle 7, ENDC/5, p. 3 (March 19, 1962).

<sup>60</sup> ENDC/P.V. 55, pp. 13-14 (June 13, 1962).

Nations Peace Force, formulated by Mr. Godber, the representative of the United Kingdom, provided:

The United Nations peace force must be strong enough in numbers and equipment to be able to deal rapidly and decisively with any force or opposition with which it may be confronted. . . . It stands to reason that if the force cannot be relied upon to deal with any challenge, it cannot be relied upon to keep the peace; and if it cannot be relied upon to keep the peace, if it is going to prove no more serviceable than, for instance, the helmet of Don Quixote, there is no point in having it at all.<sup>61</sup>

Mr. Cavalletti, the representative of Italy, declared:

They [the international forces] should be capable of taking effective preventive and enforcement action in every case, because that is the only way in which the smaller countries, which will be deprived of their armed forces and their military alliances, will be able to feel reassured.<sup>62</sup>

In Stage III of the United States' plan it is proposed that the United Nations Peace Force would be progressively strengthened "until it had sufficient armed forces and armaments so that no state could challenge it."<sup>63</sup> Mr. Dean commented: "We believe that caging the mice and not the lions will not necessarily solve our problem."<sup>64</sup>

The Soviet representative, Mr. Zorin, drew a connection between United States proposals concerning rules of international conduct,<sup>65</sup> an increasingly strong peace force, and the fact that the United States had not excluded the possibility of the peace force having nuclear weapons. Mr. Zorin said:

. . . The international force [under the provisions of the United States' plan] will be set up during Stage II and will continuously increase to the end of general and complete disarmament, even receiving nuclear weapons. The conclusion is inescapable that this procedure for the development of the international force does not pursue the aim of maintaining peace but clearly has some other aim. Should not these aims be sought in the proposals of the United States for what are referred to as rules of international conduct, various coercive measures for their enforcement, and other similar provisions, which in ordinary language means the setting up of what is in essence an

<sup>61</sup> ENDC/P.V. 54, p. 14 (June 12, 1962). "... he proceeded to fashion out of cardboard a kind of half-helmet, which, when attached to the morion [a visorless headpiece], gave the appearance of a whole one. True, when he went to see if it was strong enough to withstand a good slashing blow, he was somewhat disappointed; for when he drew his sword and gave it a couple of thrusts, he succeeded only in undoing a whole week's labor. The ease with which he had hewed it to bits disturbed him no little, and he decided to make it over. This time he placed a few strips of iron on the inside, and then, convinced that it was strong enough, refrained from putting it to any further test; instead, he adopted it then and there as the finest helmet ever made." Cervantes, *Don Quixote*, p. 61 (Putnam trans., New York, 1951).

<sup>62</sup> ENDC/P.V. 41, p. 83 (May 24, 1962).

<sup>63</sup> ENDC/30, Sec. H, par. 3, p. 32 (April 18, 1962), quoted on p. 57 above.

<sup>64</sup> ENDC/P.V. 54, p. 44 (June 12, 1962).

<sup>65</sup> See discussion on pp. 52-56 above.



international bludgeon to repress national liberation movements and impose one's will on peoples by force? This is the only way in which one can understand principles for the organization of an international force that grows larger and larger towards the end of disarmament.<sup>66</sup>

Mr. Zorin was equally vigorous when, speaking of "the deliberate policy of the Western Powers," he asked:

What does it signify? In effect it amounts to the setting up of a police regime throughout the world under which law will be enforced by means of international weapons. International law has always reflected relations between sovereign States. This is now to be replaced by the law of the big stick, which is to be handed to the United Nations.<sup>67</sup>

The Soviet Delegation refused to accept language proposed by the United States for inclusion in Part I of the treaty providing that the United Na-

<sup>66</sup> ENDC/P.V. 55, pp. 57-58 (June 13, 1962).

<sup>67</sup> ENDC/P.V. 50, p. 31 (July 23, 1962). Mr. Zorin's outburst was prompted by a statement of Mr. Cavalletti, the representative of Italy, that if there were to be a legal rule making it a crime against international law to use nuclear weapons, there would be required, to prevent infringement, a United Nations peace force "sufficiently strong to enforce respect for international law." ENDC/P.V. 49, p. 30 (June 5, 1962).

Throughout the course of the debates, Mr. Zorin made a number of interesting statements on the nature of relations between sovereign states and settlement of disputes. In reply to a remark of Mr. Godber, the British representative, that "It is no good our seeking to create a world safe for bandits" (ENDC/P.V. 54, p. 53 (June 12, 1962)), Mr. Zorin said:

"This is a very remarkable utterance, and one that reflects the attitude of the Western Powers to the honor, dignity and prestige of States. A treaty on disarmament is, after all, not the same thing as internal legislation applied to the private citizens of a State but is the expression of relations between States. Here modern States are being treated as potential criminals. The conduct of States and the conduct of the individual are quite different things that, I would have said, could not be compared. The same criteria cannot be applied to the conduct of a State as to the conduct of an individual. To do so would represent a purely mechanical and incorrect approach." ENDC/P.V. 55, p. 53 (June 13, 1962).

United States proposals for third-party settlement of disputes were described in the following manner: "Free and equal negotiations between sovereign States are replaced by the capricious and despotic decision of an arbitrator." ENDC/P.V. 56, p. 31 (June 14, 1962). The Soviet view of peaceful settlement of disputes was set forth:

"The Soviet Union is an ardent advocate of the peaceful settlement of disputes between States. We are against any attempts to settle disputes by force of arms. But the peaceful settlement of disputes means negotiation without encroaching upon the rights and interests of any particular party; it means mutual concessions and seeking mutually-acceptable settlements without encroaching upon the sovereign rights of any State. The United States proposal emphasizes something else: compulsory arbitration, the compulsory jurisdiction of the International Court of Justice, the establishment of a special Peace Observation Corps and enforcement measures to ensure compliance with international agreements. No matter what fine words have been used, it would mean, in practice, an encroachment upon the sovereign rights of one State or another and an attempt to set up a supra-national international authority acting in favor of those who would be at the head of it." ENDC/P.V. 26, p. 29 (April 24, 1962).

tions Peace Force should have the capability "effectively [to] deter or suppress any threat or use of arms."<sup>68</sup>

*Consistency of United States Peace Force Proposals with the United Nations Charter*

The Soviet representative, Mr. Zorin, charged that "the United States is in fact proposing that a United Nations Peace Force should be established without reference to the Security Council, and consequently in violation of the United Nations Charter."<sup>69</sup> On a subsequent occasion he said:

The Charter contains a definite principle and definite provisions, embodied in Article 43, on the procedure governing organization of international armed forces. You are putting this aside and proposing to conclude an agreement on a new basis now to be formulated, and not in accordance with the United Nations Charter.<sup>70</sup>

Mr. Zorin expounded at considerable length on the impossibility of reaching agreement with the Soviet Union regarding peace-keeping forces except on the basis of Article 43 of the Charter. He said:

If you wish to do this [establish a peace force] without our agreement, you will be acting in opposition to us. But can you conclude a treaty on general and complete disarmament against our opposition? It is quite clear that this is unrealistic.

The question which then arises is why you act in this way. There can be only one answer: you do not desire a treaty on general and complete disarmament, because if you do desire such a treaty it can only be achieved with our agreement and with your agreement. We are well aware of this. The reason why we are holding these discussions with you is because we want to reach an agreement. If you want our agreement, why do you try to set up armed forces in circumvention of the United Nations Charter? Do you imagine that we shall agree to violate the United Nations Charter? We declare to you openly that we shall not do so. We wish to set up an armed force in conformity with Article 43 of the United Nations Charter. If you have the same wish we shall not have any disagreement. In such case, why do you set Article 43 aside and proceed without it? You can see from this analysis that your position here is quite incomprehensible.<sup>71</sup>

Mr. Dean responded to the Soviet Delegation's charges:

We have heard a good deal from our Soviet colleague, to the effect that the United States plan seeks to bypass the United Nations. Nothing could be further from the truth. . . . On the contrary, the United States wishes to strengthen the United Nations by creating a United Nations peace force which can guarantee effectively the rights of States as set forth in the Charter of the United Nations. Mr. Zorin has stated on many occasions that Article 43 of the United Nations Charter provides the means for establishing forces which may be used by the

<sup>68</sup> ENDC/40/Rev. 1, p. 5 (May 31, 1962).

<sup>69</sup> ENDC/P.V. 27, p. 34 (April 25, 1962).

<sup>70</sup> ENDC/P.V. 55, p. 55 (June 13, 1962).

<sup>71</sup> *Ibid.* 56.

Security Council, but this certainly does not mean that Members of the United Nations may not agree to create institutions such as the United Nations peace force which may be necessary in order to safeguard, in a world of general and complete disarmament, their fundamental rights under the United Nations Charter.

Article 43 of the United Nations Charter does not exhaust the means provided in the Charter to ensure the collective security of Members of the United Nations. . . . We have behind us valuable experience, some of it representing improvisation in the face of urgent requirements, some growing out of the broad recommendatory powers of the General Assembly as laid down in Articles 10, 11 and 12 of the Charter and all of it entirely within the authority of the United Nations. Thus there exists ample precedent and broad authority to carry out within the framework of the Charter what we have in mind in improving the peace-keeping machinery of the United Nations.<sup>72</sup>

### *The Soviet Proposals*

Under the heading "Measures to Strengthen the Capacity of the United Nations to Ensure International Peace and Security," Article 18 of the Soviet draft treaty provides, as to Stage I of the disarmament process:

1. To ensure that the United Nations is capable of effectively protecting States against threats to or breaches of the peace, all States parties to the Treaty shall, between the signing of the Treaty and its entry into force, conclude agreements with the Security Council by which they undertake to make available to the latter armed forces, assistance and facilities, including rights of passage, as provided for in Article 43 of the United Nations Charter.

2. The armed forces provided under the said agreements shall form part of the national armed forces of the corresponding States and shall be stationed within their territories. They shall be kept up to full strength, equipped and prepared for combat. When used under Article 42 of the United Nations Charter, these forces, commanded by the military authorities of the corresponding States, shall be placed at the disposal of the Security Council.<sup>73</sup>

For Stage II, Article 27 provides:

The States parties to the Treaty shall continue to implement the measures, referred to in Article 18 of the present Treaty, regarding the placing of armed forces at the disposal of the Security Council for use under Article 42 of the United Nations Charter.<sup>74</sup>

For Stage III, Article 36, entitled "Contingents of Police (Militia)," provides in part:

1. To maintain internal order, including the safeguarding of the frontiers and of the personal security of citizens, and to ensure compliance with their obligations in regard to the maintenance of international peace and security under the United Nations Charter, the States parties to the Treaty shall be entitled to have, after the complete abolition of armed forces, strictly limited contingents of police (militia), equipped with light firearms.<sup>75</sup>

<sup>72</sup> *Ibid.* 41.

<sup>74</sup> *Ibid.* 18.

<sup>73</sup> ENDC/2, p. 13 (March 19, 1962).

<sup>75</sup> *Ibid.* 23.

And also for Stage III, Article 37, entitled "Police (Militia) Units to be made available to the Security Council," provides:

1. The States parties to the Treaty undertake to place at the disposal of the Security Council, on its request, units from the number of contingents of police (militia) retained by them, as well as to provide assistance and facilities, including rights of passage. The placing of such units at the disposal of the Security Council shall be carried out under the provisions of Article 43 of the United Nations Charter. To ensure that urgent military measures may be undertaken, the States parties to the Treaty shall maintain in a state of immediate readiness that part of the police (militia) contingents which is intended for joint international enforcement action. The size of the units which the States parties to the Treaty undertake to place at the disposal of the Security Council, as well as the areas where they are stationed, shall be specified in agreements to be concluded by the States parties to the Treaty with the Security Council.

2. The command of the units referred to in Paragraph 1 shall be made up of representatives of the three principal groups of States existing in the world on the basis of equal representation. The commanding body shall decide on all questions by agreement among its members representing the three groups of States.<sup>76</sup>

*Use of "Police (Militia) Contingents" for Maintaining International Peace*

The representative of Italy, Mr. Cavalletti, objected to the lack of separation, in the Soviet plan, between forces for maintaining internal order and those for maintaining international peace. He pointed to a dilemma in using the same forces for both purposes. On the one hand, if the police militia were strictly proportional to the requirements for maintaining internal order, then fulfilment of a request by the United Nations for part of the forces would leave the country with inadequate internal forces remaining. On the other hand, if a large country with a great population, in anticipation of such requests, were to retain larger national police forces than would be strictly necessary for maintaining internal order, then such a country might wind up with such a large force that it "would have a considerable military advantage over other States and could undertake aggression against a smaller country."<sup>77</sup>

Along similar lines, Mr. Godber, the representative of the United Kingdom, observed:

... if we look into the provisions of the Soviet draft, it becomes clear that the Soviet Union is in fact proposing, not the single and effective force which we believe would be essential, but a series of national armies, or national militias, under national control—diminished armies, certainly, but national armies none the less—which could presumably invade the territory of their neighbors if they chose to do so and if there was no peace force to stop them.<sup>78</sup>

<sup>76</sup> *Ibid.* 23-24.

<sup>77</sup> ENDC/P.V. 41, pp. 32-33 (May 24, 1962).

<sup>78</sup> ENDC/P.V. 54, p. 19 (June 12, 1962).

*"Troika" Command of the Forces for Maintaining Peace*

Another feature of the Soviet proposals which attracted considerable attention was the provision that the command of the police (militia) units should be "... made up of representatives of the three principal groups of States existing in the world on the basis of equal representation," and that "the commanding body shall decide on all questions by agreement among its members representing the three groups of States."<sup>79</sup> Mr. Cavalletti, the Italian representative, pointed out that these provisions, taken together with the requirement under the Soviet plan of Security Council action, would result in a "double veto" over use of the forces:

We are not military experts, but I think anyone can understand that a military force which cannot act unless a double veto is overcome—and in particular a veto of three commanders—has obviously no chance of exerting the slightest influence for the maintenance of peace.<sup>80</sup>

The point was pursued by Mr. Godber, the representative of the United Kingdom:

They [the Soviet proposals] provide first of all for the Security Council veto and, secondly, for a *troika* command of the force itself, which would paralyse it utterly except when the three commanders were in unanimous agreement. And in how many recent crises have the Communist bloc, the Western Powers and the non-aligned countries all found themselves in agreement? We have some experience around this table of the difficulty of getting all three to look at matters in exactly the same light.<sup>81</sup>

Mr. Zorin replied by asking:

Do you want to give the command to a single individual, who would inevitably be a representative of the Socialist countries, or the Western Powers, or the non-aligned States? It is of course clear to everyone that in such a case the armed forces could be used against the interests of any of the groups of States and to the detriment of their security. What has happened, Mr. Godber, to your desire to secure the same law for all? It has disappeared. You speak of high principles, but in fact you are practicing the same old Western policy which you have hitherto succeeded in practicing in the United Nations—a policy of encroaching on the interests of other States.<sup>82</sup>

The British Delegation's views as to the over-all effectiveness of the Soviet proposals were summarized in an analogy to a fire brigade:

What sort of a fire brigade is the Soviet Government suggesting? One in which every fireman has to be summoned from his own house when the alarm goes, for there will be none on permanent duty; one in which each fireman's equipment is different from that of his col-

<sup>79</sup> ENDC/2, Art. 37, par. 2, p. 24 (March 19, 1962). \*Concerning this language, Mrs. Myrdal, the representative of Sweden, stated: "I would prefer that we avoid at all times any phraseology that lumps together the non-aligned countries in a bloc which they do not wish to form." ENDC/P.V. 27, p. 19 (April 25, 1962).

<sup>80</sup> ENDC/P.V. 51, p. 51 (June 7, 1962).

<sup>81</sup> ENDC/P.V. 54, p. 15 (June 12, 1962).

<sup>82</sup> ENDC/P.V. 55, p. 59 (June 13, 1962).

leagues; one in which the members have never worked together before—remembering of course that, in many cases, of necessity such forces do not even speak the same language. Finally, the Soviet Union is proposing a fire brigade which is obliged to apply to some distant householder for the ignition key of its fire engine, and to another distant householder for the key of the water supply hydrant. Such a fire brigade might, I suppose, eventually be able to assemble; but long before it did so I fear the house would have burnt down, and other houses with it.<sup>83</sup>

### CONCLUSION

The discussions at the Conference of the Eighteen-Nation Committee on Disarmament revealed clearly a basic difference in viewpoint between the United States and the Soviet Union on the relationship between peace-keeping and general and complete disarmament. The United States expressed the view that disarmament must be accompanied by greatly improved means for settling international disputes and maintaining international peace, including the establishment of a truly effective United Nations peace force, if general and complete disarmament were to be achieved. The Soviet Union, on the other hand, asserted that the surest path to international peace and security would be first and foremost the elimination of armaments and the disbanding of armed forces.

If the type of peace-keeping program advocated by the United States, together with general and complete disarmament, were agreed upon and successfully carried out, there can be little doubt that a vast change in world politics would necessarily result. The United States' peace-keeping program envisions in or by the end of Stage III the creation of institutions providing a "basis for peaceful change in a disarmed world" and "the just and peaceful settlement of all disputes, whether legal or political in nature"; and, at the same time, the United Nations Peace Force would be strengthened "until it had sufficient armed forces and armaments so that no state could challenge it."<sup>84</sup> These goals imply nothing less than a world where the fundamental rights and duties of states would in fact be subject to enforcement by collective sanctions and where change in such rights and duties not only should not, but actually could not, be altered by unilateral force. Experience thus far under the United Nations Charter, whatever some may have hoped for in the way of gradual evolution, can hardly be viewed as constituting much more than an excursion into the foothills of such a world—the snow-clad Alps still a considerable distance away.

Although implementation of the United States' peace-keeping program would probably entail revolutionary changes, the introduction of these proposals appears broadly consonant with one major current of American policy in recent times. This is the current which embraces the prominent participation of the United States in promotion of the League of Nations and the United Nations Organization. These organizations undoubtedly

<sup>83</sup> ENDC/P.V. 54, p. 18 (June 12, 1962).

<sup>84</sup> ENDC/80, Stage III, Sec. H, p. 32 (April 18, 1962).

contemplated an increasingly significant rôle for collective sanctions to deter or counter aggression, as opposed to traditional collective defense or alliances. To this extent, the United States' peace-keeping proposals represent an extension of, rather than a departure from, prior policy.

The United States' peace-keeping proposals do not constitute a "bypassing" of the United Nations, as charged by the Soviet Union. It is hard to see any fair basis for the Soviet charge when there are to be created a *United Nations* Peace Force, a *United Nations* Peace Observation Corps, when there is to be a considerable rôle played by the International Court of Justice, and when the parties are to agree expressly "to support measures strengthening the structure, authority, and operation of the United Nations so as to improve its capability to maintain international peace."<sup>85</sup> And it must not be overlooked that the entire peace-keeping program is conceived as a means of ensuring to the Members of the United Nations the secure enjoyment of the rights and benefits set forth in Articles 1 and 2 of the Charter under "Purposes and Principles."

It is the United States, and not the Soviet Union, which wishes to see the United Nations a truly vital institution capable of effectuating the great purposes for which it was conceived. The United States views the United Nations Charter as a constitutional instrument which must be broadly construed to give effect to its fundamental purposes.<sup>86</sup> On the other hand, the Soviet Union, in order to oppose measures which would not serve its political interests, such as the establishment of a truly effective United Nations Peace Force, has posed as the champion of rigorous, literal implementation of the contractual terms of the Charter. In this connection, one writer has referred to the Soviet conception of "the special truce-like character of covenants between the 'socialist camp' and the outside world."<sup>87</sup>

The positions taken by the Soviet Government at the Eighteen-Nation Conference on the subject of peace-keeping should not come as a surprise. A review of Soviet positions taken at the United Nations shows a wide range of continuity extending into the Eighteen-Nation Disarmament Conference.<sup>88</sup> It might have been hoped by some that reference to an "international peace force" in the Joint Statement of Agreed Principles, as well

<sup>85</sup> *Ibid.*, Stage I, Sec. H, pp. 17-19, and Stage II, Sec. G, pp. 25-26.

<sup>86</sup> In his oral statement to the International Court of Justice in the case concerning *Certain Expenses of the United Nations*, Mr. Abram Chayes, Legal Adviser of the U. S. Department of State, said: "The Court needs no reminder that it is dealing with a constitutive instrument, regulating, within its scope, important relations among men and nations, meant to endure for many years, designed to promote great ends and intended to grant powers adequate to serve the purposes for which it was established." Reproduced in 47 Dept. of State Bulletin 30, 39 (1962).

In 1949 the Court stated: "Under international law, the [U. N.] Organization must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties." *Reparations for Injuries Suffered in the Service of the United Nations*, [1949] I.C.J. Rep. 174, 182.

<sup>87</sup> Dallin, *The Soviet Union at the United Nations* 11 (1962).

<sup>88</sup> See Dallin, *op. cit.*

as other phrases in that document, heralded an important shift in Soviet policy.<sup>89</sup> However, the debates at Geneva revealed no significant shift. In addition to Security Council control over the international forces, the Soviets have now added the requirement of "troika" command within the forces. In the advocacy of "troika" arrangements there is a particularly striking example of the persistence of fundamental elements in Soviet positions. In this case it is the element that no one can be neutral or impartial with respect to Soviet affairs. As Litvinoff put it in 1922: "Only an angel could be unbiased in judging Russian affairs. . . ."<sup>90</sup>

The prospect for reaching agreement with the Soviet Union on meaningful peace-keeping measures of the type proposed by the United States cannot be said to be great at this time. Mr. John J. McCloy, writing prior to the discussions at the Eighteen-Nation Conference, said:

The American and Soviet approaches diverge again in the attitude of the U.S.S.R. and other Communist countries toward the use of threats of force, indirect aggression and subversion as means of overthrowing free societies. We have felt bound to set up counter forces to meet this form of aggression, but we would be quick to abandon them if the threat were removed. If significant progress is to be made toward disarmament, the dangerous distinction between just and unjust wars must certainly be abandoned. We cannot be asked to disband the means of self-defense, while the Communists seek to exempt certain kinds of conflict from the process of international settlement. The same is true of attempts from abroad to bring about changes within a free country by force of arms. It is hard to see how we can reach the goal of a secure world in which there no longer is need for national armed forces and armaments so long as the Communist leadership sets the destruction of free governments as a basic aim, in achieving which it feels justified in using any method, including force.<sup>91</sup>

Regrettably, the positions taken and the statements made by the Soviet Delegation at Geneva give no grounds for believing that the Soviet Government intends to agree to the establishment of any peace-keeping measures which might thwart active Soviet support of "national liberation movements" of "the peoples" struggling against "rotten reactionary regimes."<sup>92</sup>

Finally, a few words should be said concerning the participation of the eight non-aligned countries—Brazil, Burma, Ethiopia, India, Mexico, Nigeria, Sweden and the United Arab Republic—in the debates on peace-keeping. Except for India, the non-aligned countries did not contribute

<sup>89</sup> Dallin, *Ibid.* 87. The author refers to "the shift in the Soviet position since 1960 regarding an international police force in a 'disarmed' world . . ."

<sup>90</sup> Quoted in Sohn, *Cases and Materials on World Law* 1046 (1950). Lincoln Bloomfield in "Arms Control and World Government," 14 *World Politics* 645 (1962), points to the doctrinal continuity between Litvinoff's assertion and Khrushchev's statement that there may be neutral nations but there are no neutral men.

<sup>91</sup> McCloy, "Balance Sheet on Disarmament," 40 *Foreign Affairs* 354 (1962).

<sup>92</sup> In the Report on the Moscow Conference of Communist Parties, Jan. 6, 1961, Premier Khrushchev, in speaking of the "uprisings against rotten reactionary regimes," declared that "The communists fully support such just wars . . ." Quoted in U. S. Arms Control and Disarmament Agency, *Documents on Disarmament* (1961) 8 (1962).



to the peace-keeping discussions to any significant degree. It is possible that some of these countries, witnessing a fundamental conflict of view between the Western group of countries and the Soviet bloc, perceived no way that their interventions might bring the two sides closer together and, therefore, chose to remain silent.<sup>93</sup>

<sup>93</sup> In order to "justify" a statement during the Eighteen-Nation Conference debates on the problem of disarmament control, Mr. de Mello-Franco, the representative of Brazil, explained:

"The purpose of our [the eight-nation] collaboration compels us to adopt an attitude of caution and reserve here, which may sometimes give an impression of inaction or uncertainty, whereas in reality it is merely the application of a special technique, which we might call 'the technique of non-involvement.' We can understand how difficult it is to be the constant witnesses of political and diplomatic controversy, to be always attentive to the course of the discussion and always ready to co-operate in order to guide it towards the general objective of agreement, though without ever opting for one party or the other. To make the definition I have just given more precise, it might be said that this is 'the technique of participation without involvement'." ENDC/P.V. 54, p. 22 (June 12, 1962).

SOVIET CRIMINAL LEGISLATION IN IMPLEMENTATION  
OF THE HAGUE AND GENEVA CONVENTIONS  
RELATING TO THE RULES OF  
LAND WARFARE

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On April 23, 1954, the Supreme Soviet of the Union of Soviet Socialist Republics ratified the Geneva Conventions of 1949<sup>1</sup> with reservations not here pertinent.<sup>2</sup> Despite the undertaking which appears in all of the Geneva Conventions<sup>3</sup> concerning the enactment of legislation "necessary to provide effective penal sanctions for persons committing or ordering to be committed . . . grave breaches . . ."<sup>4</sup> no Soviet legislation has been enacted to

<sup>1</sup> The Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U. S. Treaties 3316; T.I.A.S., No. 3364 (referred to herein as the Geneva Prisoner of War Convention); the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U. S. Treaties 3516; T.I.A.S., No. 3365 (referred to herein as the Geneva Civilian Convention); the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U. S. Treaties 3114; T.I.A.S., No. 3362 (referred to herein as the Geneva Wounded and Sick Convention); and the Geneva Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U. S. Treaties 3217; T.I.A.S., No. 3363 (referred to herein as the Geneva Wounded and Sick Convention, Sea).

<sup>2</sup> Sbornik Deistviushchikh Dogovorov, Soglashenii i Konventsii, Zakliuchennykh SSSR s Inostrannymi Gosudarstvami [Collection of Treaties, Agreements and Conventions of the U.S.S.R. in Force with Foreign States] 71-280 (16th issue, Moscow, 1957).

<sup>3</sup> Arts. 129 and 130 of the Geneva Prisoner of War Convention; Arts. 146 and 147 of the Geneva Civilian Convention; Arts. 49 and 50 of the Geneva Wounded and Sick Convention; and Arts. 50 and 51 of the Geneva Wounded and Sick Convention, Sea.

<sup>4</sup> "Grave breaches" are generally defined as "willful killing, torture or inhuman treatment, including biological experiments, willfully causing great suffering or serious injury to body or health, and extensive destruction and appropriation of property not justified by military necessity and carried out unlawfully and wantonly" (Arts. 50 and 51 of the Geneva Wounded and Sick Convention and Geneva Wounded and Sick Convention, Sea, respectively); "willful killing, torture or inhuman treatment, including biological experiments, willfully causing great suffering or serious injury to body or health, compelling a prisoner of war to serve in the forces of the hostile power, or willfully depriving a prisoner of war of the rights of fair and regular trial prescribed in this convention" (Art. 130, Geneva Prisoner of War Convention); and "willful killing, torture or inhuman treatment, including biological experiments, willfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile power, or willfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property not justified by military necessity and carried out unlawfully and wantonly" (Art. 147, Geneva Civilian Convention).

implement that undertaking. Soviet criminal legislation relating to the rules of land warfare has remained basically the same as it was before ratification.<sup>5</sup> This is especially significant in light of the fact that this legislation, embodied in the military criminal code (the Law of December 25, 1958),<sup>6</sup> was enacted well after Soviet ratification of the Geneva Conventions of 1949. Notwithstanding this sameness, Soviet commentaries maintain that four articles (Articles 29, 31, 32 and 33) of the Law of December 25, 1958, are related to, or based upon, the Geneva Conventions of 1949.<sup>7</sup> Article 29 proscribes certain conduct by Soviet military personnel while in a prisoner-of-war status. Article 31 forbids acts of violence or illegal seizures of property perpetrated against the civilian population of a combat area. The remaining two articles, Articles 32 and 33, provide

<sup>5</sup> See Ugolovnyi Kodeks, RSFSR [Criminal Code, R.S.F.S.R.] (Moscow, 1960).

<sup>6</sup> The Law on Criminal Responsibility for Military Crimes (referred to herein as the Law of Dec. 25, 1958). A translation of this law may be found in *Highlights of Current Legislation and Activities in Mid-Europe*, Library of Congress Mid-European Law Project, Vol. VII, Nos. 2 and 3 (February and March, 1959), pp. 58-67.

<sup>7</sup> Nauchno-Prakticheskii Kommentarii k Zakonu ob Ugolovnoi Otvetstvennosti za Voinskie Prestupleniia [Scientific and Practical Commentary on the Law of Criminal Responsibility for Military Crimes] 101-108 (Major General of Justice, A. G. Gornyi, Chief Military Procurator, ed., Moscow, 2d ed., 1961). Arts. 29-33, Law of December 25, 1958 (translated in *Highlights*, *op. cit.* 66-67), read as follows:

*"Sec. 29. Crimes of servicemen taken prisoners of war.*

a) The voluntary participation by a serviceman, held as a prisoner of war by the enemy, in works of war significance or in any project which he knows may result in prejudice to the Soviet Union or its Allies, if it lacks the elements of treason against one's country, shall be punished by confinement for from *three to ten years*.

b) Violence to fellow prisoners of war or cruel treatment of them, if committed by a prisoner in the position of a superior, shall be punished by confinement for from *three to ten years*.

c) The commission by a serviceman who is a prisoner of war of acts intended to harm other prisoners of war, for mercenary motives or in order to secure benevolent treatment for himself by the enemy, shall be punished by confinement for from *one to three years*.

*"Sec. 31. Violence against the population of a combat area.* Robbery, illegal destruction of property, violence, or any illegal seizure of property under pretext of military emergency committed against the population in a combat area shall be punished by confinement for from *three to ten years* or by *death*.

*"Sec. 32. Ill-treatment of prisoners of war.*

a) Ill-treatment of prisoners of war, if it is repeated or coupled with particular cruelty or directed against the sick or wounded, as well as negligence in the execution of duties with respect to the sick and wounded by persons responsible for their medical care and treatment, in the absence of elements of a more severe crime, shall be punished by confinement for from *one to three years*.

b) Ill-treatment of prisoners of war, if it is committed without such aggravating circumstances, shall entail application of rules of the Disciplinary Code of the USSR Armed Forces.

*"Sec. 33. Illegal wear or abuse of emblems of the Red Cross or Red Crescent." The wearing in a combat area of any emblem of the Red Cross or Red Crescent by unauthorized persons, the abuse of flags or emblems of the Red Cross or Red Crescent, or the misuse of paint reserved for painting transport facilities used in medical evacuation shall be punished by confinement for from *three months to one year*."*

penalties for the mistreatment of enemy prisoners of war and the improper use of the emblems and insignia of the Red Cross or the Red Crescent.

Article 29 is the only new provision. It regulates the conduct of Soviet military personnel *inter se* and does not involve the protection of third persons contemplated by the Geneva Convention of 1949. Articles 31, 32, and 33 are substantial re-enactments of Articles 28, 29, 30 and 31 of the Statute on Military Crimes of 1927,<sup>8</sup> the last three of which were originally enacted<sup>9</sup> to implement the Geneva Convention of 1906<sup>10</sup> and the related Hague Convention of 1907.<sup>11</sup> Articles 31, 32 and 33 also have clear antecedents in pre-revolutionary, Tsarist legislation.<sup>12</sup>

Despite the Soviet failure to implement the Geneva Conventions of 1949, the claim is made that the Soviet Union is the leader in the movement to establish criminal responsibility for violations of the laws and customs of war.<sup>13</sup> The burden of this paper is to establish the suggestion made above

<sup>8</sup> Translated in Harold J. Berman and Miroslav Kerner, Documents on Soviet Military Law and Administration 85-95 (Cambridge, 1955).

Arts. 28-31, Statute on Military Crimes, 1927 (translated in Berman and Kerner, Documents, *op. cit.* 94-95) read:

"193(28). Robbery, theft, illegal destruction of property, violence, or any illegal taking of property under pretext of military necessity, if committed with respect to the population in a combat area, shall entail deprivation of freedom for not less than three years with or without confiscation of property, or where there are aggravating circumstances the highest measure of social defense with confiscation of property.

"193(29). (a) Ill-treatment of prisoners of war, if repeated or accompanied by particular cruelty or directed against the sick or wounded, or negligent execution of duties with respect to such sick or wounded on the part of persons responsible for their medical care and treatment, shall entail deprivation of freedom up to three years.

(b) Ill-treatment of prisoners of war, if committed without such aggravating circumstances, shall entail application of the rules of the disciplinary Code of the Worker-Peasant Red Army.

"193(30). The wearing in a combat area of any emblem of the Red Cross or Red Crescent by any person not having the right to wear it, or the issuance by a commander of regulations for the wearing thereof by such persons, shall entail deprivation of freedom up to one year.

"193(31). Abuse in wartime of any Red Cross or Red Crescent flag or emblem, or of a color reserved for means of transport for evacuation of sick or wounded, shall entail deprivation of freedom up to one year."

<sup>9</sup> A. N. Chuvatin, M. N. Nikitchenko, and S. P. Cherkasov, *Polozhenie o Voinskikh Prestupleniakh, Postateinyi Kommentarii* [Sectional Commentary on the Statute on Military Crimes] 80 (Moscow, 1929).

<sup>10</sup> The Geneva Convention and Protocol for the Amelioration of the Condition of the Wounded in Time of War, July 6, 1906, 35 Stat. 1885; Treaty Series, No. 464 (referred to herein as the Geneva Convention of 1906).

<sup>11</sup> The Hague Convention for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention, Oct. 18, 1907, 36 Stat. 2326; Treaty Series, No. 543 (referred to herein as the related Hague Convention of 1907).

<sup>12</sup> *E.g.*, see Art. 258 of the Voinskii Ustav o Nakazaniakh [Military Regulations on Punishment] 802-816 (D. F. Ognev, ed., Saint Petersburg, 4th ed., 1912).

<sup>13</sup> A. N. Trainin, *Zashchita Mira i Bor'ba s Prestupleniami protiv Chelovechestva* [Defense of Peace and the Struggle against Crimes against Mankind] 182-194 (Moscow, 1956); E. P. Meleshko, "K Istorii Voprosa ob Otvetstvennosti za Narushenie Zakonov i Obychaev Voiny [A Historical Approach to the Question of Responsibility for Violations of the Laws and Customs of War]," *Sovetskii Ezhegodnik "Mezhdunarodno*

that the Soviet claim for pre-eminence in this area can only be based upon criminal legislation which, in implementing earlier conventions, follows clearly identifiable Tsarist precedents.

#### TSARIST LEGISLATION

Russia became a party to the Geneva Convention of 1906 on February 9, 1907, and to the Hague Conventions and Declarations on January 26, 1909.<sup>14</sup> The 1912 edition of the Military Regulations on Punishment (the military criminal code) contained Article 258, the three paragraphs of which clearly implemented the provisions of the Geneva Convention of 1906.<sup>15</sup> Article 258 provided penalties for (a) the unauthorized wearing of the brassard of the Red Cross or an order requiring such wearing, (b) the unauthorized use of the flag of the Red Cross or an order requiring such use, and (c) the mistreatment or failure to take proper care of enemy or friendly sick and wounded. The commentary on this article enumerates the persons and places entitled to the protection of the emblem and markings of the Red Cross, and notes that mistreatment or the failure to take proper care includes "failure to render aid as well as other degrading and violent actions."<sup>16</sup> A Soviet commentary in 1947 went so far as to note that Article 258 of the Tsarist code covered the same general area as Articles 29, 30 and 31 of the Statute on Military Crimes of 1927.<sup>17</sup>

Article 279 of the 1912 edition proscribed "wartime murder, rape, theft, robbery, or destruction of another's property by fire or water." This article was included in the military criminal code to cover the conduct of military personnel in a situation of martial law as well as a situation of wartime.<sup>18</sup> Prior editions contained this article and, in addition, a related

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Prava, 1960 [Soviet Yearbook of International Law, 1960] 218-230 at 230 (Moscow, 1961).

<sup>14</sup> Mezhdunarodnoe Pravo v Izbrannykh Dokumentakh [Selected Documents of International Law], Vol. II, Doc. No. 203, note 1, p. 247 (Moscow, 1957).

The 1912 edition of the Military Regulations on Punishment (the military criminal code) contained Article 258, the three paragraphs of which clearly implemented the provisions of the Geneva Convention of 1906.<sup>15</sup> Article

<sup>15</sup> Voinskii Ustav, *op. cit.* note 12, pp. 302-303. Article 258 reads:

(1) "One who knowingly wears the brassard of the Red Cross when not entitled thereto under the Geneva Convention is subject to . . .

"The same penalty is applicable to a commander who orders the wearing of the arm band of the Red Cross by persons not entitled thereto."

(2) "One who knowingly raises or orders the raising of the flag of the Red Cross over institutions not enjoying protection under the Geneva Convention is subject to . . ."

(3) "Persons to whom is entrusted, even if only temporarily, the supervision, treatment and care of the sick and wounded, are subject to . . . for the mistreatment of such persons or the careless discharge of their duties towards them."

<sup>16</sup> *Ibid.*

<sup>17</sup> Chkhikvadze, Voenno-Ugolovnoe Pravo, Chast' II-Osobennaiia [Military Criminal Law, Part II—Special Part] 241-243 (I. T. Goliakov, ed., Moscow, 1947).

<sup>18</sup> A. Myshnikov, Russkie Voenno-Ugolovnye Zakony v Sviazi s Zakonami Obshche-Ugolovnymi [Russian Military Criminal Law as it Relates to General Criminal Law] 117 (Saint Petersburg, 3rd rev. ed., 1902); see also Voinskii Ustav, *op. cit.* note 12, p. 816.

Art. 279 reads: "Persons guilty of wartime murder, rape, robbery, theft and the destruction of another's property by fire or water shall be sentenced to . . ."

article, Article 267, which prohibited the "seizure of supplies, clothing, and other things from the population of an area occupied by the Army as well as any unauthorized requisitions from such population."<sup>19</sup> Article 267 prescribed more serious penalties if the proscribed conduct was accompanied by the use of force or perpetrated by a military unit or as part of a conspiracy.<sup>20</sup> The Russian commentary on this article states that the offense includes "any aggressive act which capitalizing upon the fear generated by war manifests itself in the arbitrary seizure of property belonging to the inhabitants of the occupied area under the pretext of the right to seize war booty."<sup>21</sup>

#### SOVIET LEGISLATION

Shortly after its accession to power, the Bolshevik Government enacted a decree on June 4, 1918, by which it "acknowledged" all of the international conventions relating to the Red Cross and declared the intention of the Russian Soviet Government to comply with them.<sup>22</sup> No domestic penal legislation was enacted in fulfillment of the undertaking contained in those conventions (Article 28 of the Geneva Convention of 1906 and Article 21 of the related Hague Convention of 1907) relating to the enactment of criminal legislation necessary for suppressing in time of war individual acts of mistreatment of the sick and wounded and misuse of the distinctive markings of the Red Cross.<sup>23</sup> After the formation of the Soviet Union in 1923 and all of the great Powers (with the exception of the United States) had extended recognition to it in 1924 and 1925, the Soviet Union on June 16, 1925, formally adhered, without reservation, to the Geneva Convention of 1906 and the related Hague Convention of 1907.<sup>24</sup>

<sup>19</sup> Art. 267, *Voinskii Ustav o Nakazaniakh* [Military Regulations on Punishment] contained in *Prodolzhenie 1907 Goda Svoda Voennykh Postanovlenii* [Compilation of Military Laws, 1907 Supplement] 255 (Saint Petersburg, 1908). It reads: "Seizure of stores, clothing and other things, as well as unlawful requisitions, from the inhabitants of a region occupied by the Army subject the guilty persons to . . ."

"If the crime contemplated by this Article is committed by an entire unit, by a conspiratorial group or by a single person employing a weapon or violence against the population, the crime is treated as one of the forms of robbery or theft and is punished . . ."

<sup>20</sup> *Ibid.*

<sup>21</sup> Myshnikov, *op. cit.* 116.

<sup>22</sup> Decree on the Acknowledgment of all International Conventions on the Red Cross, contained in *Sbornik Deistvuiushchikh Dogovorov, Soglashenii i Konventsii, Zakliuchennykh s Inostrannymi Gosudarstvami I-II* [Collection of Treaties, Agreements, and Conventions in Effect with Foreign States] 359 (Moscow, 2nd rev. and enlarged ed., 1928).

<sup>23</sup> Chuvatin et al., *op. cit.* 81.

<sup>24</sup> *Sbornik Deistvuiushchikh Dogovorov, Soglashenii i Konventsii, Zakliuchennykh s Inostrannymi Gosudarstvami* [Collection of Treaties, Agreements and Conventions in Effect with Foreign States] 197 (A. V. Sabanin and V. F. Orlov-Ermak, editors, Moscow, 1931); see also T. A. Taracouzio, *The Soviet Union and International Law* 264-269 (New York, 1935); and Robert M. Slusser and Jan F. Triaka, *A Calendar of Soviet Treaties, 1917-1957*, p. 51 (Stanford, California, 1959). The adherence of the Soviet Union without reservation has been said to constitute "convincing proof that at least formally the Soviets wish[ed] to be considered as sharing the views of other states in this matter . . . [as] political necessity [was] . . . an important, if not decisive, factor in Soviet adherence to these conventions." Taracouzio, *op. cit.* 327.

In accordance with the requirements of these conventions (Articles 26 and 20, respectively) the Revolutionary Military Council (*Revoliutsionnyi Voennyi Sovet*), by order No. 953 of 1925, made the provisions of the conventions mandatory for the Red Army.<sup>25</sup> In fulfillment of the undertaking relating to the enactment of criminal legislation, the 1924 Statute on Military Crimes, the first All-Union codification of military criminal law,<sup>26</sup> was amended by the addition of Articles 29, 30, and 31.<sup>27</sup> At the time of the enactment of Articles 29, 30, and 31, the 1924 Statute on Military Crimes already contained Article 28 which proscribed "robbery, theft, and the unlawful destruction or taking of property under the pretext of military necessity perpetrated against the population in an area of active operations."<sup>28</sup> All of these provisions were continued in the subsequent codification of 1927, which remained in force until superseded by the Act of December 25, 1958.<sup>29</sup>

The early Soviet commentaries note that Article 28 of the 1924 Statute on Military Crimes was intended to protect the Soviet population as well as an enemy population, with principal emphasis on the former.<sup>30</sup> In [Soviet Military Criminal Law] 437 (Moscow, 1948).

this regard it is emphasized that the crime contemplated by Article 28 is one committed when the country is at war with another state or when portions of the Soviet Union are under martial law.<sup>31</sup> The reason for including the offenses contemplated by Article 28, already a part of the regular criminal code, in the military criminal code was explained in 1929 on the basis that

in wartime or in a combat situation the *social danger* of these offenses increases and it is necessary to employ exceptional deterrent measures.<sup>32</sup>

Couched in terms of "social danger," the standard of Soviet criminality, this rationale reflected the domestic orientation of Article 28. The tone of subsequent commentaries remained the same in the sense that there is no suggestion that Article 28 was intended to implement the international obligations of the Soviet Union.<sup>33</sup> The first mention of an international obligation in connection with Article 28 is contained in the commentary on Article 31 of the Law of December 25, 1958, the successor to Article 28.<sup>34</sup> That commentary states, in effect, that the article implements in part the Geneva Civilian Convention. The domestic orientation of the provision

<sup>25</sup> Chuvatin et al., *op. cit.* 80.

<sup>26</sup> Harold J. Berman and Miroslav Kerner, *Soviet Military Law and Administration* 189 (Cambridge, 1955).

<sup>27</sup> Chuvatin et al., *op. cit.* 78.

<sup>28</sup> *Ibid.* at 76-77, 81.

<sup>29</sup> Berman and Kerner, *Documents, op. cit.* 94-95; *Nauchno-Prakticheskii Kommentarii, op. cit.* 5.

<sup>30</sup> Chuvatin et al., *op. cit.* 77; V. M. Chkhikvadze, *Sovetskoe Voenno-Ugolovnoe Pravo*

<sup>31</sup> *Ibid.*

<sup>32</sup> Chuvatin et al., *op. cit.* 77. Emphasis supplied.

<sup>33</sup> K. I. Solntsev, *Ugolovnoe Pravo, Osobennaya Chast', Voinskie Prestuplenia* [Criminal Law, Special Part, Military Crimes] 67 (Moscow, 1938); Chkhikvadze, *op. cit.* 437.

<sup>34</sup> *Nauchno-Prakticheskii Kommentarii, op. cit.* 106.

remains, however, as it is stated that one of its principal purposes is to provide protection for the *peaceful* element of a *Soviet* or foreign population in an area of military operations.<sup>35</sup> The proscription is said to be necessary in order to eliminate conduct which (a) weakens the combat effectiveness of troops and, (b) in violating the interests of the peaceful population, can undermine the authority and prestige of the Soviet Armed Forces in the area of operations.<sup>36</sup> Soviet concern for the civilian population is motivated, at least in part, by the practical realization that protection of the population facilitates the control of that population as well as other aspects of civil affairs operations in an area of operations.

Article 29 of the Statute on Military Crimes of 1927<sup>37</sup> provides penalties for repeated, or particularly cruel, mistreatment of prisoners of war or the negligent execution of duties with respect to sick or wounded prisoners. Strictly speaking, that portion of Article 29 relating to the mistreatment of prisoners of war appears to implement the Hague Regulations on Land Warfare,<sup>38</sup> rather than the Geneva Convention of 1906 and the related Hague Convention of 1907. Nevertheless, an early Soviet commentary on Article 29 notes that it was accession of the Soviet Union to the Geneva Convention of 1906 and the related Hague Convention of 1907 which resulted in this specific proscription of acts which previously had been included under the general provisions covering dereliction of duty and offenses against the person.<sup>39</sup> Ten years later, a more discerning and perhaps more politically oriented commentary noted that the accession of the Soviet Union was only a partial reason for the inclusion of Article 29 in the Statute on Military Crimes. Cited as equally important is "the general policy of the Soviet government [embodied in] the laws and regulations of the Workers-Peasants Red Army [which] demands of all military personnel the most humane treatment of prisoners of war."<sup>40</sup> By 1948 this article was said to be "a guarantee of the fulfillment of international agreements dealing with the detention of prisoners of war."<sup>41</sup> It was also noted that humane treatment of prisoners of war is the "generally acknowledged standard of conduct of military personnel of the Soviet Army." This Soviet commentary claims that

although the German government . . . unilaterally and flagrantly breached the Hague and Geneva Conventions concerning prisoners of war, the Soviet Union continued to observe strictly the established laws and customs of war and the rules established by international agreements.<sup>42</sup>

The most recent commentary on Article 32 of the Law of December 25, 1958, a substantial re-enactment of Article 29 of the Statute on Military

<sup>35</sup> *Ibid.*

<sup>36</sup> *Ibid.*

<sup>37</sup> Translated in Berman and Kerner, Documents, *op. cit.* 85-95.

<sup>38</sup> Hague Convention IV Respecting the Laws and Customs of War on Land and the Annex thereto embodying the Regulations Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, Treaty Series, No. 539 (referred to herein as the Hague Regulations on Land Warfare).

<sup>39</sup> Chuvatin et al., *op. cit.* 77-78.

<sup>40</sup> Solntsev, *op. cit.* 67.

<sup>41</sup> Chkhikvadze, *op. cit.* 444.

<sup>42</sup> *Ibid.*



Crimes of 1927, declares that the humane treatment of prisoners of war required under this article is "a firm principle of Soviet policy" which is also incorporated in the Geneva Prisoner of War Convention.<sup>43</sup> Notwithstanding these and other references to the benevolent policy of the Soviet Union towards prisoners of war and the fact that Soviet commentators through the years have cited the Hague Regulations on Land Warfare with approval,<sup>44</sup> formal Soviet acknowledgment of the binding character of the mentioned regulations did not occur until March 7, 1955, the date of the Note of the Soviet Minister of Foreign Affairs concerning the Hague Conventions and Declarations of 1899 and 1907.<sup>45</sup> That note gave an affirmative reply to the inquiry of the Government of The Netherlands, the depositary of ratifications under the Hague Conventions and Declarations, whether the Soviet Union considered itself bound by those Hague Conventions and Declarations of 1899 and 1907 which were ratified by Tsarist Russia.<sup>46</sup> Thus, formal Soviet acknowledgment of the binding effect of the Hague Regulations on Land Warfare did not occur until approximately one year after the Supreme Soviet had ratified the Geneva Conventions of 1949 on April 23, 1954.<sup>47</sup>

Articles 30 and 31 of the Statute on Military Crimes of 1927 proscribed (a) the unauthorized wearing of any emblem of the Red Cross or Red Crescent, (b) the issuance by a commander of an order providing for such unauthorized wear, (c) abuse in wartime of any flag or emblem of the Red Cross or Red Crescent, and (d) misuse of paint or color reserved for transport used for the evacuation of the sick or wounded. The stated rationale of these articles is that, according to the Geneva Convention of 1906, "the emblems and distinguishing marks of the medical service of the Army are the entitlement of a specified category of persons so that every unauthorized use is a crime."<sup>48</sup> Articles 30 and 31 have been superseded by Article 33 of the Law of December 25, 1958. Article 33 is a re-enactment of the provisions of Articles 30 and 31, with the exception of that portion of Article 30 dealing with the criminal liability of a commander for issuing an order which contemplates the unauthorized wearing of an emblem of the Red Cross or Red Crescent.

The new article in the Law of December 25, 1958, Article 29, provides severe penalties<sup>49</sup> for certain conduct by Soviet military personnel while in a prisoner-of-war status. Such personnel may not (a) voluntarily

<sup>43</sup> Nauchno-Prakticheskii Kommentarii, *op. cit.* 107.

<sup>44</sup> F. I. Kozhevnikov, *Uchebnoe Posobie po Mezhdunarodnomu Publichnomu Pravu* [Textbook on Public International Law] 230-232, 234-236, 239-240 (Moscow, 1947); E. A. Korovin, *Sovremennoe Mezhdunarodnoe Publichnoe Pravo* [Contemporary Public International Law] 147-159 (Moscow, Leningrad, 1926).

<sup>45</sup> *Mezhdunarodnoe Pravo, Dokumentakh, op. cit.*, Vol. II, p. 247.

<sup>46</sup> *Ibid.* Russia did not ratify the 8th (Convention Relative to the Laying of Automatic Submarine Contact Mines), 11th (Convention Relative to the Right of Capture in Naval Warfare), and 12th (Convention Relative to the Creation of an International Prize Court) Hague Conventions. *Ibid.*

<sup>47</sup> Trainin, *op. cit.* 194; *Sbornik Deistvuiushchikh Dogovorov, op. cit.* note 2, pp. 71-280.

<sup>48</sup> Chuvatin et al., *op. cit.* 79.

<sup>49</sup> Confinement from one to ten years.

participate "in works of war significance or in any project which he knows may result in prejudice to the Soviet Union or its Allies"; (b) do "violence to fellow prisoners" or treat them cruelly when serving as their superior; or (c) commit acts intended to harm other prisoners for mercenary motives or in order to secure better treatment. The general commentary on this article notes that "military personnel of the Soviet Army must always be true to their Motherland and comply with their military oath, Soviet laws, and military regulations."<sup>50</sup> It is said that in case of capture, regulations require the Soviet soldier to

uphold the honor and dignity of the Soviet soldier; sacredly protect military and state secrets; demonstrate steadfastness, courage, and a feeling of camaraderie for fellow prisoners; mutually support fellow prisoners and restrain them from giving aid to the enemy; and reject all attempts of the enemy to use him for the purpose of inflicting harm upon the armed forces of the Union of Soviet Socialist Republics and of the Soviet Motherland. Having become a prisoner of war, he must utilize all opportunities presented him or his comrades for escape and return to Soviet or allied forces.<sup>51</sup>

The specific commentary discusses the elements of the offenses as follows:

(a) *Voluntary Participation in Works of War Significance*

The subject must have voluntarily participated in work or activities known to him to have military significance. Forced participation is not an offense under this article. If the motivation behind voluntary participation is anti-Soviet in the sense of seeking to harm the military might of the Union of Soviet Socialist Republics or to give aid to its enemies, rather than the desire to ease or improve the conditions of captivity, the offense is the more serious one of treason to the Motherland.<sup>52</sup>

(b) *Violence to, or Harsh Treatment of, Fellow Prisoners by a Superior*

Harsh treatment includes physical harm, threats of such harm, and psychological duress directed at fellow prisoners of war. Examples of conduct within this proscription are: depriving fellow prisoners of food, clothing, rest, and comfort items; forcing them to perform work for which they are not physically fit; or generally degrading them. If the violence or harsh treatment has as its purpose the termination of the patriotic activity of other prisoners or of their struggle against the enemy in order to assist the enemy or for any other anti-Soviet purpose, the act may constitute treason.<sup>53</sup>

(c) *Acts Intended to Harm Other Prisoners Done Out of Mercenary or Other Motives*

This offense "can take the form of informing on fellow prisoners, taking from them food, clothing and other items," or otherwise mistreating them for the purpose of improving the lot of the offender.<sup>54</sup>

<sup>50</sup> Nauchno-Prakticheskii Kommentarii, *op. cit.* 101-102.

<sup>51</sup> *Ibid.* at 102. The quoted requirement of Soviet regulations is analogous to the Code of Conduct promulgated by Exec. Order 10631, Aug. 17, 1955, to govern the conduct of U. S. military personnel who become prisoners of war (See Dept. of Defense Pamphlet 8-1, "The U. S. Fighting Man's Code," November, 1955).

<sup>52</sup> *Ibid.*

<sup>53</sup> *Ibid.* at 103-104.

<sup>54</sup> *Ibid.* at 104.

Article 29 is related to the Geneva Prisoner of War Convention only tangentially in the sense that the mentioned article incorporates the prohibition (applicable to a Detaining Power) relating to forced labor in connection with activities having a military character or purpose<sup>55</sup> as the basis of criminal liability for Soviet military personnel. Article 29 does not otherwise bear any relationship to the Geneva Prisoner of War Convention, which generally prescribes standards of treatment of, rather than standards of conduct for, prisoners of war.<sup>56</sup> In no sense of the term can it be said that Article 29 implements an international obligation of the Soviet Union.

#### THE POLEMICAL LINE

The polemical line adopted by the Soviets in this area is that the Soviet Union, in contrast to the attitude of the bourgeois or capitalist states, has been a leader in the movement to establish criminal responsibility for violations of the laws and customs of war.<sup>57</sup> A Soviet commentary of 1956 states that

the Soviet Union, consistently and strongly championing the cause of peace, has been an active proponent of all agreements and measures directed at the humanization of war.<sup>58</sup>

In attempting to paint a cheerful picture of Soviet activity and intentions in this area, that same commentary reports that as early as 1918 "the Soviet state approved the Geneva Convention of 1906 concerning the sick and wounded," and then notes that

it is very significant that even before adhering to the Geneva Convention of 1929, the Soviet Union imposed criminal liability for the violation of the laws and customs of war.<sup>59</sup>

This bid for the mantle of humanity must fail in view of the facts that (a) the approval by the Soviet state in 1918 was not accompanied by the enactment of the requisite implementing criminal legislation, and (b) the criminal liability referred to was imposed in 1925 pursuant to the requirements of Article 28 of the Geneva Convention of 1906, to which the Soviet Union had then formally acceded. (The Geneva Convention of 1929<sup>60</sup> replaced the Geneva Convention of 1906<sup>61</sup> and substantially continued its provisions, including an article (Article 29) similar to the original Article 28, which contained the undertaking concerning the enactment of implementing criminal legislation.)<sup>62</sup> The Soviet experience thereafter is similarly devoid of any basis for a claim to leadership in this area.

<sup>55</sup> Art. 50, Geneva Prisoner of War Convention.

<sup>56</sup> Art. 4, Geneva Prisoner of War Convention.

<sup>57</sup> Trainin, *op. cit.* 182-194; Meleshko, *loc. cit.* 230.

<sup>58</sup> Trainin, *op. cit.* 191.

<sup>59</sup> *Ibid.* at 192.

<sup>60</sup> The Geneva Convention for the Amelioration of the Condition of the Wounded and Sick of Armies in the Field, July 27, 1929, 47 Stat. 2074; Treaty Series, No. 847 (referred to herein as the Geneva Convention of 1929).

<sup>61</sup> Art. 34, Geneva Convention of 1929.

<sup>62</sup> See Trainin, *op. cit.* 186.

As indicated at the outset, the Soviet Union has not implemented the "grave breaches" provisions of the Geneva Conventions of 1949. It must be noted, however, that the Soviet provisions, enacted primarily to implement the Geneva Convention of 1906, do *incidentally* implement certain portions of the Geneva Conventions of 1949, but only because all of these conventions are, to a certain extent, *in pari materia*. Thus Article 33 of the Law of December 25, 1958, covering the illegal wear or abuse of emblems of the Red Cross,<sup>63</sup> in effect implements Articles 53 and 54 of the Geneva Wounded and Sick Convention,<sup>64</sup> the successor to the Geneva Conventions of 1929 and 1906.<sup>65</sup> The ill-treatment of prisoners of war or of the sick and wounded, prohibited by Article 32 of the Law of December 25, 1958, can be considered within the undertaking contained in Articles 129 and 50 of the Geneva Prisoner of War and Wounded and Sick Conventions, respectively, to "take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than . . . grave breaches . . . ." Although the proscription contained in Article 31 of the Law of December 25, 1958, concerning violence against the population of a combat area was enacted originally for reasons unconnected with the international obligations of the Soviet Union, it may be said to implement, in effect, that portion of the "grave breaches" provision (Article 147 of the Geneva Civilian Convention) which can be included under the language of Article 31 relating to physical violence and unlawful appropriation and destruction of private property. Article 31, a substantial re-enactment of the prior provision in the Statute on Military Crimes of 1927 (*i.e.*, Article 28), was not changed to incorporate the conventional concept of "grave breaches."

There is still another basis for discounting the Soviet claim to pre-eminence in the field of criminal legislation in implementation of the rules of land warfare. The legislative history of the current Soviet provisions relating to the rules of land warfare (Articles 31, 32, and 33) antedates the Statute on Military Crimes of 1927 and the 1924 codification. A comparison of the language, scope of coverage, rationale, and purpose of enactment of Article 258 and Articles 267 and 279 of the Tsarist military code with corresponding Articles 29, 30, and 31 and Article 28, respectively, of the Statute on Military Crimes of 1927 reveals a congruity which betrays an antecedental relationship. Soviet writers cannot concede that their criminal legislation relating to the rules of land warfare follow Tsarist precedents. To do so would jeopardize their claim that the Soviet Union has been and is the leader in this humanitarian endeavor, for if the Soviet claim can be sustained on the basis of extant legislation

<sup>63</sup> The unauthorized use of the emblem or name of the Red Cross or Red Crescent is also punished by the general criminal codes (*e.g.*, Art. 202, Criminal Code, R.S.F.S.R., note 5 above, p. 97).

<sup>64</sup> Art. 53 prohibits the unauthorized use of the emblem of the Red Cross, and Art. 54 contains an undertaking "if . . . legislation is not already adequate, [to] take measures necessary for the prevention and repression, at all times, of the abuses referred to under Article 53."

<sup>65</sup> Art. 59, Geneva Wounded and Sick Convention.

which has Tsarist precedents, it is but a short step of logic to accord recognition to the actual source. There is still another reason why Soviet writers are loath to attribute their legislation to Tsarist or other bourgeois sources. The general aversion to emulation of the bourgeois world is especially strong in the field of law because of the repeated claim that Soviet law is uniquely "socialist law."<sup>66</sup> Under this approach, the normal predilection of the lawyer for precedent becomes a bourgeois deviation if it involves a reference to non-"socialist" authority. Few references are made to bourgeois legislation except in a disparaging way to point up the superiority of Soviet legislation.<sup>67</sup> Any resemblance between Soviet and bourgeois provisions is usually discounted as being purely formal. In the area under consideration there is a similarity of form and of content as well. The rationale, reason for enactment, and scope of coverage of the Tsarist and Soviet provisions, as stated by both Russian and Soviet commentaries, are essentially the same. This similarity of form and substance merges to indicate an antecedental relationship which, despite its repugnance from the standpoint of the ideological and other preferences of Soviet legal writers, cannot be ignored.

There is little information available concerning the extent to which the provisions dealing with crimes in violation of the laws and customs of war are propaganda props rather than actual substantive bases for criminal prosecution. An indication that Articles 29, 30, and 31 of the Statute on Military Crimes of 1927 had no practical application, except perhaps as a device to establish *bona fides* on the part of the Soviet Union in the discharge of its international obligations relating to the rules of land warfare,<sup>68</sup> can be obtained from a Soviet commentary in 1948 that "in, the Soviet Army—a highly disciplined Army serving lofty progressive aims . . . [these crimes] in practice did not occur."<sup>69</sup>

#### CONCLUSION

The claim that the Soviet Union is the leader in the movement to establish criminal liability for violations of the rules of land warfare must be rejected on two principal grounds: (a) the Soviet Union has not enacted legislation to implement the "grave breaches" provisions of the Geneva Conventions of 1949, and (b) extant Soviet criminal legislation is based upon Tsarist precedents. Any right to leadership which accrues from extant legislation is, both in its origin and entitlement, Tsarist rather than Soviet.

<sup>66</sup> "Ezhegodnoe Sobranie Mezhdunarodnoi Assotsiatsii Iuridicheskikh Nauk [Annual Meeting of the International Association of Juridical Sciences]," *Sovetskoe Gosudarstvo i Pravo* [Soviet State and Law], No. 1 (1962), p. 117.

<sup>67</sup> For example, Chkhikvadze states:

"The military criminal legislation of the USA does not contain any provisions which protect the rights and interests of the local population against violence and other crimes perpetrated by military personnel even though the experience of the American Army indicates that such crimes have been committed frequently." (p. 440.)

<sup>68</sup> See Taracourio, *op. cit.* 264-269, 327.

<sup>69</sup> Chkhikvadze, *op. cit.* 447.

## EDITORIAL COMMENT

WILLIAM CULLEN DENNIS

December 22, 1878–September 14, 1962

William Cullen Dennis was one of the historic figures of the American Society of International Law. Respected by all who knew him, loved by many colleagues and by thousands of students, he was that rather rare and very precious combination of a hard-headed lawyer and ardent advocate of the peaceful settlement of international disputes.

Dennis was born in Richmond, Indiana, on December 22, 1878. He died on September 14, 1962, in Richmond, after a heart attack suffered on a hiking trip with an old friend in one of the Indiana State parks.

Dennis' later years were devoted to the world of education. He became President of Earlham College in 1929 and retired as President Emeritus in 1946. He had very materially concerned himself extensively with local affairs in Richmond up until the time of his death. He had undertaken, strenuously and successfully, the strengthening and development of Earlham, one of the leading private colleges in the country, especially during the difficult years of 1930–1940. He established at the college an Institute of Polity to deal with foreign affairs of the United States, and himself taught a course in his favorite subject, international law; he also conducted an evening class for Earlham students and for Richmond residents on current events. He had previously taught at American University in Washington, D. C., and at Columbia, George Washington, Illinois and Stanford Universities. He was a member of Phi Beta Kappa.

It should be recalled that Dennis as a young man had had an exceptional academic career. He began by study at home, but soon—1889 (at the age of 11)—went to Bonn and entered the very severe German gymnasium training. He then moved to the Royal High School in Edinburgh—hardly less severe. He returned to Earlham and took his Bachelor's degree in 1896. He then transferred to Harvard, where he took a Master's degree in 1898 and his law degree in 1901, at the age of 22. In later life he received honorary degrees from Earlham, Depauw, Indiana and Butler Universities and Wabash College.

Mr. Dennis was a Quaker. He was a member of the Friend's Church of West Richmond, a trustee of Bryn Mawr from 1912 to 1929, and became President of the Indiana Association of Church-Related and Independent Colleges in 1939. Personally, though a liberal-minded individual, he was a firm opponent of what he regarded as evil in human relations, including Communist dictatorship anywhere and everywhere. He was a devoted Republican and often served as a delegate to State Republican Conventions. He took an active part in local civic affairs—the Richmond Rotary Club, the Columbia Club of Indianapolis—and was a member of the Cosmos Club in Washington. He was a member of the American Bar Association

and of the Indiana Bar Association, and had served as the Chairman of the Committee on Pacific Settlement of International Disputes of the ABA Section on International and Comparative Law.

Dennis was an enthusiastic outdoors man and hiker, and a student of nature. He always resented somewhat the confinement of the city.

Prior to his return to Richmond in 1930, Dr. Dennis had been in private law practice in Washington from 1911 to 1917 and 1920 to 1929. After retiring as President of Earlham in 1946 he resumed his practice in Richmond. Arbitration and pacific settlement may be said to have been his predominant concern both intellectually and even emotionally. In 1901-1902 Dennis was Secretary of the Lake Mohonk Conference on International Arbitration. It was at such a conference in 1905 that the idea of forming the American Society of International Law was first broached and developed by an informal committee composed of Robert Lansing, James Brown Scott and George W. Kirchwey. On many occasions Mr. Dennis acted as counsel to the United States Government and as its agent in international arbitrations. He was an Assistant Solicitor in the Department of State from 1906 to 1910, under Solicitors Scott and Reuben Clark, respectively. He was also legal adviser to the Chinese Government from 1917 to 1919. While in the Department he worked with Secretaries Root and Knox, and afterwards with Secretaries Hughes and Kellogg, Chief Justice Edward White and General Pershing. He was of course a close associate of Dr. Scott and worked closely with Chandler P. Anderson and his old friend, J. Reuben Clark, Jr., when the latter was Under Secretary of State.

Dennis was agent for the United States Government in the arbitration of the *Orinoco Steamship* case between the United States and Venezuela before the Permanent Court of Arbitration at The Hague in 1909-1910; in the *Chamizal Arbitration* between the United States and Mexico before the Joint Boundary Commission, 1910-1911; and in the arbitration of the *Norwegian Ship Claims* between the United States and Norway at The Hague in 1921-1922. He was a member of one of the International Commissions of Inquiry established under the Bryan treaties of 1914 for the advancement of peace; secretary to Chief Justice White in the latter's capacity as sole arbitrator in the *Costa Rica-Panama Boundary Arbitration*, 1911-1914, and general legal adviser to the American members of the Plebiscitary and Boundary Commissions of the *Tacna-Arica Arbitration* between Peru and Chile, 1925-1926. He was also special counsel to the Department of State at the Preliminary Conference on Communications, 1920-1921, and counsel for the United States on the British-American Claims Commission, London, 1923.

Mr. Dennis was one of the charter members of the American Society of International Law and later one of its Vice Presidents. At the time of his death he was an Honorary Vice-President. He served a number of terms on the Executive Council from 1921 to 1933 and was Corresponding Secretary of the Society from 1924 to 1930. He was also an active member of the Board of Editors of the *American Journal of International Law* from 1925 to 1930, and an honorary member after 1946.

Perhaps one of the most significant activities of Dr. Dennis in connection with the Society was his activity as Chairman of the Society's Special Committee on Enlargement of the Scope of the Publications of the Department of State, when, in co-operation with representatives of Committees of the Conference of Teachers, American Political Science Association, American Historical Association, and the Association of American Law Schools, he appeared before the Director of the Budget, and presented their case so well that a substantial amount (for those days—1929) was included in the State Department budget for fiscal 1930. As a result, the publication division of the State Department was expanded, and the documents, treaties, diplomatic notes, reports of conferences, arbitrations, and hearings before the Committees on Foreign Relations and Foreign Affairs of Congress, were subsequently printed and made available to the public by the Department of State and the Government Printing Office. The *United States Treaty Series*, *Treaties and Other International Acts*, the *Department of State Bulletin*, Press Releases, Conference Series, Arbitration Series, and other sources of information relating to the foreign relations of the United States, as well as the accelerated publication of *U. S. Foreign Relations*, are the direct fruits of this work.

Unfortunately Dr. Dennis was too busy to write very frequently or very fully for the JOURNAL or elsewhere; a list of his contributions to the JOURNAL and *Proceedings* of the Society is appended to this comment.

William Cullen Dennis served his fellow man faithfully and well in the cause of international peace and order.

PITMAN B. POTTER

- "The American Journal of International Law for January, 1908," 1 A.J.I.L. 944 (1907).
- "The Necessity for an International Code of Arbitral Procedure," 7 A.J.I.L. 285 (1913).
- "The Chamizal Arbitration Award," 5 A.J.I.L. 709 (1911).
- "Diplomatic Correspondence Leading up to the World War," 9 A.J.I.L. 402 (1915).
- "Extraterritoriality and the United States Court for China," 1 A.J.I.L. 469 (1907).
- "The Arbitration Treaties of 1911 and the Senate Amendments," 6 A.J.I.L. 614 (1912).
- "Lake Mohonk Conference on International Arbitration," 2 A.J.I.L. 615 (1908).
- "The Orinoco Steamship Company Case before the Hague Tribunal," 5 A.J.I.L. 35 (1911).
- "The Rio de la Plata Dispute over Jurisdiction between the Argentine Republic and Uruguay," 1 A.J.I.L. 984 (1907); 4 *ibid.* 430 (1910).
- "The Effect of War on Treaties," 23 A.J.I.L. 602 (1929).
- "Extraterritoriality in China," 18 A.J.I.L. 781 (1924).
- "The Settlement of the Nanking Incident," 22 A.J.I.L. 593 (1928); 23 *ibid.* 120 (1929).
- "Projects on Pacific Settlement and the Pan American Court of Justice of the American Institute of International Law," 21 A.J.I.L. 137 (1927).
- "The Sinking of the *I'm Alone*," 23 A.J.I.L. 351 (1929).
- "Treaty regulating Tariff Relations between the United States and China," 22 A.J.I.L. 829 (1928).
- "The Venezuela-British Guiana Boundary Arbitration of 1899," 44 A.J.I.L. 720 (1950).
- "International Organization: Executive and Administrative," 1917 *Proceedings* 91.
- "Extraterritoriality and Foreign Concessions in China," 1930 *Proceedings* 194.
- "The Doctrine of Rebus Sic Stantibus," 1932 *Proceedings* 53.



## CO-EXISTENCE CODIFICATION RECONSIDERED

Draft codes of peaceful co-existence were presented to the 50th Conference of the International Law Association in Brussels during August, 1962.<sup>1</sup> For the first time it has become possible to determine with some clarity the varying meanings given to a controversial concept by international lawyers of different schools of thought. The Yugoslav rapporteur, a member of the Indian Branch, a committee of the American Branch, and the Soviet Branch each submitted drafts. A report of the Association's committee stated the circumstances under which the drafts had been prepared, and its Canadian member appended a commentary on the problem.<sup>2</sup>

A synthesis of the various drafts is now to be attempted under resolution of the Association's committee, although the title of the endeavor may be altered to bring it into accord with the work of the General Assembly of the United Nations on "legal aspects of friendly relations and co-operation among states."<sup>3</sup> Such a change of name would, in the view of most of those attending the committee's presentation at Brussels, help the Association to fulfill its consultative function to the United Nations by providing materials directly related to the entire study of the United Nations rather than to such part of it as may be included in what many believe to be a narrower concept, namely, that of peaceful co-existence.

The Brussels meetings were not without drama. In response to the activities of some participants seeking to eliminate the title "peaceful co-existence" from the committee's designation, participants from the U.S.S.R. and several of the people's democracies took the floor. Their opposition rested on the assumption that the change of name was not to bring the work of the Association into accord with that of the United Nations, but to register a defeat for Soviet policies, which Soviet statesmen have sought to associate with the concept of peaceful co-existence for some years.

In the light of the debate, the vote of those attending the committee's presentation recommending a change of name for the committee was reported to the plenary assembly of the Association, but action was postponed until the Executive Committee might consider the matter in greater detail and with more leisure than was possible during the short Brussels meeting. Yet, whatever the decision as to the future name of the committee, the Brussels Conference represented a milestone in consideration of the

<sup>1</sup> The record is in process of assembly and will appear as *International Law Association, Report of the Fiftieth Conference, Brussels*.

<sup>2</sup> All drafts and comments, except those of the Soviet Branch, were printed as a committee document distributed at the Conference. The Soviet Branch submitted separately a Report by the Committee on Peaceful Coexistence of the Soviet Association of International Law (Moscow, 1962; 20 pp.) and a Declaration of Principles of Peaceful Coexistence, Draft (Moscow, 1962; 5 pp.). The report and draft of the committee of the American Branch also appears in *Proceedings and Committee Reports of the American Branch of the International Law Association, 1961-1962*, pp. 72-77 (New York, 1962).

<sup>3</sup> See *Future Work in the Field of Codification and Progressive Development of International Law. Report of the Sixth Committee. U.N. Doc. A/5036, Dec. 15, 1961*.

subject because of the presentation of draft codes. The issues that were excessively vague when the item of peaceful co-existence was placed on the agenda of the Association at the Dubrovnik Conference in 1956 on motion of the Yugoslav Delegation, have become clearer, although they are not yet sharply defined.

All of the drafts took the view that an extensive code in the form of an exhaustive international convention to be executed by states was undesirable, if not impossible of achievement. The concept of peaceful co-existence was conceived to be not a branch of law subject to codification, but a global aim to be sought by many means.<sup>4</sup> For the draftsmen of Western mentality it was interpreted as but the minimal aim of maintenance of peace, to be fostered with whatever difficulty until time has been gained to establish a firmer fabric of world order. Under this view a code of peaceful co-existence can be only a statement of those principles of international law that take priority in achieving this minimal aim. For the draftsmen from the U.S.S.R. and the lawyers who associate themselves with them, the concept is much more, being an aim suggesting the reformation of society upon the basis of existing international law, but incorporating social, economic and organizational elements favored by Soviet policy as essential to preservation of peace shaped as much as possible in the Soviet image. Thus the Soviet Branch found it necessary to include within its draft the principle of the "troika" as a feature of the structure of international organizations.

Readers of the JOURNAL have recently had the opportunity to examine Soviet concepts as they appear to an American<sup>5</sup> and a Canadian<sup>6</sup> student of Soviet literature relating to international law. From the quotations set forth by these scholars it is possible to note the vehemence with which Soviet authors have sometimes espoused peaceful co-existence. It emerges as an aim going far beyond the limited maintenance of peace to a re-constitution of the entire corpus of international law. Speakers from the Marxist-oriented states at Brussels and the report of the Soviet Branch did not go so far. The point was made, as it had been stated by delegates from the U.S.S.R. and the people's democracies at the United Nations

<sup>4</sup> This position might have been anticipated in the light of the debate within the Sixth Committee of the 16th General Assembly. Mr. Dorogin (Byelorussia) then said: "There was, of course, no question of making it [peaceful co-existence] the subject of a special convention, but it was a fundamental principle which should influence all the activities of the United Nations, including those of the International Law Commission." See General Assembly, 16th Sess., Official Records, 6th Committee, Legal Questions, Summary Records of Meetings, Sept. 20-Dec. 15, 1961 (New York, United Nations, 1962), p. 175 (S.R. 724, par. 5). Mr. Capotorti (Italy) said likewise: "Peaceful coexistence as it was usually understood was a political phenomenon which did not lend itself to codification." *Ibid.*, p. 160 (S.R. 722, par. 6).

<sup>5</sup> See Robert D. Crane, "Soviet Attitude Toward International Space Law," 56 A.J.I.L. 684 at 710-723 (1962).

<sup>6</sup> See Edward McWhinney, "'Peaceful Co-existence' and Soviet-Western International Law," 56 A.J.I.L. 951-970 (1962).

during the 16th General Assembly in 1961, that there was no intention to create a wholly new body of international law without regard to the past.<sup>7</sup>

Examination of the records of the Sixth Committee at the 16th General Assembly indicates that several delegates from former colonial areas had very much in mind a sense of injustice done by international law as it existed prior to the second World War. It was urged that the institutions of international law favoring colonial Powers be changed quickly.<sup>8</sup> The slow evolution of customary law was declared inadequate to the situation. Just what the elements are that require modification remains to be clarified, but some were specified: the new concept of neutralism,<sup>9</sup> the new international pluralism,<sup>10</sup> nationalization of subsoil, and control by archipelagos that have become states of the waters between the various islands.<sup>11</sup> Some delegates referred constantly to the influence of technical advance upon international law, as well as to the wave of national liberation and economic emancipation, and the rise of socialist countries.<sup>12</sup>

If consideration of the legal aspects of peaceful co-existence is to mean a review of the general principles of international law to determine which require re-thinking in the light of technical and social change, there would be many international lawyers, even those of mature years and from long established states, who would participate. They would see in the review a

<sup>7</sup> Prof. G. I. Tunkin, who also spoke for the Soviet Branch at the International Law Association Conference, said in the Sixth Committee:

"... the trends in the old international law sanctioned the policy of force and the institutions of colonialism . . . but the old international law also contained democratic principles and progressive rules which remained in force. . . . The old international law had changed to such a point that today it was necessary to speak of a new international law. That, however, did not mean that nothing had remained of the old international law. Some of its parts remained in force with the necessary alterations but the differences between the old and the new law ought to be pointed out. . . ." Sixth Committee, Summary Records of Meetings, cited note 4 above, at 211 (S.R. 729, par. 6). It may be significant that Prof. Tunkin corrected a misrepresentation of his remarks in the provisional summary record which had made one sentence read: "The old international law should not be rejected as a whole, since it was the foundation of modern law." See U.N. Doc. Provisional A/C.6/SR.729, pt. 3.

<sup>8</sup> See report of Mr. Ulloa (Peru): "The difference between the international law of the past and that of the future was one of substance rather than form. Where in some spheres of international life international relations remained the same, the law of the past could be maintained and perfected, but new types of relations should be governed by new rules." Sixth Committee, Summary Records of Meetings, cited note 4 above, at 193 (S.R. 726, par. 29). Mr. Yasseen (Iraq) said: "... there was no doubt that since the establishment of the International Law Commission the situation in the international community had changed considerably from both the scientific and political point of view; . . . the slow evolution of customary law was no longer enough." *Ibid.*, p. 175 (S.R. 724, par. 7). Mr. Roseen (Israel) said: "His delegation had been impressed with the sincerity of those who held that traditional international law was no longer satisfactory, although he thought that too broad a generalization to that effect might be misleading." *Ibid.*, p. 75 (S.R. 704, par. 3).

<sup>9</sup> See report of Mr. Perera (Ceylon), *ibid.*, p. 210 (S.R. 728, par. 26).

<sup>10</sup> See report of Mr. Pechota (Czechoslovakia), *ibid.*, p. 170 (S.R. 723, par. 22).

<sup>11</sup> See report of Mr. Jusuf (Indonesia), *ibid.*, p. 71 (S.R. 702, par. 25).

<sup>12</sup> See report of Mr. Jusuf (Indonesia) quoting speech of President Sukarno to the General Assembly on Sept. 30, 1960, *ibid.*, p. 189 (S.R. 726, par. 6).

continuation, albeit at accelerated pace, of the ever-recurring process of "development" of international law to keep abreast of change. This very process was declared by the Charter to be a function of the United Nations, and the International Law Commission has frequently indicated that in its view codification must include "development" if it is to have validity.

Perhaps the reluctance of jurists from long established states to proceed in the direction of a concept of "peaceful co-existence" has been strengthened, beyond the natural reluctance to sail uncharted seas whose distant shores are vaguely defined, by what exuberant authors in the U.S.S.R. have written. If the corpus of international law is to be changed beyond recognition in the creation of a new international law, jurists, whose careers have been oriented on the measured development of law through carefully considered judgments, rendered in solution of specific problems presented by concrete conflicts, cannot be expected to embrace the proposal. Their reluctance to do so is strengthened when they hear the concept of peaceful co-existence pressed so vigorously by politicians as to arouse suspicion that it is one-sided; that it requires acceptance of a single nation's or group of nations' maximum aims before it can be achieved.

No student of psychology will deny that it is the rare mind that can dissociate its concept of the desirable from what is "right" for the world. In spite of the well-recognized danger of attempting to transfer to the group or nation the motives of the individual, history suggests that in this instance there is reason to do so. The youthful United States included founding fathers who were confident that an end would be brought to the international evils of those times if other states could be induced to adopt the American form of democracy. The youthful enthusiasm of new states that have emerged since the first World War indicates that there are again men who believe they have found truth and that the truth will set us free.

Painful as it may be for men with longer memories to listen to the current claims of those with panaceas, there can be no escaping the ordeal. Perhaps the most that can be expected in a world courted by demagogues is that the steps necessary to achievement of their panaceas be made crystal clear so that those who are being wooed can measure the cost of what they are asked to accept. Thus, if the achievement of peaceful co-existence requires acceptance of the principle of the "troika" in international organization, the statesmen of Asia and Africa can measure this against their present achievement. They can compare the proposal that their representative be one of three executives with the present situation in which an Asian is the sole executive. The votes in the General Assembly in the past suggest that in such a comparison of but a single issue listed in those necessary to achievement of peaceful co-existence they have made up their minds.

Some of those of Western orientation who have sat on the Committee on Peaceful Co-existence of the International Law Association have been of the view that the term had such worldwide appeal as to require its exploration. To reject it, at least at the present time, because it is closely associated in the United States and in some countries of Western Europe with Soviet and Communist Chinese diplomacy is to play into the hands of

those who wish to paint opponents as war-mongers. The declaration of the Bandoeng Conference incorporating peaceful co-existence as an aim of Asian and African policy was signed by too many Powers to be ignored. Because of this view, the decision of the 49th Conference of the International Law Association<sup>13</sup> to codify peaceful co-existence was accepted as a means of clarifying issues. The 50th Conference provided the stage for testing the wisdom of such an approach.

The drafts submitted in Brussels permit jurists of all lands to assess the situation. The drafts of the Soviet Branch and of a committee of the American Branch may now be compared textually.

The Soviet Branch draft proclaims the following principles of peaceful co-existence:

(1) The principle of peaceful co-existence is a fundamental principle of modern international law. No distinctions in the social and state structure shall hinder the exercise and development of relations and co-operation between states, since every nation has the right to establish such a social system, and to choose such a form of government as it considers expedient and necessary for the purposes of ensuring the economic and cultural prosperity of its country.

(2) All states shall practice tolerance and live together in peace with one another as good neighbors, without recourse to the threat or use of force against the territorial integrity or political independence of any nation, and shall settle all their international disputes by peaceful means. All states shall, in accordance with the United Nations Charter, take individual or collective measures to prevent or suppress acts of aggression, and to maintain international peace and security, and shall prevent and suppress propaganda of a new world war, and acts constituting a threat to international peace and security, as well as the fomenting of enmity among nations. All states shall do their utmost to promote the prompt implementation of general and complete disarmament, which is the most effective means to secure international peace.

(3) All states shall develop and strengthen international co-operation in the economic, social and political fields, as well as in the field of science and culture, on the basis of free will, equality, and mutual benefit, without any discrimination for economic, political, ideological, or other reasons.

(4) Relations between all states shall be developed on the basis of respect for the sovereignty and territorial integrity of states, for the right of peoples and nations to self-determination. The right of peoples and nations to self-determination, *i.e.*, the right to freely determine their political, economic, social, and cultural status, also includes inalienable sovereignty over their natural wealth and resources. Peoples may in no case be deprived of means of subsistence belonging to them by any title whatsoever claimed by any other state; colonialism in all its forms and manifestations must be done away with.

<sup>13</sup> Resolution on the Legal Aspects of Coexistence. International Law Association, Report of the Forty-Ninth Conference, Hamburg, pp. xxii-xxiii (London, 1961):

(5) No state has the right to interfere in the internal affairs of any other state. The recognition of the right of every people to settle all questions concerning its own country by itself is an immutable law of international relations.

(6) All states, regardless of size, and political and economic might, are, to one and the same degree, equal participants in international intercourse. No state may be prevented from participating in the settlement of international problems affecting its interests. States shall be represented in international organizations with consideration for the fact of the existence at present of three large political groupings.

(7) All states shall fulfill in good faith their international obligations arising from treaties and other sources of international law.

The draft of the American Branch's committee reads:

(1) States shall respect obligations arising from the Charter of the United Nations, from treaties and from other sources of international law.

(2) Disputes between states shall, if not settled by negotiation, be referred to third parties for mediation, conciliation or arbitration, or to the International Court of Justice or other international tribunal for decision in accordance with international law.

(3) International interchange of cultural accomplishment, of peoples and of ideas shall be encouraged and permitted without censorship, unless the interchange be designed by one or more of the parties to foment civil strife in the receiving state. In case of dispute a state believing itself threatened may submit the matter to the United Nations, the International Court of Justice or impartial arbitrators for determination.

(4) States administering non-self-governing territories shall, in furtherance of the United Nations' Charter's objective of self-government and of the commonly accepted right of self-determination of peoples, establish a program of preparation of the inhabitants of these territories for, and attainment of, self-government or political independence, provided the inhabitants desire such preparation and are capable of benefiting by it to the extent of maintaining an independent existence and social fabric. Should there be a dispute as to such a desire and ability, individuals residing in such territory may submit it to the United Nations' Trusteeship Council for determination. The administering state shall facilitate such action, and in the event that the Trusteeship Council responds affirmatively to the submission, shall develop with the inhabitants a proper program. In the event of disagreement in the preparation of such a program, the Trusteeship Council shall reconsider the matter and prepare a program to be binding upon the parties and implemented under its supervision.

(5) International commerce shall be promoted with the aim of maximizing the peaceful production and sharing of abundance.

(6) States having the economic capacity to do so shall tender to states with economies in less advanced stages of development economic and

technical assistance and capital investment, by public or private means as circumstances suggest, and the receiving state shall ensure that aid so tendered and investment so made shall be used for the designated purposes, and afforded the most constant security and protection in accordance with international law and with such terms of treatment and repayment as may have been agreed upon between the receiving state and the foreign public or private source.

(7) Aid to peoples seeking to improve their economic condition or to achieve or render secure their political independence shall in no case take the form of military advice or military equipment, much less of direct military action or support to armed bands, by the aiding state, regardless of the apparent justice of the cause, except on recommendation of the Security Council or the General Assembly of the United Nations and on request of the lawfully constituted authorities of the receiving territory.

(8) There shall be complete disarmament of every state, but only after agreement has been reached on effective control and a permanent international police force has been established by the United Nations. States may retain only those forces and weapons which are necessary for the maintenance of internal order, but annual reports shall be filed with the United Nations declaring forces, weapons, and production facilities, and the approximate location of forces. The state must submit to verification of such information by the United Nations.

Both drafts have elements in common, the most notable being form. Although the American committee entitled its draft a "code" so as to bring it into accord with the resolution in response to which it was prepared, the form is that of a declaration. The Soviet Branch entitled its draft a "declaration." Both drafts are relatively short and avoid the details that would be necessary to a draft of a convention. Both have to do with many of the same issues: performance of treaty obligations, promotion of trade, exchange of cultural accomplishments, non-intervention in domestic affairs, self-determination and disarmament. Yet, with these elements of similarity, many of which were found in the draft of the member of the Indian Branch and in the report of the Yugoslav rapporteur, the accord ends.

The committee of the American Branch evidenced preoccupation with detail in a few places where a simple statement of a principle such as self-determination could be expected to be more disruptive than if the fact were squarely faced that immediate liberation in some instances can make for war. The African and Asian states recognize this fact in their votes in the United Nations. They have favored an approach to what was New Guinea that causes it to pass through a series of hands before it may choose its own future. The American committee's specific proposals indicate a possible procedure to be followed during a period of tutelage on the road to independence and out of the hands of the original colonial Power. The Soviet Branch, in contrast, seems to recognize no possibility but immediate liberation, regardless of consequences for the peace of the world.

. . . . .

For the American committee emphasis would be placed on third-party determination, and notably the International Court of Justice, in the settlement of disputes. The Soviet Branch finds it enough to require that disputes be settled by peaceful means and to demand that a state have the right to settle all questions concerning its own country by itself. Soviet practice has favored diplomatic negotiation above all else in the settlement of disputes, and this may be what is favored by the draft, even though it has been pointed out in the past that diplomatic negotiation favors the stronger Power and impairs the sovereignty of the weaker.

Cultural exchange is favored by both sets of draftsmen but with a significant difference. The Soviet Branch speaks for the fostering of international exchange on the basis of free will, equality and mutual benefit without discrimination. Nothing is said of censorship, even though it has been Soviet practice to close borders to foreign periodicals not emanating from, or endorsed by, fraternal Communist parties in the countries of origin. The American committee has been specific in attempting to regulate the practice of censorship rather than to pretend that it does not exist.

Economic aid, for the American committee, must include conditions for the protection of investment, whether public or private, so that conditions for further infusion of capital may be preserved. The Soviet Branch limits its declaration to "strengthening international cooperation in the economic field."

Military assistance seems to the American committee to be a troublesome matter requiring control in the interest of world peace. Events have proved that, without control, military assistance can foster civil war which quickly flames into conflict between the great Powers. For the Soviet Branch, the matter requires no clarification unless it be contained in the prohibition of aggression or the threat or use of force against the territorial integrity or political independence of any nation.

Examination of the Soviet draft whets the appetite for more. There may be a basis for friendly relations and co-operation among states, as the United Nations agenda defines the concept, but much study remains to be directed to clarification of the manner in which broadly stated goals are to be achieved. The problem before the International Law Association is now to determine the lines of such study.

The majority of the participants in the Brussels discussions concluded that the work of the Association should be devoted to exploration of specific issues arising from the demand that the corpus of international law be reviewed so as to determine what aspects require modification to meet postwar needs. Thus, it was proposed that there be consideration of the machinery to be utilized in bringing about peaceful change of existing rules of international law, and that there be study designed to discover those rules of conduct that are common to the variously oriented schools of thought. The recently successful Vienna Conference on Diplomatic Immunities might be a model for such study in other fields.

Specific matters proposed for study were the legal consequences of the accession of new states to independence; a state's responsibility for the use



of its territory to the injury of other states, and damages in the case of injury done to another country; aggression; the content of the rule of non-intervention; and peaceful settlement of disputes.

Seen in the light of these proposals that came from many places on the floor, the participants in the Brussels Conference indicated their concern lest the development of international law be too slow to aid in reducing tensions arising under the special conditions of wars of colonial liberation and in the first years of independence of new states. The demand is being made for the application of careful thought by the scholars who comprise the membership of the International Law Association with branches in states of widely varying political orientation and experience.

Some delegates to the Sixth Committee of the 16th General Assembly doubted that anyone but diplomats could be practical in the development of international law, and the rôle of professors was specifically derided.<sup>14</sup> The history of the development of international law belies such a conclusion. The academics of the *Institut de Droit International* and the practitioners, academics and diplomats of the International Law Association in the past have taken the time, which busy foreign office officials often lack, to prepare proposals that are not without influence, if one may judge by references in the Sixth Committee itself to the work of these reflective bodies.<sup>15</sup> There is no reason why these unofficial bodies need conceal their expert knowledge and avoid preparation of studies that will guide the diplomats in their thinking when the ultimate international conference of states is held to debate the issues.

With regard to the specific matter of codification of the legal aspects of peaceful co-existence, the new direction proposed by those who attended the debates of the International Law Association in Brussels seems sound. Codification has been tried. It has produced some clarification, but the subject remains excessively vague. Concentration on the items that have been indicated both within and without the United Nations as requiring re-thinking in the light of the admittedly considerable changes that have appeared in the social and technical structure of the fabric of international relations commends itself as the most fruitful goal of scholarship. Whether these are to be studied as aspects of peaceful co-existence or of friendly relations and co-operation among states has yet to be decided.<sup>16</sup> The argu-

<sup>14</sup> See report of Mr. Amado (Brazil), Sixth Committee, Summary Records of Meetings, cited note 4 above, at p. 156 (S.R. 721, pars. 6 and 14), and report of Mr. Yasseen (Iraq), referring to remarks of Mr. Amado excised from the final report: "As the Brazilian representative had said . . . international law was the work not of professors but of States." *Ibid.*, p. 176 (S.R. 724, par. 10).

<sup>15</sup> See report of Mr. Ustor (Hungary), *ibid.*, p. 142 (S.R. 718, par. 16); of Mr. Amado (Brazil), *ibid.*, pp. 155-156 (S.R. 721, pars. 6 and 21); and of Mr. Perera (Ceylon): "He referred, in particular, to the three conferences held by the International Law Association, which boasted a large membership from Western States . . ." *ibid.*, p. 210 (S.R. 728, par. 25).

<sup>16</sup> The Executive Council of the International Law Association decided on Oct. 27, 1962, after completion of this editorial comment, to continue the Committee on the Juridical Aspects of Peaceful Co-existence under its present name until 1964 to complete a list of the principles or rules of peaceful co-existence, and also to establish

ments in favor of adopting the United Nations' terminology will seem impelling to many because it permits a fresh start unencumbered by such political overtones as have come to be associated with the words "peaceful co-existence" in recent years, and because it permits precise correlation between the work of the Association and the diplomats of the United Nations who seem, in spite of their criticism, to have drawn upon the Association in the past for ideas.

JOHN N. HAZARD

#### THE SABBATINO CASE—THREE STEPS FORWARD AND TWO STEPS BACK

The July 6, 1962, decision of the United States Court of Appeals for the Second Circuit in *Banco Nacional de Cuba v. Sabbatino*<sup>1</sup> reached the correct result in holding the Cuban Government's title to sugar, which it had expropriated while in Cuba, was invalid because the expropriation decree violated international law. However, from the standpoint of expanding the rôle of our courts in ascertaining and administering international law "as often as questions of right depending upon it are duly presented for their determination" (*Paquete Habana*, 175 U. S. 677, 700), the court's opinion was disappointing. The court took three steps forward by (1) its willingness to review the international law validity of the Cuban expropriation decree; (2) its holding that the decree was in violation of international law, and (3) its further holding that this violation of international law invalidated the expropriating government's title.

Unfortunately, these steps forward were accompanied by two, in the writer's opinion, unnecessary steps backward: (1) The court expressly limited its willingness to review the international validity of a foreign government's acts to a case "where the State Department has expressed a lack of concern as to the outcome of the litigation" and "where an agency of the expropriating country instead of some third party is the litigant relying upon the expropriation for its title." (2) It cast doubt on the established principle of international law that a taking of an alien's property without provision for adequate compensation is, in and of itself, a violation of international law, without regard to whether or not the taking is also discriminatory or retaliatory in nature.

#### *Act of State Doctrine*

The doctrine, asserted by the Cuban Government in defense of its title, that acts of a foreign sovereign with respect to persons or property within such sovereign's territory may not be reviewed in the courts of the United States, should not apply where such acts are alleged to violate international law. The act of state doctrine is not a rule of public international law, but rather a doctrine that, if applied to acts violating international law,

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a new committee to examine and report on two topics: (1) the legal aspects of the emergence of new states into independence, and (2) the content of the legal rule of non-intervention in the internal affairs of other states.

<sup>1</sup> Reported in 56 A.J.I.L. 1085 (1962).

would undermine its authority and afford such acts the full protection of our courts and police forces.

Judicial reluctance to interfere with the Executive Branch's prerogatives in the field of foreign policy under our Constitutional separation of powers does not require, and the court's decision explicitly recognizes that it does not require, total judicial abstention in all cases from the review of foreign sovereign acts of state. Neither does it require, as the court's opinion seemed to imply, a specific State Department waiver of the doctrine in each individual case.

Where the act of state is alleged to violate international law and not just the municipal law of the acting state or United States public policy, adequate notice to the State Department and appropriate consideration of any affirmative State Department request for judicial abstention are all that respect for the Executive Branch would seem to require. With the act of state doctrine so restricted, the general presumption would be in favor of, rather than against, the courts' discharging their fundamental responsibility of deciding cases, including cases involving international law. Moreover, the State Department would be spared the embarrassment of affirmatively authorizing review of a foreign sovereign's acts in a specific case. Any complaint by the foreign sovereign that United States courts have misapplied international law could be met by the United States State Department agreeing to submit the question of "denial of justice" to an appropriate international tribunal (or, in the case of another country which has accepted the International Court's compulsory jurisdiction, by merely refraining from invoking the Connally or "self-judging" reservation to the United States' acceptance).

The actual State Department letters involved in the *Sabbatino* case indicate a State Department position much closer to that urged here than that suggested by the court's apparent interpretation of those letters as constituting an affirmative expression of "lack of concern as to the outcome of the litigation." The extracts from these letters quoted in the opinion read as follows:

The Department of State has not, in the *Bahia de Nipe* case or elsewhere, done anything inconsistent with the position taken on the Cuban nationalization by Secretary Herter. *Whether or not these nationalizations will in the future be given effect in the United States is, of course, for the courts to determine.* Since the *Sabbatino* case and other similar cases are at present before the courts, any comments on this question by the Department of State would be out of place at this time. As you yourself point out, statements by the executive branch are highly susceptible of misconstruction. [Emphasis added]

I have carefully considered your letter and have discussed it with the Legal Adviser. Our conclusion, in which the Secretary concurs, is that the Department should not comment on matters pending before the courts.

The court called specific attention to the fact that it was by-passing the act of state doctrine in a case involving the foreign state itself rather than

a third party, and hence the problem of preserving the security of titles to property subject to international trade was not presented. It is to be hoped that this specific reference was in no sense intended as an indication that the result might be different if a third-party purchaser for value were before the court. For however important the security of individual commercial transactions may be, of far greater concern is the maintenance of those minimum standards of civilized conduct on which the general security of all such transactions ultimately rests.

*Uncompensated Taking as Violation of International Law*

The court concluded that the expropriation decree of the Cuban Government provided an "illusory compensation" in worthless Cuban bonds. However, after a review of the relevant authorities relating to the question of whether a failure to provide adequate compensation is a violation of international law, the court "declined at this time to attempt a resolution of that difficult question," resting its holding instead on the fact that, in addition to failing to provide adequate compensation, the Cuban decree also involved a retaliatory purpose and discrimination against United States nationals.

By reviewing the relevant authorities in its opinion and, in effect, concluding (despite the fact that all of the decisions of international tribunals and most of the writers cited upheld the principle of adequate compensation, as do the United States Government and the draft *Restatement of the Foreign Relations Law of the United States*) that the question was a difficult one, the court tends to suggest the uncertainty of international law in an area of fundamental importance to private international investment abroad.

Moreover, the court's references to the views of "some writers . . . that the payment of adequate compensation is not required by international law," and to the fact that "it is commonplace in many parts of the world for a country not to pay for what it takes," may be subject to misconstruction. They might be taken to indicate the importance which United States courts, in ascertaining international law, would attribute to the views of a minority of writers (some of whom at least, are not disinterested) and to the mere practice (as distinguished from the custom) of states, a practice which, though frequently protested, has only rarely, because of the inadequacies of international remedies, been tested in court.

While it is understandable that a United States court would be reluctant to decide a question which confiscating governments have so frequently in recent years avoided submitting to international tribunals, it is regrettable that the court did not either go into the question fully and reach a definite conclusion or rest on its decision that a determination of this question was unnecessary, without at the same time casting doubt on the international law principle involved.

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## NOTES AND COMMENTS

### THE 1962 BRUSSELS CONVENTION ON THE LIABILITY OF OPERATORS OF NUCLEAR SHIPS

#### I

On May 25, 1962, the Brussels Convention on the Liability of Operators of Nuclear Ships was opened for signature<sup>1</sup> after a final vote which found the United States, the U.S.S.R. and the Eastern European countries joined in opposition to a very large majority of the fifty-odd participants of the 1961/1962 Diplomatic Conference on Maritime Law. Among the countries supporting the new convention were the United Kingdom, France, Japan, and most Western European countries.<sup>2</sup> Since the United States had been one of the earliest sponsors of a convention in this field, and since at present nuclear ships are being operated only under American and Soviet flags,<sup>3</sup> this result and its consequences on nuclear shipping deserve some comment.

The basic problems arising in connection with liability for nuclear damage are well known.<sup>4</sup> There can be little doubt that, despite the outstanding safety record of nuclear industry—there has never been a major nuclear incident involving large-scale damage outside the installation site<sup>5</sup>—existing tort law does not adequately protect the public against nuclear risks. Also, remedial legislation cannot be fully effective on a purely national basis, especially where the source of the risk is mobile, as, for instance, a nuclear ship or a shipment of radioactive materials.

In the first place, large-scale nuclear incidents, although their probability is infinitesimal, might cause damage of a magnitude unparalleled in

<sup>1</sup> The text of the convention is reproduced below, p. 268.

<sup>2</sup> The Scandinavian countries abstained, on the ground of the high limit of liability; *of. below*.

<sup>3</sup> When the Eleventh Session of the Brussels Diplomatic Conference on Maritime Law opened in April, 1961, the world nuclear fleet already comprised over 25 ships. 21 nuclear submarines and 2 surface units had been commissioned by the United States Navy. 27 nuclear submarines were under construction and 18 had been approved by Congress. It was known that the U.S.S.R. had commissioned a number of nuclear warships and the icebreaker *Lenin*, which was already in operation in the Arctic Sea. A United Kingdom nuclear submarine was expected to be operational in 1963. As to nuclear merchant ships, the nuclear ship *Savannah* was scheduled to enter into operation in the near future. Plans for a European nuclear ship were being studied under the auspices of the European Nuclear Energy Agency of the O.E.C.D., and it was reported that the construction of a nuclear oceanographic ship was being considered in Japan.

<sup>4</sup> See Doc. No. 3 of the Diplomatic Conference on Maritime Law, Brussels, 1961; Stason, Estep and Pierce, *Atoms and the Law* (University of Michigan Law School, 1959); International Problems of Financial Protection against Nuclear Risk, Harvard Law School and Atomic Industrial Forum (1959).

<sup>5</sup> See Smets, *Progress in Nuclear Energy, Law and Administration*, Vol. 3, p. 89 ff. (1962). Note that even the so-called Windscale reactor incident did not cause any personal injuries or direct off-site damage.

other industrial fields.<sup>6</sup> Since the aggregate claims for compensation might in such cases well exceed the financial resources of the nuclear industry,<sup>7</sup> it is conceivable that many victims, especially those suffering delayed injuries, would not recover to the full extent of the damage suffered. Perhaps more importantly, the inadequacy of existing tort law appears from the fact that, even in connection with minor nuclear accidents, damage could be caused at great distances, and that many of the typical injuries due to radiation would manifest themselves after considerable periods of time. Lastly, proof of fault or negligence as a basis for tort claims might be very difficult to establish in connection with nuclear accidents.

In the non-maritime field, special nuclear legislation was adopted in the United States as far back as 1957,<sup>8</sup> and since that time in a number of European countries. A convention was signed in 1960 under the auspices of the European Nuclear Energy Agency of the O.E.E.C.<sup>9</sup>

In connection with nuclear-powered shipping, a first draft convention was elaborated in 1959 at the 19th Conference of the International Maritime Committee in Rijeka.<sup>10</sup> Since the International Maritime Committee represents principally the traditional seafaring nations, it was considered necessary to establish close working relations with the International Atomic Energy Agency,<sup>11</sup> which counted among its 73 members the U.S.S.R. and many countries which, though not expected to operate a nuclear fleet, would soon be concerned with the problem of nuclear safety and liability, if foreign nuclear ships were to enter their ports or territorial waters. A representative panel of experts met under International Atomic Energy Agency auspices in 1960 and published a report and revised version of the Rijeka draft convention.<sup>12</sup> All these documents

<sup>6</sup> See Atomic Energy Commission, Report on Theoretical Possibilities and Consequences of Major Accidents in Large Nuclear Power Plants ("Brookhaven Report") (March, 1957), COH Atomic Energy Law, p. 4036.

<sup>7</sup> Especially where nuclear ships are concerned, the owner is likely to be a "one-ship corporation" whose principal assets are the ship itself.

<sup>8</sup> So-called Price-Anderson Amendment to the Atomic Energy Act of 1954, 71 Stat. 576 (1957).

<sup>9</sup> Convention on Third Party Liability in the Field of Nuclear Energy, signed at Paris July 29, 1960. 55 A.J.I.L. 1082 (1961).

<sup>10</sup> The International Maritime Committee is a non-governmental organization in which some 20 national associations of maritime law are represented. It has traditionally been charged with the preparatory work for the Brussels Conference on Maritime Law. The so-called "Rijeka draft" was before the 1961/62 Brussels Conference as Doc. No. 2.

<sup>11</sup> The initiative for this co-operation was chiefly attributable to Mr. Sterling Cole, then Director General of the I.A.E.A.

<sup>12</sup> The Panel was composed of experts from Albania, Argentina, Belgium, Bulgaria, Canada, Czechoslovakia, Denmark, Federal Republic of Germany, France, Greece, India, Italy, Japan, Norway, Poland, Rumania, Sweden, Turkey, Ukrainian S.S.R., U.S.S.R., United Kingdom, United States, Yugoslavia. Its chairman was H. E. Mr. Albert Lilar, President of the International Maritime Committee and President of the 1961/62 Brussels Diplomatic Conference. The Panel's Report was submitted to the Diplomatic Conference as Doc. No. 3, and a revised version of the Rijeka draft convention as Doc. No. 3-A.

served as a basis for the Diplomatic Conference on Maritime Law which met in Brussels in April, 1961, and May, 1962, at the invitation of the Belgian Government and of the International Atomic Energy Agency.

## II

Compared to the earlier Brussels conventions, the 1962 Convention on Liability of Operators of Nuclear Ships is remarkable chiefly because it goes beyond the area of private law, and because it involves both seafaring nations and countries which are not likely to possess important merchant fleets in the near future.

The principal objective of the Convention is to give potential claimants adequate financial protection against nuclear risks without exposing the owners and operators of nuclear ships, their suppliers, and conventional shipping to an unreasonable level of liability. This was accomplished by the setting of a uniform ceiling of liability per accident, by requiring that financial guarantees be maintained by the operator of the nuclear ship, and by requiring the flag state (referred to as the licensing state)<sup>13</sup> to provide the necessary sums—up to the limit established by the Convention—in the event that the proceeds of the guarantee maintained by the operator fell short of the aggregate compensation due to victims. In order to establish such a system of limited and guaranteed liability, it proved essential to concentrate liability on one defendant—the operator of the nuclear ship—to the exclusion of all other persons who could otherwise be sued on the basis of fault or negligence under traditional tort law. Also, the Convention had to contain uniform jurisdictional rules providing for a single court competent to marshal and distribute the proceeds of limited liability in the event that the damage exceeded the limit established by the Convention. Furthermore, the interest of the victims required that claimants be dispensed from the burden of proving fault or negligence on the part of the operator, that, as a minimum, the period of prescription correspond to the average latency of nuclear injuries, and that the Convention contain provisions for the enforcement of judgments and the transferability of compensation in their national currency.

If the principle of limiting liability proved to be non-controversial,<sup>14</sup> this was not the case with regard to the setting of the actual limit. Two trends were represented at the Conference: One, championed principally by the United States and by the Afro-Asian countries, was to set a high limit of liability, regardless of whether or not private insurance would be available to cover it. The opposite trend, represented by the Scandinavian countries, Liberia, and the U.S.S.R., favored a limit of liability which might conceivably be covered by the international insurance market in the fore-

<sup>13</sup> Art. XV is intended to preclude the licensing by contracting states of nuclear ships not flying their flag, and the operation of nuclear ships flying the flag of a contracting state without a valid license or authorization granted by such state.

<sup>14</sup> Except with regard to warships, where several countries asked that liability be unlimited. However, the Conference agreed to extend the benefit of a limit of liability to warships as well.

seeable future without recourse to financial guarantees from the licensing state.<sup>15</sup>

It was clear from the outset that the limit of liability could not be predicated on an objective estimate of the risk of nuclear damage.<sup>16</sup> Even those European countries which, in connection with non-maritime nuclear risks, had favored the setting of a limit of civil liability commensurate with an estimate of the capacity of the private insurance market, *i.e.*, approximately \$15 million,<sup>17</sup> recognized that in connection with nuclear ships the limit should be substantially higher. It was this view which finally prevailed when the Conference adopted a ceiling of liability of \$100 million per incident, *i.e.*, a limit which would necessarily call for an intervention of the licensing state in the event of large-scale or successive nuclear incidents.<sup>18</sup>

The amount of this limit calls for some comment. With regard to *land-based nuclear installations*, a limit of liability corresponding to the capacity of the private insurance market appears to be quite sufficient. In effect, most of the damage may be expected to occur on the territory of the installation state even in the event of large-scale nuclear incidents. In the absence of special legislation such as that enacted in the United States, it can nevertheless be assumed that installation states will take the necessary measures to cover excess damage, *i.e.*, damage which exceeds the limit of liability and for which no tort compensation can be obtained from the operator. Indeed, installation states will generally be in a position to take effective relief action within the purview of their social, labor, or other collective legislation. This is particularly true for Socialist countries, where relief is furnished as a matter of public law, and not necessarily by civil compensation on a monetary basis.<sup>19</sup> As to possible excess damage occurring in neighboring countries, bilateral or regional arrangements are quite sufficient where land-based installations or shipments of nuclear materials are concerned.<sup>20</sup>

<sup>15</sup> Proposals were thus put forward for a limit ranging from 50 to 75 million dollars. In the course of the Conference, insurance experts estimated that within a few years it might be possible to obtain insurance coverage up to 50 million dollars, but without automatic reinstatement.

<sup>16</sup> See Doc. No. 3 of the Brussels Conference, pp. 20 and 21 and Annex II, pp. 36-39.

<sup>17</sup> This is the estimated capacity of the insurance market in Europe: figures ranging from 5 to 15 million dollars have been adopted in national legislation in Italy, Japan, Sweden, Switzerland, and the United Kingdom, and in the Paris (O.E.E.C.) Convention for the liability actually imposed on the operator.

<sup>18</sup> This might be done by an indemnification of the operator by the licensing state (as in the Price-Anderson Amendment, above), or by state reinsurance. In no event, however, can claimants be required to proceed separately against the licensing state, since the submission of the licensing state to the jurisdiction of foreign courts, or to ordinary civil courts in many countries, might cause considerable difficulties.

<sup>19</sup> This would occur in particular with regard to medical care, evacuation, retraining and relocation of victims.

<sup>20</sup> The complementary convention envisaged by EURATOM members, to raise the limit of liability of 15 million dollars established by the Paris (O.E.E.C.) Convention to 125 million dollars by state intervention, is a clear example that excess damage



The situation is quite different with regard to major accidents involving *nuclear ships*, where damage may well be caused only outside the territory of the licensing state. In such cases, licensing states might not show the same zeal in providing compensation for excess damage; it would, of course, be difficult for them in that connection to utilize foreign collective relief mechanisms which would not be within their control. For this reason, the Conference considered it necessary to establish a uniform limit of liability which would necessarily involve some contribution on the part of the licensing state in the event of large-scale nuclear incidents. This does not mean, of course, that a similar solution would be adopted in national legislation or in agreements dealing with non-maritime nuclear risks. Nor does the setting of a ceiling of \$100 million imply that all victims will necessarily recover on a civil law basis in the form of monetary compensation. Article VI of the Convention allows national legislation (and this includes legislation of any country on the territory of which damage has been suffered) to provide for compensation of victims by means of social security or other collective relief mechanisms. In such cases, the social security or other relief organization acquires by subrogation the rights of victims against the operator. In the event of certain typical nuclear injuries provable only on a statistical basis, this might indeed permit recovery, even if the individual victims would not be in a position to prove their claim in the absence of precise proof of a causal link between their individual damage and the accident.<sup>21</sup>

As to the ten-year period of prescription established in Article V, it was pointed out by some delegations that, as shown by the wartime experience in Japan, the latency period of some nuclear injuries could be considerably longer than ten years. However, in view of the fact that causation would be very difficult to establish in such cases, and that extraordinary relief measures would always be possible without delaying the definitive distribution of the fund to other claimants, Article V was accepted by the Conference as a compromise solution.<sup>22</sup>

The most radical departure from existing rules of tort law is undoubtedly the rule of channeling (Article III), whereby the operator is liable for nuclear damage caused by his ship, to the exclusion of any other person.

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problems with regard to land-based risks can better be handled on a narrow regional basis.

<sup>21</sup> With regard to many typical nuclear injuries resulting in leukemia and other cancers, which are indistinguishable from similar diseases occurring without exposure to ionizing radiation, it will often not be possible to prove causation by a nuclear incident in *individual* cases, although statistical proof may be forthcoming where increases of the incidence rate of particular diseases can be observed in any population group exposed to a nuclear incident. See, in this connection, *Atoms and the Law*, *op. cit.* note 4 above, pp. 421-532.

<sup>22</sup> However, Art. V(1) does not preclude the licensing state from establishing a longer period of prescription (as has been done by means of a special mutual fund under Swiss law), if the resulting liability is covered by insurance or state guarantees, and provided that this does not affect the rights of any claimants who filed suit within the ten-year period.

This means that, even if fault or negligence on their part could be proved, no actions would lie against suppliers of equipment or services to the ship except within the narrow limits of recourse actions under Article III(5). Also, liability will not attach to owners or operators of conventional ships which may collide with a nuclear ship and thus provoke a release of ionizing radiation.

The exoneration of non-operators from liability for nuclear damage applies even when damage is caused to the nuclear ship itself. In effect, while such damage is covered by the definition of "nuclear damage" in Article I(7), Article II(3) provides that it "shall not be covered by the operator's liability as defined in this Convention." This means, on the one hand, that damage to the nuclear ship is not included in the limit of liability and cannot be covered by the financial guarantees maintained for the benefit of victims, even if the operator and the owner of the ship should be two different persons.<sup>23</sup> It also means, however, that, in the absence of special contractual arrangements, liability will not attach to anyone for nuclear damage sustained by the nuclear ship, not even to a colliding ship upon proof of fault, since Article II(2) provides that "no person other than the operator shall be liable for [such] nuclear damage."<sup>24</sup>

The channeling of liability to the operator may, in line with modern concepts of tort law, be justified on the ground that those operating and deriving profit from a nuclear ship should bear the entire risk of third-party damage that might be caused by its hazardous qualities. However, the principal reason for this strict channeling of liability is of a practical nature. The Conference wanted to avoid the situation where third parties, and in particular the owners of conventional ships as well as suppliers of nuclear equipment, would be required to maintain insurance coverage with regard to their potential third-party liability in cases of collision, or in the event that a nuclear incident could be attributed to defective equipment.<sup>25</sup> Such multiple coverage of the same risk would not in any way benefit victims; it would, on the other hand, result in a pyramiding of insurance premiums and would render more difficult the pooling and international re-insurance arrangements necessary to mobilize maximum insurance coverage for any given ship.<sup>26</sup>

In connection with the rule of channeling, some question arises as to whether the Convention should be interpreted as a bar to the responsibility of states which might be incurred under customary public international

<sup>23</sup> This is the case, for instance, for the N.S. *Savannah*.

<sup>24</sup> This wording may appear somewhat unclear; however, in view of the rejection of an earlier proposal which would merely have excluded from the Convention any damage to the nuclear ship, thus reserving liability under general rules of tort law, it may be assumed that the Conference intended to bar *any* tort liability for damage to the nuclear ship.

<sup>25</sup> In view of the financial strength of the nuclear equipment industry, the temptation would be great to seek to establish claims against major suppliers.

<sup>26</sup> Thus an insurer might be doubly committed as a direct insurer and as re-insurer or co-insurer of different defendants. The insurance industry as a whole considers that such multiple coverage would not be desirable.

law, *e.g.*, by an extension of the *Trail Smelter* doctrine<sup>27</sup> to a licensing state which authorized a nuclear ship to be operated without proper safety precautions. This question was raised on several occasions during the Conference, receiving different answers from different delegations.<sup>28</sup> It seems reasonable to assume, however, that the Convention is intended to regulate only liability arising under civil law and, hence, that it is not intended to affect causes of action which may arise on an inter-governmental level pursuant to very special rules of customary international law. The fact that, under the Convention, states may be civilly liable when they themselves operate nuclear ships, that they may be subsidiarily involved as guarantors of the liability of private operators, or that the Convention contains certain regulatory clauses of a public law nature, such as the obligation not to permit ships to be operated without a license, does not alter this conclusion.<sup>29</sup>

Among the cornerstones of the Convention are its rules concerning jurisdiction over actions for nuclear damage. Due to the peculiar characteristics of nuclear damage and, in particular, to the fact that it might occur at a considerable distance from its source or manifest itself only after many years, a system of *in rem* or *quasi in rem* jurisdiction based on the presence of the ship<sup>30</sup> would not have given claimants sufficient protection. After exploring the possibility of concentrating jurisdiction in the courts of a single state, the Conference agreed that basic jurisdiction should be left with a plurality of courts to be selected by the individual victims.<sup>31</sup> Article X thus provides that actions for nuclear damage may be filed either in the courts of the licensing state or in the courts of any contracting state in the territory of which damage has been sustained. Only in cases where the aggregate damage appeared likely to exceed the limit of liability did it seem essential to concentrate final jurisdiction in the courts of a single state. Article XI provides for a mechanism whereby the courts of the licensing state can be called upon by any interested party to establish a limited liability fund subject to their control. The Convention contains no details as to the manner in which the fund shall be appropriated and distributed. However, Article XII(1) requires all contracting states to provide for the

<sup>27</sup> Cf. *Trail Smelter Arbitration* (1941), 3 Int. Arb. Awards (U.N. pub., Sales No. 49. V. 2); 35 A.J.I.L. 684 (1941); also *International Problems of Financial Protection against Nuclear Risk*, note 4 above, p. 79, and note 180.

<sup>28</sup> Thus the French Delegation maintained that the Convention would be a bar against any additional state responsibility, while the U.A.R. Delegation took the opposite view. It should be noted that in a special Annex to the Paris (O.E.E.C.) Convention it is expressly provided that "This Convention shall not be interpreted as depriving a Contracting Party . . . of any recourse which might be available to it under international law." This Annex appears to be of a declaratory rather than of a constitutive nature.

<sup>29</sup> See Art. XII.

<sup>30</sup> As, for instance, in the Convention relating to the Limitation of Liability of the Owners of Sea-going Ships (Brussels, 1957), 6 Benedict, Admiralty 399 (7th ed., 1958).

<sup>31</sup> It proved impossible to find a single forum convenient both for victims injured on board the ship and for victims who sustained nuclear damage, *e.g.*, on a colliding ship or on land.

prompt and equitable distribution of compensation. Thus, the courts of the licensing state will have a certain discretion in determining how the limited liability fund can best be distributed: in particular, it will be within their power to set aside a certain portion of the fund for late claims; on the other hand, they will not be entitled to establish definitive orders of preference among classes of claims. Final distribution will have to be effected on a *pro rata* basis to all claimants holding judgments of courts of competent jurisdiction. In that connection, the court administering the limited liability fund will be bound by Article XI(4) of the Convention, which requires it to enforce without further proceedings on the merits any final judgment of a competent foreign court.<sup>32</sup>

While this system of jurisdiction was the only one on which agreement could be reached at the 1962 Conference, it was nevertheless recognized that it was far from perfect, and that it should be reconsidered by a special committee before the first revision conference.<sup>33</sup> Some of the jurisdictional features of the Convention will probably be retained even in a revised convention, such as the waiver of sovereign immunities on the part of licensing states (Article X(3)), and the avoidance of direct actions against the licensing state when it is called upon to furnish indemnification pursuant to Article III(2).<sup>34</sup>

The principal difficulty, however, rests in the fact that, by leaving basic jurisdiction with the courts of any state in the territory of which it is claimed that nuclear damage has been suffered, the 1962 Convention exposes the operator and the licensing state to the danger of ill-considered rulings of foreign courts, which may not have at their disposal the necessary technical expertise and may be influenced by political considerations. This danger is particularly apparent with regard to such basic issues of fact as the occurrence of a nuclear incident, and the causal link between incident and the alleged damage. The proper adjudication of these issues requires competent and impartial scientific investigation. Will such competence and impartiality always be forthcoming in the claimant's own court, where the defendant is a foreign nuclear operator backed by insurance and, more importantly, where the financial resources and prestige of his government will be involved? It was said in Brussels that full jurisdictional competence of the victims' own courts and the dangers implied therein were a reasonable price to be paid by countries lending their flag to nuclear shipping. In effect, the Convention allows no re-examination on the merits of final judgments entered by foreign courts of competent jurisdiction.<sup>35</sup> All a licensing state might conceivably do to protect its interests against ill-considered foreign judgments would be to refuse to

<sup>32</sup> This obligation is, of course, subject to such modalities of distribution as may be determined by courts of the licensing states, and to the exceptions enumerated in Art. XI(4). In cases where no limitation fund is established, the problem of enforcement of judgments in foreign courts should not arise, since compensation will be covered by insurance and possibly by government indemnification.

<sup>33</sup> A standing committee was established for that purpose by a resolution of the Conference.

<sup>34</sup> See note 18 above.

<sup>35</sup> See note 32 above.

live up to its obligations under the Convention, and to refer the resulting dispute to the arbitration and adjudication procedure provided for in Article XX of the Convention.<sup>36</sup> This, however, would not always be desirable for political reasons, and the operator would remain unprotected against any measures of enforcement, including arrest and seizure of his ship, outside the licensing state.

A number of solutions might be envisaged to avoid the dangers inherent in the present jurisdictional rules of the Convention. The Soviet Delegation had suggested from the outset that, in order to avoid abuses, the definition of nuclear incident be pegged to precise threshold levels below which radiation and contamination may be considered harmless. In the absence of reliable scientific criteria, however, this suggestion was not retained.<sup>37</sup> A different approach would have been the establishment of an international tribunal to adjudicate all claims for nuclear damage.<sup>38</sup> Proposals to that effect had been put forward by several delegations at the Brussels Conference, but it was found that the problems arising in that connection were too complex for an early solution. Another possibility would be to create a special arbitral body of experts to which certain issues of fact, *e.g.*, the occurrence of a nuclear incident, could be referred by any interested state, including, of course, the licensing state. To avoid the difficulties of compulsory jurisdiction of such an arbitral body of experts, it might be sufficient to provide that any judgment contrary to the findings of such a body would not be enforceable or otherwise bind the parties under the Convention. A related proposal had been put forward in Brussels, but it was rejected chiefly because it sought to inject an international expert procedure in the proceedings before the court of original jurisdiction. This was considered an inadmissible interference with the procedural law of the forum, which the Convention had avoided in other instances.<sup>39</sup> If, however, reference to a body of experts were maintained on an inter-governmental level, it might prove less revolutionary to the revision conference.

It may seem strange that, once the Conference had reached almost unanimous agreement on these basic features of the Convention and on all the legal innovations which they imply, the support of the two major nuclear shipping countries was lost principally over the issue of whether or not nuclear warships were to be covered by the Convention.

Although the question of warships was not raised until late in the discussion, the two principal objectors to the inclusion of warships—one of them, the United States, had earlier strongly urged that they be included<sup>40</sup>

<sup>36</sup> Reservations to this clause are expressly permitted and may, for instance, be expected from all Latin American countries.

<sup>37</sup> See Doc. No. 3 of the Brussels Conference, pp. 15-16.

<sup>38</sup> Proposals to this effect were put forward in particular by the Argentine, Scandinavian, and U.A.R. Delegations, while the U.S.S.R. favored a Belgian suggestion for a special international arbitration mechanism.

<sup>39</sup> *E.g.*, in connection with questions of distribution of the limited liability fund.

<sup>40</sup> This had been the position of the U. S. expert on the I.A.E.A. Panel; at that time the United Kingdom expert was opposed to the inclusion of warships.

—were faced with a solid bloc of votes led by the United Kingdom and made up of all delegations from Asia, Africa, Latin America, and Western Europe, with the exception of Belgium. The argument in favor of the inclusion of nuclear warships in the Convention was primarily of a practical nature. For many years to come nuclear propulsion will be used chiefly on warships. This represents a real hazard against which protection should be given not only to the public at large, but also to conventional shipping by extending to it the rule of channeling established by the Convention on a multilateral basis, which effectively insulates conventional shipping from any liability for nuclear damage that might occur in cases of collision with nuclear warships. The argument against the inclusion of warships, on the other hand, was that any responsibility for damage caused by them was not a matter of civil law, which the Convention was intended to regulate, but of public international law. It was submitted by the Eastern European delegations that there would be no justification for limiting state responsibility with regard to warships: indeed, such a step would mean that the Conference intended to legalize the use of nuclear energy for purposes of war. The United States Delegation did not associate itself with this line of argument. It merely pointed out that its instructions did not allow it to sign the Convention if it included nuclear warships, and concluded that any convention on nuclear ships would be of little practical significance without United States and Soviet participation.

A proposal to amputate warships from the Convention and to negotiate a separate protocol extending to them some of the fundamental rules of the Convention was not retained. However, an important concession was made in that the jurisdiction of foreign courts was not extended to actions for damage caused by warships.<sup>41</sup>

### III

This result leaves the United States and the U.S.S.R., both of which operate important nuclear fleets, in an embarrassing position, even though Article XXVI, which provides for a revision conference after the Convention has been in force for five years, stresses the experimental and interim nature of the agreement reached in Brussels. It is very unlikely that the U.S.S.R. and other Eastern European countries will lift their objections to the Convention which, in addition to the question of warships, concern also the clauses on enforcement of judgments and transferability of compensation, and the clause limiting accession to Members of the United Nations and of its specialized agencies.<sup>42</sup> Failure to adhere to the Convention would not, however, greatly affect the movements of the Soviet nuclear fleet, unless it were expected to enter Western or neutral ports or territorial waters. It might, of course, restrict the mobility of a future Soviet

<sup>41</sup> See Art. X(3), last sentence.

<sup>42</sup> See Art. XXV. Such a restriction does not appear in the other Brussels Conventions, and one might wonder whether its political motivation has any place in a convention dealing primarily with private law. Art. XXV was proposed by the United States and was adopted by less than a two-thirds majority.

nuclear merchant marine, but not of special ships such as the *Lenin*, which is operated as an icebreaker exclusively in international and Soviet waters.

The problem is more difficult for the United States which, in addition to the N.S. *Savannah*, expects to lend its flag to the operation of other nuclear ships, and which is by no means assured of access to many of the friendly foreign ports at which such ships, including warships, are expected to call.<sup>43</sup>

In many respects, the 1962 Brussels Convention is an American convention. American views prevailed on the limit of liability, on indemnification by the licensing state, on channeling of liability, on the barring of recourse actions, and, finally, even on many of the final clauses, including Article XIX, which insures the continued application of the Convention for as long as twenty-five years of operation to ships licensed prior to the termination of the Convention. This provision, which was one of the few adopted by less than a two-thirds majority, is particularly important for the American nuclear industry which is, and may be expected to remain, one of the principal suppliers of nuclear equipment and which, in the absence of the Convention and its provisions limiting and channeling liability, would be particularly exposed to tort liability for nuclear damage.

What will be the position of American nuclear shipping and of nuclear suppliers once the 1962 Brussels Convention enters into force?<sup>44</sup> The Convention does not imply that ships flying the flag of contracting states will automatically be granted access to the ports and territorial waters of other contracting states.<sup>45</sup> Nor does it withhold the protection of the rule of channeling from suppliers who are nationals of non-contracting states, or otherwise allow discrimination on the basis of nationality, as long as the nuclear incident involves a ship covered by the Convention, i.e., flying the flag of a contracting state.<sup>46</sup> It might thus appear that, by negotiating a series of bilateral agreements, the United States could obtain for its nuclear fleet the same benefits as are granted under the Convention. This would make it unnecessary to ratify the 1962 Convention and to submit American nuclear warships to it.

There are several difficulties with this approach. In the first place, bilateral agreements covering the essential features of the 1962 Convention would in most countries be subject to parliamentary ratification,<sup>47</sup> so that no saving of time or effort could be expected. Secondly, it is difficult to

<sup>43</sup> In the course of bilateral negotiations for the admission of the N.S. *Savannah* to friendly ports in Western Europe, the problem of liability—and in particular also of the jurisdiction of local courts—has proved to be one of the most difficult issues.

<sup>44</sup> Art. XXIV requires only three ratifications, of which one must be from a licensing state. The first licensing state to ratify might be the United Kingdom or Japan.

<sup>45</sup> See Art. XVII.

<sup>46</sup> See Art. XII. An American suggestion that contracting states be allowed to "extend the Convention" to non-contracting states by "bilateral arrangements was, of course, not retained.

<sup>47</sup> To the extent that the agreement would modify existing rules of tort law and of jurisdictional competence, such ratification would be required in most European countries.

imagine how uniform bilateral agreements could be concluded with all countries which may be involved; *e.g.*, the flag state of any colliding ship; any state on the territory of which nuclear damage was suffered, or alleged to be suffered, or whose nationals or residents were injured by a nuclear incident; states in which operators, ship-owners, or suppliers of nuclear equipment could be sued, or where a levy of execution could be sought against their assets. Indeed, the effectiveness of many of the essential features of the 1962 Convention—for instance, the rule of channeling—presupposes a multilateral commitment to abide by uniform jurisdictional rules, and to apply the substantive provision of the Convention. It would hardly be realistic to expect that this could be duplicated even by a series of identical bilateral agreements. Lastly, it may in the long run well appear that even the closest allies of the United States will, as a minimum condition for allowing American nuclear warships to enter their ports and territorial waters, require the application to them of rules of liability identical with those of the 1962 Convention. It can indeed hardly be expected that warships will be given preferential treatment, and that liability for damage caused by them will be less strict than with regard to nuclear merchant ships. Conversely, it is quite possible that, in bilateral negotiations, the United States Government will experience some difficulty in obtaining the application of a limit of liability and of the rule of channeling with regard to its nuclear warships, even if such benefits would be forthcoming should the United States ratify the Brussels Convention.

In conclusion it is, of course, safe to assume that if it is not accepted by any of the major nuclear countries, the 1962 Convention will not be very effective as such. However, it is equally certain that its key provisions constitute the minimum conditions under which most countries in Western Europe, Asia, Africa, and Latin America will admit foreign nuclear ships to their ports and territorial waters. Since these key provisions will be more effective (both as regards the public and with respect to the owners, operators, and suppliers of nuclear ships and with regard to conventional shipping) if they are embodied in a multilateral agreement, it would clearly be in the interest of any major nuclear Power such as the United States to adhere to the Convention and thus allow it to become a positive instrument of international law. The alternative of negotiating bilateral agreements would be time-consuming and at best protect in a few selected countries the maritime and supplier industries involved in nuclear shipping. As to nuclear warships, it is most unlikely that bilateral or *ad hoc* arrangements would result in a treatment more favorable than that accorded to them in the 1962 Convention.

PEIDER KÖNZ \*

\* Secretary of the Council and Head of the Legal Service, Organization for Economic Co-operation and Development; Deputy Secretary General of the 1961/62 Brussels Diplomatic Conference on Maritime Law. The views expressed in this note do not reflect the position of the O.E.C.D. or of the sponsors and Secretariat of the Brussels Diplomatic Conference.



## THE ORGANIZATION OF PETROLEUM EXPORTING COUNTRIES (OPEC)

International agreements for the regulation of certain commodities among producing and even consumer countries have been concluded from time to time. Thus, of the more important commodity agreements, we find the Agreement of May 6, 1937, concerning the Regulation of Production and Marketing of Sugar; the Agreement of September 9, 1942, for the International Control of Production and Export of Tin; and the Agreement of May 7, 1934, for the Regulation of the Production and Export of Rubber.<sup>1</sup> But, except for the *ad hoc* agreements among certain Powers during the wars or international emergencies, there have been few permanent and regulated compacts among producing countries in the field of petroleum.

The concept of co-operation among exporting nations in the Eastern and Western Hemispheres was discussed informally in the late 1950's. The first formal indication of these developments occurred at the end of the First Arab Petroleum Congress (Cairo, April 16-23, 1959),<sup>2</sup> which expressed the wish, in its second resolution, that

the governments of the oil-producing states should, from time to time, exchange views on measures for the conservation of oil resources and their proper exploitation and other such matters, for the purpose of coordinating the measures taken by the individual countries and ensuring the regular flow of oil to world markets.

Further consultation among petroleum officials of both Venezuela and some of the Near Eastern countries led to the invitation by the Government of Iraq to Iran, Kuwait, Saudi Arabia and Venezuela to attend a conference in Baghdad. The meetings, which were held in the Iraq capital, took place September 10-14, 1960. Following the discussion of various mutual petroleum problems, the conference reached an agreement to form a permanent body for common petroleum policy.<sup>3</sup>

According to the Preamble of the Baghdad Agreement, the participants, considering the importance of petroleum as a vital source of income for their development programs and for the balancing of their budgets, that oil was an expendable source of income which needed replacement, that it was an important source of energy for the world, and that the stability of prices was necessary, found it advisable to form a permanent institution to be called the Organization of Petroleum Exporting Countries.<sup>4</sup> The purposes of this organization are "the unification of petroleum policies for member countries individually and collectively" and for "consultation among its members with a view to coordinating and unifying the policies and determining, among other matters, the attitude which members should adopt wherever circumstances such as those referred to [reduction of the

<sup>1</sup> 1 Oppenheim, *International Law (Peace)* 974-976\* (8th ed., H. Lauterpacht).

<sup>2</sup> The Arab World, Special Issue: Arab Oil, First Arab Petroleum Congress, Vol. V, May-June 1959 (New York: Arab Information Center); also The Economist, May 2, 1959, and The Observer, April 26, 1959.

<sup>3</sup> New York Times, Sept. 25 and Oct. 9, 1960.

<sup>4</sup> The Times (London) Sept. 26, 1960.

posted price of crude oil in the Middle East by the major oil companies] have arisen."

The original members of OPEC were to be the five countries (Iraq, Iran, Kuwait, Saudi Arabia and Venezuela) which were represented at the Baghdad Conference, and any country with substantial net export of crude petroleum accepted unanimously by the founding five. The first non-founding country to be admitted to membership was Qatar. At its fourth resumed conference in June, 1962, both Libya (which became a net exporter of oil in 1961) and Indonesia (the eighth-ranking petroleum exporter in the world) joined the organization.<sup>5</sup> Trinidad has sent observers to the conferences (the first at Baghdad September 10-14, 1960, the second in Caracas January 16-21, 1961, the third at Tehran October 28 to November 4, 1961, and the fourth at Geneva April 5, 1962).<sup>6</sup> Iraq, since the activation of its claims to sovereignty over Kuwait, has been unwilling to attend meetings where the latter was represented.

According to the Statutes,<sup>7</sup> adopted in January, 1961, the principal organs of the OPEC are: (1) The General Conference; (2) The Board of Governors; (3) The Secretariat. The Conference, which meets twice yearly in regular sessions (in capitals of members) or in special sessions, if the Board of Governors or its Chairman consider it necessary, is the supreme authority. It formulates the general policy, adopts the rules, and makes decisions by unanimously adopted resolutions *ad referendum*.

The Board of Governors, composed of representatives for each of the original members and one collectively representing those admitted later,<sup>8</sup> meets at least once every three months at the Headquarters. It prepares the Conference agenda, draws up the Organization's budget, reports on all developments, implements the Conference decisions and in general manages the affairs of OPEC.

The Chairman of the Board of Governors is *ex officio* the Secretary General and also the person who is legally authorized to represent the Organization. He is chosen according to alphabetical rotation among the countries represented on the Board.

The staff of the Secretariat is appointed by the Secretary General (in accordance with the regulations and with due regard for geographical distribution among the members). The members of the staff are international civil servants pledged to serve above all the interests of the Organization. The Secretariat's duties consist, *inter alia*, in preparing studies on the petroleum industry; implementing resolutions of the Conference; helping members with technical assistance; gathering information; making contacts with other international organizations, and general administration. Geneva, host city to so many international institutions,

<sup>5</sup> The Times (London), June 6, 1962.

<sup>6</sup> The Economist, July 7, 1962.

<sup>7</sup> The Statutes (which have been amended) were adopted at the Second Conference which met in Caracas Jan. 16-21, 1961. See 12 Middle Eastern Affairs 179 ff. (June-July 1961).

<sup>8</sup> This has been changed by an amendment adopted at the Fourth Conference (Geneva, April-June, 1962). See New York Times, and Times (London), July 3, 1962.

was chosen as the center of OPEC, and its Secretary General has signed a headquarters agreement with the Swiss Government.

Commenting on the purposes and developments of the Organization, His Majesty the Shah of Iran, Mohamed Reza Pahlevi, considered its usefulness as coming from the contributions it will make toward the unification of petroleum policies among its members, and the safeguarding of their interests as well as that of the consumers and all the petroleum industry.<sup>9</sup> The President of Venezuela saw its aim as that of prevention of competitive quarrels at the expense of vital interests of the exporting countries.<sup>10</sup> This point of view was shared by Mr. Mohamed Salman, the Minister of Petroleum in Iraq, who regarded the identification of common interests through fair and intelligent joint action among the producing member countries as the principal justification for the establishment of OPEC.

As for the organizational aspects of OPEC, its first Secretary General, Mr. Fuad Rouhani,<sup>11</sup> declared its structure definitely laid out and that specific lines of action had also been perfected which would permit the attainment of those proposed objectives. The former Minister of Petroleum and Mineral Affairs in Saudi Arabia, Sheikh Abdullah Al Tariki, sums up by saying that "the Organization of Petroleum Exporting Countries exists, and it has both a clear doctrine and policy which are implemented by its functioning permanent organs."<sup>12</sup>

ISSAM AZZAM

#### REGIONAL MEETINGS OF THE SOCIETY

*Dallas, Texas, October 12-13, 1962*

A regional meeting of the American Society of International Law was held at the Legal Center, Southern Methodist University School of Law, on October 12-13, 1962. The meeting was jointly sponsored by the law schools of the University of Texas and Southern Methodist University. It was planned as the first of an annual series to be held in major cities in the region. The 1963 meeting is tentatively planned for Austin or Houston, Texas. Co-operation and publicity were obtained from the State Bars of Texas and Oklahoma and the local and county Bar Associations in Dallas, Tulsa and Austin.

The meeting consisted of three panel discussions and a luncheon. The first session, on Friday morning, October 12, was devoted to problems of United States-Mexican relations. Dr. Cesar Sepúlveda, Dean of the School of Law, National University of Mexico, was unable to be present in person, but presented the Mexican point of view on such matters as the

<sup>9</sup> In an interview with Miss Wanda M. Jablonski, *Petroleum Week*, Dec. 9, 1960.

<sup>10</sup> Speech of Sr. Romulo Betancourt, President of the Republic of Venezuela, at the opening of the Second Meeting of the Organization of Petroleum Exporting Countries held in Caracas Jan. 16, 1961. See "Venezuela and OPEC" (Caracas: Imprenta Nacional, 1961).

<sup>11</sup> "La Esfera" (Venezuela), Jan. 22, 1961.

<sup>12</sup> *Ibid.*, Jan. 16, 1961.

Chamizal problem, the inflow of saline water, and controversies over rights in the Gulf of Mexico, in a detailed paper which was read at the meeting. James S. Moore, Esq., of the El Paso, Texas, Bar, then gave a thorough account of the history and current status of the Chamizal question, with suggestions as to its solution. A question and answer period, and a general discussion followed, as was the case with other sessions. Professor E. Ernest Goldstein of the Law School, University of Texas, presided over both of Friday's formal sessions. About 50 persons were in attendance.

The luncheon meeting, chaired by Dean Riehm of the Southern Methodist University Law School, was addressed by Dr. Richard B. Johnson, Chairman of the Department of Economics. Dr. Johnson spoke on the problems of creating a forward-looking economic policy for the United States in the 1960's.

The afternoon session began with an address by Charles F. Burgman, Esq., International Counsel of Yale & Towne Mfg. Co. (New York City), who spoke on the problems of lawyers and business men moving into, and operating in, the European Common Market and, prospectively, the Latin American market as well. He was followed by Professor Carl Fulda of the Louisiana State University Law School, who gave a lucid presentation of the anti-trust arrangements of the European Market.

On Saturday morning two scientists and two lawyers joined forces to discuss the problems raised by the extremely rapid advance of science and technology in recent years. Dr. Lloyd Berkner, President of the Graduate Research Center of the Southwest and the "father" of the International Geophysical Year, teamed with Colonel Martin Menter, of the office of the General Counsel, Federal Aviation Agency, to discuss the impact and meaning for society and law of man's ability to penetrate outer space. Then Dr. W. Armstrong Price, an oceanographer, who is Chairman of the State Submerged Lands Board of Texas, joined J. Chrys Dougherty, Esq., of the Austin, Texas, Bar, in analyzing the problems of the high seas, the sea bottoms and the continental shelf. This session was presided over by Professor Howard J. Taubenfeld of the Law School, Southern Methodist University.

The papers presented at the meetings are being divided between the law journals of Southern Methodist University and Texas so that all will be published. The co-chairmen for the meeting, Professors Goldstein and Taubenfeld, wish to express their deep appreciation to all those—the national society, the State and local bar associations, the two law schools and their deans, Professors Schwartz of Oklahoma and Kozolchyk of Southern Methodist, and others—who made this meeting possible through their joint efforts.

HOWARD J. TAUBENFELD

*Chapel Hill, North Carolina, February 1-2, 1963*

Another regional meeting of the Society will be held at the University of North Carolina School of Law on February 1 and 2, 1963. The general

subject of the meeting will be "Legal Aspects of International Business Transactions," to which three sessions will be devoted.

On Friday morning, February 1, the "Legal Aspects of Doing Business in Latin America" will be discussed under the chairmanship of Dr. William Brantley Aycock, Chancellor of the University of North Carolina. Mr. William D. Rogers, Special Counsel to the Agency for International Development, will speak on "The Legal Aspects of the Alliance for Progress." Mr. John G. Laylin, of the District of Columbia Bar, will speak on "The Legal Climate for Private Enterprise in the Alliance for Progress." Colombian participation in the Alliance for Progress will be discussed by the Honorable José Camacho-Lorenzana, Minister of the Embassy of Colombia to the United States.

On Friday afternoon, Dr. William Friday, President of the Greater University of North Carolina, will preside over the second session, which will consider "Legal Aspects of Doing Business with the European Common Market." The speakers will be the Honorable Luther H. Hodges, Secretary of Commerce, who will discuss "Implementing the Foreign Trade Act of 1962"; Mr. Robert A. Giles, General Counsel of the Department of Commerce, who will speak on "Legal Problems of Trading with the E.E.C."; Mr. William P. S. Breese, Counsel, Johns-Manville Corporation, New York, who will discuss "Corporate Legal Problems in the E.E.C."; and Mr. Walter Sterling Surrey, of the District of Columbia Bar, who will discuss "Legal Problems to be Encountered in the Operation of the Foreign Trade Act of 1962."

On Friday evening, a reception and dinner will be held, at which Judge L. Richardson Preyer, of the Federal District Court for Middle North Carolina, will speak on "The North Carolina Trade Fair Mission, or Innocence Abroad."

The "Legal Aspects of Doing Business in Space" will be the subject of the third session on Saturday morning, February 2, 1963. Dr. Henry Brandis, Jr., Dean of the School of Law of the University, will preside. Mr. John Cobb Cooper, Professor Emeritus of International Air Law at McGill University, and a well-known authority on the subject, will discuss "Current Developments in Space Law." Mr. Arnold Frutkin, Director of the Office of International Programs of the National Aeronautics and Space Administration, will speak on "International Space Programs"; Mr. Walter D. Sohler, Deputy General Counsel of the National Aeronautics and Space Administration, will discuss "Legal Aspects of Space Exploration"; and Mr. Horace P. Moulton, Vice President and General Counsel of the American Telephone and Telegraph Company, will discuss "Doing Business in Space."

The sessions, arrangements for which are in charge of Professor Seymour W. Wurfel, of the University of North Carolina Law School, will take place in the Court Room of the Law School.

ELEANOR H. FINCH

## 57TH ANNUAL MEETING OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW

THE STATLER HILTON HOTEL, WASHINGTON, D. C., APRIL 25-27, 1963

## TENTATIVE PROGRAM

## LAW AND CONFLICT: CHANGING PATTERNS AND CONTEMPORARY CHALLENGES

An examination of the changing assumptions and challenges confronting international law in the contemporary world.

THURSDAY, APRIL 25, 1963

2:15 p. m.

PANEL: Cuban Quarantine: Implications for the Future

CONFERENCE: The Application of Social Sciences to the Study of International Law

8:30 p. m.

ADDRESS: Professor Hardy C. Dillard, President of the Society

PANEL: Friendly Relations and Co-operation among States: The Legal Accommodation of Contending Systems

FRIDAY, APRIL 26, 1963

9:30 a. m.

PANEL: The Rôle of Force and the Rôle of Law in the Resolution of Contemporary Conflicts between States

PANEL: Social Conflict in the World Today and the Future of the Legal Protection of Foreign Investment

2:15 p. m.

PANEL: The Legal Status of Competing Claims to Use Outer Space and the Impacts upon Conflicts on Earth

PANEL: Fundamental Challenges to Legal Doctrines Affecting International Coercion: Aggression, Self-Defense, Non-Intervention, Self-Determination, Neutrality

5:30 p. m.

. . . Informal Reception for officers, members and guests

8:30 p. m.

PANEL: The Supranational Management of Domestic Violence: United Nations, Regional Organizations, International Control Commissions

PANEL: Emerging Patterns of Federalism in a World of Conflict

SATURDAY, APRIL 27, 1963

9:30 a. m.

Business Meeting and Election of Officers

2:15 p. m.

PANEL: Status of International Law—Some Perspectives of Foreign  
Scholars

STUDENT MOOT COMPETITION involving an international law case

7:30 p. m.

ANNUAL BANQUET

## CONTEMPORARY PRACTICE OF THE UNITED STATES RELATING TO INTERNATIONAL LAW

The material for this section has been prepared by a committee consisting of RICHARD B. BILDER, HAROLD S. BURMAN, STANLEY L. COHEN, THOMAS T. F. HUANG, SYLVIA E. NILSEN, HERBERT K. REIS, and ALFRED P. RUBIN, under the chairmanship of ERNEST L. KERLEY, all of the Office of the Legal Adviser, Department of State, with the exception of Mr. Rubin, who is in the Department of Defense.

### RECOGNITION OF STATES

#### *Prerequisite—United States recognition of Government of Peru*

On August 17, 1962, the Department of State issued the following statement:

The Department of State has cabled our Chargé d'Affaires in Lima, Mr. Douglas Henderson, directing him to acknowledge the communication of July 18 from Foreign Minister Llosa of the Government of the Military Junta. By means of this acknowledgment we are resuming relations with the Peruvian Government, and thus recognizing the junta as the provisional Government of Peru. This action was taken after consultation with other hemisphere governments in the light of the following facts:

The United States Government has ascertained that the junta is in effective control of the government and the country, and that it has pledged itself to fulfill Peru's international obligations.

In considering this action, and our economic assistance program within the framework of the Charter of Punta del Este, the United States Government notes that the junta has decreed the restoration of constitutional guarantees of civil liberties in Peru. It has set the date June 9, 1963, for the holding of free elections. Furthermore, it has guaranteed that, under the Constitution, all political parties will be accorded full electoral rights and that the results of the elections, whatever they may be, will be respected and defended by the junta and the Armed Forces which it represents. By announcing that on July 28, 1963, power will be turned over to an elected President and Congress, the junta has affirmed the provisional nature of its position.

We note that the Organization of American States has been assured by the junta that it will maintain an open-door policy toward all those desiring to witness the electoral process at close hand and that, in accordance with that policy, the junta is considering inviting in due course appropriate organizations and persons of stature and responsibility in the Americas. The United States Government welcomes this open-door policy, which will permit international representatives of stature and responsibility to be present in Peru to observe the carrying out of the electoral process in accordance with the announced terms and conditions.

We attach particular significance not only to the guarantee to respect the results of free elections and the restoration of constitutionally assured civil liberties but also to the fact that the junta government



has formally and publicly affirmed its commitment to this program at the August 8 meeting of the OAS Council, thereby demonstrating its belief in the value of the inter-American system. Thus the interim government has taken important steps on the road back to constitutional government in Peru.

In the light of these solemn commitments and since a recognized government succeeds to the agreements entered into by prior governments, performance under previously signed loan, grant, and other agreements of our economic assistance programs will, generally speaking, be resumed with the resumption of diplomatic relations. The same will apply to the Peace Corps program. (Dept. of State Press Release No. 506, Aug. 17, 1962; 47 Dept. of State Bulletin 348-349 (1962).)

### *Reference to Unrecognized Entities in Legislative Enactment*

In an unclassified memorandum the Legal Adviser stated:

Inquiries have been received by the Department of State concerning the effect of section 620(f) of the Foreign Assistance Act of 1961, as amended (22 U.S.C. 2370), on existing United States policies on non-recognition of certain Communist regimes. It is the view of this office that the enactment of this provision does not constitute United States recognition of those regimes listed therein not previously recognized by the United States. The purpose of this memorandum is to make known this interpretation and the reasons therefor in order generally to answer such inquiries and to record the position of the Department of State on the matter.

### *Discussion:*

Section 301(d) (3) of the Foreign Assistance Act of 1962 (76 Stat. 261), approved August 1, 1962, added a new subsection (f) to section 620 of the Foreign Assistance Act of 1961, as amended (hereinafter referred to as "The Act"). This new subsection provides as follows:

"(f) No assistance shall be furnished under this Act, as amended, (except section 214(b)) to any Communist country. This restriction may not be waived pursuant to any authority contained in this Act unless the President finds and promptly reports to Congress that: (1) such assistance is vital to the security of the United States; (2) the recipient country is not controlled by the international Communist conspiracy; and (3) such assistance will further promote the independence of the recipient country from international communism. For the purposes of this subsection, the phrase "Communist country" shall include specifically, but not be limited to, the following countries:

Peoples Republic of Albania,  
Peoples Republic of Bulgaria,  
Peoples Republic of China,  
Czechoslovak Socialist Republic,  
German Democratic Republic (East Germany),  
Estonia,  
Hungarian Peoples Republic,  
Latvia,

Lithuania,  
North Korean Peoples Republic,  
North Vietnam,  
Outer Mongolia-Mongolian Peoples Republic,  
Polish Peoples Republic,  
Rumanian Peoples Republic,  
Tibet,  
Federal Peoples Republic of Yugoslavia,  
Cuba, and  
Union of Soviet Socialist Republics."

The basis for the inquiries mentioned earlier in this memorandum is the listing, for purposes of the subsection, of those "countries" which are included in the phrase "Communist country". The list includes, but is not limited to, regimes which are in control of territory but are not governments or states recognized by the United States. The specific question raised is whether the approval by the Congress and the President of legislation including such a listing constitutes recognition by the United States of governments or states not previously recognized by one or more of the traditional means of extending recognition.

Recognition is a matter of intention. Normally, recognition is accomplished by means of either a formal statement to that effect or initiation or resumption of diplomatic intercourse through accreditation of diplomatic representatives or otherwise. Recognition may also be tacit.<sup>1</sup> Tacit recognition occurs through acts which, while not expressly referring to recognition, leave no doubt as to the intention to grant it. It is not considered that mere mention of a government or state in United States domestic legislation constitutes tacit recognition.

There are cases in the analogous field of recognition of belligerency where United States legislation has required or authorized particular action with respect to countries without such action being considered to constitute United States recognition of a state of belligerency. For example, a joint resolution of the Congress, approved January 8, 1937 (50 Stat. 3), provided, in pertinent part, as follows:

"That during the existence of the state of civil strife now obtaining in Spain it shall, from and after the approval of this Resolution, be unlawful to export arms, ammunition, or implements of war from any place in the United States, or possessions of the United States, to Spain or to any other foreign country for transshipment to Spain or for use of either of the opposing forces in Spain."

This resolution was not regarded as constituting recognition of the belligerency.<sup>2</sup>

The Foreign Assistance and Related Agencies Appropriation Act, 1962 (75 Stat. 717), section 107, and similar provisions of the Mutual Security Act of 1955 (69 Stat. 290) and of other foreign aid ap-

<sup>1</sup> Article 7 of the Convention on Rights and Duties of States, signed at Montevideo on December 26, 1933, ratified by the United States on July 13, 1934 (49 Stat. 8097, 3100), provides as follows:

"The recognition of a state may be express or tacit. The latter results from any act which implies the intention of recognizing the new state."

<sup>2</sup> I Hackworth, Digest of International Law (1940), p. 356; see also other examples cited by Hackworth, *supra*, pp. 356-358.

propriation acts have expressed the opposition of the Congress to the seating of the Communist China regime in the United Nations as representative of China, and such provisions, of course, have not been considered to constitute United States recognition of that regime. Similarly, section 11 of the Trade Agreements Extension Act of 1951 prohibits certain fur imports which are the product of the Union of Soviet Socialist Republics or of Communist China (65 Stat. 75, 19 U.S.C. 1367). This provision has not been considered to constitute recognition of Communist China.

Moreover, the statutory term "country" is inherently ambiguous. The Supreme Court has so stated in the following terms:

"The word 'country' in the [internal revenue statute] expression 'foreign country', is ambiguous. It may be taken to mean foreign territory or a foreign government. . . . When referring more particularly to a foreign government, it may describe a foreign State in the international sense, that is, one that has the status of an international person with the rights and responsibilities under international law of a member of a family of nations; or it may mean a foreign government which has authority over a particular area or subject matter, although not an international person but only a component part, or a political subdivision, of the larger international unit. The term 'foreign country' is not a technical or artificial one, and the sense in which it is used in a statute must be determined by reference to the purpose of the particular legislation."<sup>8</sup>

Therefore, it is necessary to determine whether the particular legislation unequivocally indicates intention by the United States to deal with the entities referred to as states or governments, as the case may be. The primary purpose of section 620(f) of the Act is, on its face, to prohibit at least one form of intergovernmental relationship—the furnishing of assistance. Further, the list itself demonstrates that the words "countries" and "Communist country" are used in a special sense. Thus, the United States Government has recognized non-Communist governments for Estonia, Latvia, and Lithuania, and, in this sense, the statute must be considered in describing them as Communist countries as referring to geographical areas. Finally, the legislative history of the provision is silent on any intention thereby to extend recognition to the Communist regimes mentioned.

#### *Conclusion:*

For these reasons, it is concluded that the listing of "countries" in section 620(f) of the Act for the purpose of that section does not constitute recognition by the United States of any territory as a state or any regime as a government. (Original in file in Office of the Legal Adviser.)

#### TREATIES

##### *Reservations—Law of the Sea Conventions—certain reservations not acceptable to the United States*

In a note of September 19, 1962, the representative of the United States of America to the United Nations informed the Secretary General

<sup>8</sup> *Burnet v. Chicago Portrait Co.*, 285 U. S. 1, at 5-6 (1932).

of the United Nations that certain reservations to the Law of the Sea Conventions<sup>1</sup> were not acceptable to the United States.<sup>2</sup> The note reads in part as follows:

... the United States does not find the following reservations acceptable:

*Convention on the Territorial Sea and the Contiguous Zone*

1. The reservations made by the Government of Czechoslovakia to Article 19,<sup>3</sup> by the Governments of Bulgaria, the Byelorussian Soviet Socialist Republic, Czechoslovakia, Rumania, the Ukrainian Soviet Socialist Republic and the Union of Soviet Socialist Republics, to Article 20,<sup>4</sup> and by Hungary to Article 21.<sup>5</sup>
2. The reservation made by the Government of the Tunisian Republic to Article 16, paragraph 4.<sup>6</sup>
3. The reservation made by the Government of Venezuela to Article 12 and to Article 24, paragraphs 2 and 3.<sup>7</sup>

<sup>1</sup> U.N. Docs. A/CONF.13/L.52-57 (1958); 52 A.J.I.L. 830 (1958).

<sup>2</sup> The function of the Secretary General, in respect of all conventions concluded under the auspices of the United Nations and of which he is the depositary, is as follows:

- (i) To continue to act as depositary in connexion with the deposit of documents containing reservations or objections, without passing upon the legal effect of such documents; and
- (ii) To communicate the text of such documents relating to reservations or objections to all States concerned, leaving it to each State to draw legal consequences from such communications.

General Assembly Res. 598 (VI), as modified by Res. 1452 (XIV) B.

<sup>3</sup> Article 21: "The Government of the Czechoslovak Republic holds that under international law in force all government ships without distinction enjoy immunity and therefore does not agree with the application of articles 19 and 20 of the Convention to government ships operated for commercial purposes." U.N. Doc. ST/LEG/3, Rev. 1 at 6 (1961).

<sup>4</sup> All reservations were substantively equivalent to the reservation of the Union of Soviet Socialist Republic: Article 20: "The Government of the Union of Soviet Socialist Republics considers that government ships in foreign territorial waters have immunity and that the measures mentioned in this article may therefore be applied to them only with the consent of the flag State." *Ibid.* at 8.

<sup>5</sup> Article 21: "The Government of the Hungarian People's Republic is of the opinion that the rules contained in Sub-Section B of Section III of Part I of the Convention are generally inapplicable to government ships operated for commercial or non-commercial purposes, in foreign territorial waters. Consequently, the provisions of Sub-Section B restricting the immunities of government ships operated for commercial purposes are applicable only upon consent of the State whose flag the ship flies." *Ibid.* at 7.

<sup>6</sup> With the following reservation: "the Government of the Tunisian Republic does not consider itself bound by the provisions of article 16, paragraph 4 of this Convention." *Ibid.*

<sup>7</sup> "In signing the present Convention, the Republic of Venezuela declares with reference to article 12 that there are special circumstances to be taken into consideration in the following areas: The Gulf of Paria and zones adjacent thereto; the area between the coast of Venezuela and the island of Aruba; and the Gulf of Venezuela."

Reservation made upon ratification: "... with express reservation in respect of article 12 and paragraphs 2 and 3 of article 24 of the said Convention." *Ibid.*

*Convention on the High Seas*

1. The reservations to Article 9 made by the Governments of Bulgaria, the Byelorussian Soviet Socialist Republic, Czechoslovakia, Hungary, Poland, Rumania, the Ukrainian Soviet Socialist Republic, and the Union of Soviet Socialist Republics.<sup>8</sup>
2. The reservation made by the Iranian Government to Articles 2, 3, and 4 and Article 26 paragraphs 1 and 2.<sup>9</sup>
3. The reservation made by the Government of Indonesia.<sup>10</sup>

<sup>8</sup> All reservations and declarations were substantively equivalent to those of the Union of Soviet Socialist Republics:

"Article 9: The Government of the Union of Soviet Socialist Republics considers that the principle of international law according to which a ship on the high seas is not subject to any jurisdiction except that of the flag State applies without restriction to all government ships.

"Declaration: The Government of the Union of Soviet Socialist Republics considers that the definition of piracy given in the Convention does not cover certain acts which under contemporary international law should be considered as acts of piracy and does not serve to ensure freedom of navigation on international sea routes." *Ibid.* at 15.

<sup>9</sup> "Articles 2, 3 and 4. The Iranian Government maintains the objection on the ground of excess of competence, expressed by its delegation at the twelfth plenary meeting of the Conference on the Law of the Sea on 24 April 1958, to the articles recommended by the Fifth Committee of the Conference and incorporated in the aforementioned articles of the Convention on the High Seas. The Iranian Government accordingly reserves all rights regarding the contents of these articles in so far as they relate to countries having no sea coast.

"Article 2(3)—article 26, paragraphs 1 and 2. Application of the provisions of these articles relating to the laying of submarine cables and pipelines shall be subject to the authorization of the coastal State, in so far as the continental shelf is concerned." *Ibid.* at 14; 52 A.J.I.L. 851 (1958).

<sup>10</sup> Reservation made upon ratification: "... that the terms 'territorial sea' and 'internal waters' mentioned in the Convention, as far as the Republic of Indonesia is concerned, are interpreted in accordance with Article 1 of the Government Regulation in Lieu of an Act No. 4 of the Year 1960 (State Gazette 1960, No. 22) concerning Indonesian Waters, which, in accordance with Article 1 of the Act No. 1 of the Year 1961 (State Gazette 1961, No. 3) concerning the Enactment of All Emergency Acts and All Government Regulations in Lieu of an Act which were promulgated before January 1, 1961, has become Law, which Article word by word is as follows:

"Article 1: 1. The Indonesian Waters consist of the territorial sea and the internal waters of Indonesia.

"2. The Indonesian territorial sea is a maritime belt of a width of twelve nautical miles, the outer limit of which is measured perpendicular to the baselines or points on the baselines which consist of straight lines connecting the outermost point on the low water mark of the outermost islands or part of such islands comprising Indonesian territory with the provision that in case of straits of a width of not more than twenty-four nautical miles and Indonesia is not the only coastal state the outer limit of the Indonesian territorial sea shall be drawn at the middle of the strait.

"3. The Indonesian internal waters are all waters lying within the baselines mentioned in paragraph 2.

"4. One nautical mile is sixty to one degree of latitude." U.N. Doc. ST/LEG/8, Rev. 1 at 14 (1961).

*Convention on the Continental Shelf*

1. The reservation made by the Iranian Government to Article 4.<sup>11</sup>
2. The reservation made by the Federal Republic of Germany to Article 5, paragraph 1.<sup>12</sup>

The Representative requests that the contents of this note be communicated to all States Members of the United Nations and to any other State invited by the General Assembly of the United Nations to become a Party to the Law of the Sea Conventions.

(Dept. of State, MS. file 399.731/9-1962, Sept. 19, 1962.)

*Interpretation—Treaty of Extradition with Brazil*

An additional protocol to the 1961 Treaty of Extradition with Brazil (Senate Executive H, 87th Congress, 1st Session) was submitted to the Senate for advice and consent to ratification on August 27, 1962 (Senate Executive F, 87th Congress, 2d Session). The additional protocol, which was signed at Rio de Janeiro on June 18, 1962, was formulated, at the request of Brazil, for the purpose of setting forth the interpretation of the two governments with respect to the provisions of Article VII of the 1961 Treaty. In view of the provisions of the Brazilian Constitution and the Brazilian extradition law prohibiting the extradition of Brazilian nationals, it is considered by Brazil that Article VII of the 1961 Treaty does not, with sufficient clarity, relieve Brazil of the obligation to surrender its nationals, and signature of the additional protocol was considered a prerequisite for submission of the treaty to the Brazilian Congress. The protocol provides that Article VII of the 1961 Treaty shall be interpreted as follows:

The Contracting Parties are not obliged by this Treaty to grant extradition of their nationals. However, if the Constitution and laws of the requested State do not prohibit it, its executive authority shall have the power to surrender a national if, in its discretion, it be deemed proper to do so.

From the standpoint of the United States it is considered that the additional protocol is substantively the same as Article VII of the 1961 Treaty, which reads as follows:

There is no obligation upon the requested State to grant extradition of a person who is a national of the requested State, but the

<sup>11</sup> "Article 4: With respect to the phrase 'the Coastal State may not impede the laying or maintenance of submarine cables or pipe-lines on the continental shelf', the Iranian Government reserves its right to allow or not to allow the laying or maintenance of submarine cables or pipe-lines on its continental shelf." *Ibid.* at 24; 52 A.J.I.L. 862 (1958).

<sup>12</sup> "In signing the Convention on the Continental Shelf of 29 April 1958, the Federal Republic of Germany declares with reference to article 5, paragraph 1 of the Convention on the Continental Shelf that in the opinion of the Federal Government article 5, paragraph 1 guarantees the exercise of fishing rights (Fischerei) in the waters above the continental shelf in the manner hitherto generally in practice." U.N. Doc. ST/LEG/3, Rev. 1 at 24 (1961).

executive authority of the requested State shall, subject to the appropriate laws of that State, have the power to surrender a national of that State if, in its discretion, it be deemed proper to do so.

The 1961 Treaty of Extradition with Brazil was ratified by the President of the United States on May 29, 1961.

*Interpretation—Consuls—taxation—United States—United Kingdom Consular Convention—New York City sales tax*

In a note to the British Embassy, dated July 24, 1962, the Department responded negatively to the contention of the British Government that Article 13(5)(a) of the Consular Convention between the United States and the United Kingdom, June 6, 1951, (T.I.A.S., No. 2494), exempts consular officials of the United Kingdom from municipal sales taxes and other similar taxes in the United States, but that United States consular officials are not similarly exempted in the United Kingdom. Article 13(5)(a) of the Convention applies the exemption of Article 13(4) "only to taxes or other similar charges in respect of which the consular officer or employee would, in the absence of the exemption provided by this Article, be the person legally liable," but excludes the exemption from application to "taxes or other similar charges in respect of which some other person is legally liable; notwithstanding that the burden of the tax or other similar charge may be passed on to the consular officer or employee." The British Government considered that the effect of these provisions was to exempt consular officers of the United Kingdom from payment of the sales tax in the United States on the grounds that the purchaser bears a legal liability for payment of the tax in the United States. It is considered that these provisions did not exempt consular officers of the United States from payment of the sales tax in the United Kingdom because the tax in the United Kingdom is merely passed on to the purchaser by the person legally liable for the payment thereof. The Department observed that, despite the variance in the number and nature of the taxes imposed by the several States of the United States which would be covered by the terms of Article 13(5)(a), the legal incidence of the tax normally falls upon the seller, manufacturer or other person preceding the purchaser in the disposition of the item. The Department therefore took the position that, since the legal incidence of the tax in such cases would not be on the purchaser, no exemption is granted consular officials by virtue of Article 13(5)(a).

The Department took the further position that, even if a sales or similar tax were construed as a tax for which the purchaser would be legally liable under Article 13(5)(a), the tax would be deemed a tax on a transaction under Article 13(5)(b)(iv), given the history of that article of the Convention. Article 13(5)(b)(iv) makes the exemption of Article 13(4) inapplicable to "taxes on transactions . . . such as taxes on the sale or transfer of . . . property. . . ." The Department concluded that, if an exemption were disallowed by Article 13(5)(b)(iv), it could not be

recognized by Article 13 (5) (a). (Dept. of State, MS. File No. 602.4111/7-6-62.)

#### OUTER SPACE

##### *Applicable rules of international law—communications satellite legislation*

In an appearance before the Senate Foreign Relations Committee on August 6, 1962, in connection with communications satellite legislation, the Secretary of State commented:

The committee has asked for a discussion of international law applicable to space communications. Obviously, in a new field of this kind, the regime of law is hardly beyond the threshold of development. Nevertheless, we believe a firm foundation of fundamental principle has been laid and that the space satellite communications system contemplated by this bill will be wholly consistent with those principles.

The basic source of legal principle governing space activities is General Assembly Resolution 1721,<sup>1</sup> jointly sponsored by the United States and the Soviet Union and adopted at the last session of the General Assembly. It says

*"The General Assembly,*

*"1. Commends to States for their guidance in the exploration and use of outer space the following principles:*

*"(a) International law, including the Charter of the United Nations, applies to outer space and celestial bodies;*

*"(b) Outer space and celestial bodies are free for exploration and use by all States in conformity with international law and are not subject to national appropriation;"*

Although the resolution "commends" the principles to member states, the United States takes the position that these principles are presently the law; the unanimous action of the General Assembly in adopting the resolution, as action by the governments of the world assembled, confirms this view.

It is evident that nothing contemplated by this bill is in conflict with the resolution. On the contrary, our pressing forward with this space satellite communications system is a constructive exercise of the freedom of space for exploration and use by all states that the resolution affirms.

Of course, it would be foolish to contend that all the legal problems of space communications have been solved, or even adequately formulated. Quite obviously they have not. But that is no valid reason for holding back. I speak about the American legal system with deference before this committee, but I had always believed the genius of the common law was that it proceeded from case to case, refining its rules and norms out of the ore of experience and practice, solving problems pragmatically as they arise, rather than seeking to

<sup>1</sup> General Assembly, 16th Sess., Official Records, Supp. No. 17 (Doc. A/5100), pp. 6-7; 46 Dept. of State Bulletin 185-186 (1962); 56 A.J.I.L. 946-949 (1962).



provide all the answers in advance through some sort of generalized code.

We believe the law of space communications will grow in this organic way rather than by a process of abstract speculation. Where early international agreement—one might almost say “legislation”—is needed to move ahead, as in the case of frequency allocation, we will be prepared to take our position at the conference table.

On other questions the development of workable solutions will await the accumulation of practice and experience. The activities of the corporation under this bill will provide much of that experience and will in this way help to provide a basis for the further development of space law. (Dept. of State Press Release No. 490, Aug. 6, 1962 at pp. 8-10; 47 Dept. of State Bulletin 318 (1962).)

## JUDICIAL DECISIONS

BY COVEY OLIVER

*Of the Board of Editors*

*Submission for preliminary decision interpreting the EEC Treaty—jurisdiction to render preliminary decision—Article 177—validity of export prohibitions—Article 85—effect of First Implementing Regulation to Articles 85 and 86*

DE GEUS v. ROBERT BOSCH GMBH.<sup>1</sup> Case No. 13-61, 8 Recueil de la Jurisprudence de la Cour 89; 8 Sammlung der Rechtsprechung des Gerichtshofes 97 (1962).

Court of Justice of the European Communities. Judgment of April 6, 1962.

This case was submitted to the Court of Justice of the European Communities for a preliminary decision under Article 177 of the European Economic Community Treaty by a Dutch court of appeal sitting at The Hague, on the ground that it presented a question requiring the interpretation of the Treaty.

The facts may be summarized as follows: During the years 1959-1960 De Geus, a Dutch company, imported into The Netherlands from Germany refrigerators manufactured by the Robert Bosch GmbH of Germany. Thereupon the Van Rijn company, the exclusive sales agent for Bosch products in The Netherlands, instituted, together with Bosch, an action against De Geus in Rotterdam, seeking an injunction and compensatory damages. Plaintiffs' position was predicated on the argument that De Geus' conduct was illegal, because it violated a contract between Bosch and its domestic customers, concluded for the benefit of Bosch's foreign sales agents, which contained the following clause: "Bosch products may not, either directly or indirectly, be exported abroad without our [Bosch's] written authorization." The defendant maintained, on the other hand, that this clause violated Article 85(2) of the Economic Community Treaty, because it has as its "object or result the prevention, restriction or distortion of competition within the Common Market." The lower court rejected this defense and gave judgment for the plaintiffs on the ground that, in the present stage of the Common Market's development, Article 85 could not invalidate agreements violating its provisions, since it was still in "statu nascendi."

The defendant appealed this judgment to the court of appeal of The Hague, reasserting its prior contention that the aforementioned export prohibition was void under Article 85(2). Since this contention was challenged by Bosch and Van Rijn, the court of appeal concluded that the case presented a question involving the interpretation of the Treaty. In its judgment of June 10, 1961, this court, therefore, requested the Court of Justice of the European Communities under Article 177 of the Economic

<sup>1</sup> Reported and translated by Thomas Buergenthal, Assistant Professor of Law, School of Law, State University of New York at Buffalo.

Community Treaty "to rule upon the question whether the export prohibition, which the Robert Bosch GmbH imposed in Stuttgart [Germany] on its purchasers who contracted to be bound by it, is void under Article 85(2) of the EEC Treaty insofar as it affected exports to The Netherlands."

On September 21, 1961, Bosch and Van Rijn lodged an appeal in The Netherlands against this judgment. This appeal was still pending when the case was argued in the Community Court. Here the parties and the European Economic Community Commission participated in the oral proceedings, while France, Germany, Belgium and The Netherlands submitted briefs.

#### *A. Admissibility of the Submission*

In its opinion the Court of Justice of the European Communities addresses itself first to the question whether it has jurisdiction to comply with the submission of The Hague court of appeal to render the preliminary decision requested:

The litigants Bosch and Van Rijn as well as the Government of the French Republic, noting that an appeal for cassation is pending against the judgment ordering the submission [to the Court of Justice], have expressed doubts as to whether a preliminary decision can be rendered upon the submission of the court of appeal of The Hague.

This doubt is based upon an interpretation of Article 177 of the Treaty according to which such a request may only be granted if the judgment ordering the submission has become final.

This interpretation, however, finds no support in the text of Article 177. It overlooks, furthermore, that the domestic law of the court requesting the preliminary decision and the law of the Community are two independent and differing legal systems.

Just as, on the one hand, the Treaty does not prohibit the domestic appellate tribunal from ruling upon appellate remedies of the nature here in question, but leaves the determination of their admissibility to domestic law and to the national court; so, on the other hand, it only conditions the jurisdiction of the Court of Justice [to render a preliminary decision] upon the existence of a submission under Article 177, without making it necessary for the Community Court to determine whether the judgment of the national court is final under governing domestic law.

The litigants Bosch and Van Rijn as well as the Government of the French Republic also maintain that the submission of the court of appeal of The Hague does not authorize the Community Court to render a preliminary decision, because it is not restricted to a question of Treaty interpretation as contemplated by Article 177; but that in reality, as its formulation indicates, it seeks to have the Community Court rule on the application of the Treaty to a concrete case.

However, the Treaty prescribes neither expressly nor by implication the form in which the national court has to submit its request for a preliminary decision.

Since the meaning of the phrase "interpretation of the Treaty," found in Article 177, could itself be the subject of an interpretation, the domestic court may formulate the question, concerning which a preliminary decision

is sought, in a concrete and simple form, thereby leaving it to the Court of Justice to rule upon the submission within the limits set by the Court's jurisdiction, that is, only insofar as it raises a question calling for the interpretation of the Treaty.

The concrete formulation of the present submission no doubt enables the Court to isolate those questions contained in it which call for the interpretation of the Treaty.

The Government of the French Republic further contends that as long as no regulations have been promulgated pursuant to Article 87 of the Treaty, the Court of Justice may not rule upon the interpretation of Article 85, because its application is until then a matter exclusively for domestic authorities.

The validity of this argument cannot be accepted.

Even if it were admitted that the application of Article 85 *et seq.* of the Treaty was a matter for national authorities, Article 177, which deals with the interpretation of the Treaty, nevertheless remains applicable. The national judge is accordingly, and depending upon the circumstances, either authorized or required to seek a preliminary decision.

This conclusion is borne out by the text as well as the meaning of Article 177. On the one hand, this provision contains no reservation concerning Article 85 *et seq.*; on the other hand, the need for uniformity in the jurisprudence, to which Article 177 addresses itself, appears to be especially pressing in those cases where the application of the Treaty has been entrusted to national authorities.

Accordingly, the Court of Justice is empowered to comply with the present submission requesting a preliminary decision pursuant to Article 177.

#### B. *On the Merits*

Having ruled that it had jurisdiction to render the requested preliminary decision, the Court of Justice proceeded to answer the question submitted by the court of appeal of The Hague:

The judgment of the court of appeal of The Hague raises the question whether Article 85 became applicable as soon as the Treaty entered into force.

In principle, the question must be answered in the affirmative.

Insofar as Articles 88 and 89 of the Treaty empower national authorities and the Commission to apply Article 85, they presuppose the application of this provision upon the entry into force of the Treaty.

However, Articles 88 and 89 are not capable of assuring the complete application of Article 85 to the extent that their mere availability would justify the conclusion that Article 85 had unfolded its total effectiveness upon the entry into force of the Treaty, and especially that it effected the invalidity in all those cases encompassed within the definition of its first paragraph, as to which no declaration had yet been made pursuant to its third paragraph.

Article 88 contemplates a decision by the authorities of the Member

States concerning the admissibility of cartels only in case there is submitted to them under governing domestic cartel law an application to allow a cartel. Article 89 recognizes the Commission's general power to police and supervise, but authorizes it only to note possible violations of Articles 85 and 86 without bestowing upon it the authority to render declarations pursuant to Article 85, paragraph 3.

Neither of the two Articles, furthermore, contains a transitory regulation governing cartels already in existence upon the entry into force of the Treaty.

It should be noted, furthermore, that the draftsmen of the First Implementing Regulation to Articles 85 and 86 of the Treaty (Official Gazette p. 204/62) obviously proceeded upon the same assumption. It appears from Article 6, paragraph 2, in conjunction with Article 5, paragraph 1, of this Regulation, that the Commission may still issue declarations pursuant to Article 85, paragraph 3, with regard to cartels already in existence upon the effective date of the Regulation, and that it is even empowered to ascribe to such declarations an effect retroactive beyond the registration of the cartel. The draftsmen of the Regulation must apparently have assumed that upon the entry into force of the Regulation there would be in existence cartels within the meaning of Article 85, paragraph 1, as to which no decision could yet have been issued pursuant to paragraph 3 [of Article 85], without, however, being void as a result thereof.

The contrary interpretation would lead to the untenable consequence that these cartels have been void for a number of years without a finding to that effect by any authority, and that this invalidity is curable retroactively. On the whole, it would be contrary to the general principle of legal certainty—to be respected in the application of the Treaty—to subject certain agreements to invalidity before it would have been possible to decide to what agreements Article 85 applies in its entirety.

Therefore it must be assumed that until the entry into force of the First Implementing Regulation to Articles 85 and 86, only such agreements and decisions had become invalid concerning which [a] the authorities of the Member States ruled pursuant to Article 88 that these agreements and decisions were governed by Article 85, paragraph 1, and that they did not qualify for an exemption from prohibition under Article 85, paragraph 3; or [b] the Commission rendered the decision provided for in Article 89, paragraph 2. This result is also consistent with the text of Article 85, paragraph 2, which speaks of agreements and decisions "prohibited pursuant to this Article" and thus seems to view the first and third paragraphs of the aforementioned Article as an inseparable whole.

Since the court of appeal of The Hague could not in its submission delimit more specifically the date with reference to which the possible invalidity of the disputed agreement is to be determined, this question must also be examined with regard to the time following the entry into force of the Regulation.

The invalidity of agreements and decisions already existing at the time of the entry into force of the Regulation is not brought about, without

more, by virtue of the fact that these agreements and decisions come within the purview of Article 85, paragraph 1. These agreements and decisions must be considered to be valid, if they fall within Article 5, paragraph 2, of the aforementioned Regulation. They must accordingly be valid for the time being if, without falling within this provision, they have been duly registered with the Commission under Article 5, paragraph 1, of the Regulation.

This validity is, however, not definitive, because the invalidity prescribed in Article 85, paragraph 2, may be brought about when the authorities of the Member States make use of the power granted them under Article 88 of the Treaty and preserved by Article 9 of the Regulation, to apply Article 85, paragraph 1, in order to prohibit certain agreements and decisions.

Beyond this, the refusal of the Commission to act pursuant to Article 85, paragraph 3, with regard to agreements and decisions falling under this Article, effectuates their invalidity from the date of the entry into force of the Regulation.

Nevertheless, Article 7 of the Regulation gives the Commission the possibility—even if the agreement or decision cannot be exempted from the prohibition under Article 85, paragraph 3,—to limit the legal effect of the prohibition of Article 85, that is to say the invalidity, for a specific period, if the participants are willing to dissolve the agreement or decision or to modify it.

From this provision of the Regulation it must be assumed that the invalidity of the agreements and decisions which have been registered with the Commission is not brought about until the Commission has decided or the authorities of the Member States have declared that Article 85 is applicable.

The submission of the court of appeal of The Hague also raises the question whether the export prohibition imposed by the Robert Bosch GmbH in Stuttgart upon its purchasers, who contracted to be bound by it, comes within the purview of Article 85, paragraph 1, of the Treaty.

This question cannot be considered to be a pure question of Treaty interpretation, because the entire text [of the agreement] into which the concisely phrased prohibitory clause fits, is not reproduced in the submission. The Court of Justice cannot consequently answer the question without embarking upon inquiries not open to it in a proceeding under Article 177 of the Treaty.

Under these circumstances, the Court of Justice must confine itself to the statement that the possibility is not precluded that the export prohibitions, to which the court of appeal refers, fall under the definition contained in Article 85, paragraph 1, especially the phrase “any agreement . . . likely to affect trade between the Member States.”

If these export prohibitions should come under Article 85, paragraph 1, it cannot be assumed, without more, that Article 4, paragraph 2, of the First Implementing Regulation to Articles 85 and 86 applies to them, so that they should be exempt under Article 5, paragraph 2, of the Regulation from registration and should accordingly be regarded as valid. This

follows because, on the one hand, under Article 4, paragraph 2, subparagraph 1, agreements which affect imports or exports between Member States are not exempt from registration, while on the other hand, the aforementioned export prohibition contemplates effects different from those enumerated in subparagraph 1 of Article 4, paragraph 2, and a subject matter different from that described in subparagraph 3 of that provision.

### C. Judgment

On the basis of these considerations, the Court of Justice rendered the following judgment:

1. Until the entry into force of the Regulation contemplated by Article 87 in conjunction with Article 85, paragraph 3, of the Treaty, the legal effect of Article 85, paragraph 2, is only brought about for such agreements and decisions as to which [a] the authorities of the Member States, acting pursuant to Article 88 of the Treaty, have expressly ruled that they are governed by the provisions of Article 85, paragraph 1, and that these provisions do not become inapplicable by virtue of the provisions of Article 85, paragraph 3; or [b] the Commission, in a decision issued pursuant to Article 89, paragraph 2, declares that they contravene Article 85.

2. Agreements and decisions already in existence at the time of the entry into force of the First Implementing Regulation to Articles 85 and 86 of the Treaty, which come within the prohibition of Article 85, paragraph 1, may only be treated as invalid, [a] if and to the extent that the Commission decides that they do not qualify for a declaration under Article 85, paragraph 3, and that Article 7, paragraph 1, of the Regulation is inapplicable; or [b] if the authorities of the Member States use the powers vested in them under Article 88 of the Treaty together with Article 9 of the Regulation.

3. Agreements and decisions, which come under the prohibition of Article 85, paragraph 1, and are not duly registered in accordance with Article 5, paragraph 1, of the First Implementing Regulation to Articles 85 and 86 of the Treaty, are void as of the time the Regulation enters into force, even though they were in existence at the time the Regulation entered into force and even though they do not come under Article 5, paragraph 2, of the Regulation.

4. The remaining content of the submission is not capable of a preliminary decision.

5. The determination involving the assessment of costs in this proceeding is left to the determination of the court of appeal of The Hague.

### *Nationality of ships—labor problems*

EMPRESA HONDURENA DE VAPORES, S. A. v. McLEOD. 300 F. 2d 222.

U. S. Court of Appeals, 2nd Circuit, January 12, 1962.<sup>1</sup>

[On its facts the case is the same as another reported in 56 A.J.I.L. 1109 (October, 1962), and the Court of Appeals reaches the same result, that

<sup>1</sup> Excerpt of portion of opinion and accompanying footnote.

under the Labor Management Relations Act of 1947 the Board had no authority to order elections for collective bargaining representatives aboard the vessels of Honduran flag and registry owned by defendant, a Honduran corporation wholly owned by the United Fruit Company, a New Jersey corporation, in control of the direction and use of the vessels through time charters.] In the course of decision Judge Friendly, of the Court of Appeals, after having expressed the view that the United States legislation was not intended to apply, said:

. . . Our belief that the Labor Act should not be held applicable in a case such as this is reinforced by the Geneva Convention on the High Seas, ratified by the United States on March 24, 1961, but not yet effective for lack of required ratification by 22 nations. Article 5, § 1, of the Convention reads:

"Each State shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. Ships have the nationality of the State whose flag they are entitled to fly. There must exist a genuine link between the State and the ship; in particular, the State must effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag."

Discussion seems to have been centered on what happens if the "genuine link" does not exist;<sup>14</sup> neither the text nor such explanatory materials as we have found say specifically what happens if the conditions of the final sentence are met. Yet, since it was deemed so important to insist upon the existence of a "genuine link" and the flag state's effective exercise of "jurisdiction and control in administrative, technical and social matters over ships flying its flag," it would be unreasonable to conclude that when all this had been done other states do not owe some obligations of respect . . .

. . . We realize that American unions understandably desire to organize vessels which they conceive to be in substance a part of this country's merchant marine, and that attempts to implement that desire can lead to a breach of the industrial peace which the Board is bound to promote, particularly when, as here, the stockholder of the foreign flag ships operates American flag vessels as well. Last summer's strike of the American merchant marine, with which we have some familiarity, see *United States v. National Marine Engineers Beneficial Ass'n.*, 294 F. 2d 385 (2 Cir.

<sup>14</sup> The "genuine link" requirement as adopted was less stringent than proposals made by such governments as the United Kingdom and the Netherlands and by the International Labor Conference, "which would have enabled states other than the flag state to withhold recognition of the national character of a ship if they considered that there was no 'genuine link' between the state and the ship." Report of the Committee on Foreign Relations to the Senate, 106 Cong. Rec. 10382 (1960). The Senate was told that the effect of the language as adopted in Geneva is that "no state can claim the right to determine unilaterally that no genuine link exists between a ship and the flag state," but "Nevertheless, there is a possibility that a state, with respect to a particular ship, may assert before an agreed tribunal, such as the International Court of Justice, that no genuine link exists. In such event, it would be for the Court to decide whether or not a genuine link existed." *Id.* [footnote by the Court.]



1961), sufficiently demonstrates this. Therefore, we recognize that a controversy between an American union and Empresa could lead or tend to lead "to a labor dispute burdening or obstructing commerce or the free flow of commerce" carried on by American flag ships, as well as directly obstructing commerce carried on by foreign ones. However, that scarcely is decisive—the question still is how far Congress intended to permit the Board to intervene in what would normally be the affairs of a foreign government in order to prevent this. Even if we were to make the unrealistic assumption that Congress was so far-seeing as not only to have contemplated the growth of flags of convenience when it adopted the Labor Act in 1935, but also to have anticipated cases where an American company would operate some ships under our own flag and others through foreign subsidiaries flying the flags of other countries, we see no basis for believing Congress would have chosen to solve the problem by an exercise of jurisdiction which would create such a conflict with a foreign government as would seem inevitable here. Mr. Justice Clark's statement in *Benz*, 353 U. S. at 147, 77 S. Ct. at 704, seems exceedingly apposite:

"For us to run interference in such a delicate field of international relations there must be present the affirmative intention of the Congress clearly expressed. It alone has the faculties necessary to make fairly such an important policy decision where the possibilities of international discord are so evident and retaliative action so certain."

In order to avoid any possible misunderstanding in this controversial area, we emphasize that we are deciding only the case before us; what the result should be when the contacts of the country of the flag are weaker relative to those of the United States than here, we do not say.

#### NOTES

##### *Visa—foreign "president"—standing to object to denial of visa*

A group in the United States that had planned, advertised, and sold tickets for the appearance of "President" Moise Tshombé of the Congolese province of Katanga had no standing to bring a declaratory judgment proceeding to require a determination to be made by the Secretary of State on the application for a visa made by the alien. *Young Americans for Freedom, Inc. v. Rusk*, 205 F. Supp. 603 (U. S. Dist. Ct., D. C., May 7, 1962).

##### *Sovereign immunity—waiver—effect of foreign state filing as plaintiff in Federal court on transfer to State court*

The administrator of the assets in New York of the estate of the late King Faisal II of Iraq obtained the consent of the Surrogate to the transfer to the accounting proceeding pending before the Surrogate of the claim of the Republic of Iraq to the King's property, filed in the Federal District Court, as against the contention by the Republic of Iraq that its bringing of suit was not a waiver of immunity as to the Surrogate's court, *In re*

*Estate of H. M. King Faisal II*, 230 N. Y. Supp. 2d 700 (Surrogate's Court, New York County, June 11, 1962). Thereafter the defendant administrator in the Federal proceeding moved for transfer, and the motion was denied on the ground that the plaintiff's submission to the jurisdiction of the Federal court did not waive its sovereign immunity to suit in the State court, *Republic of Iraq v. First National City Trust Co.*, 207 F. Supp. 588 (U. S. Dist. Ct., S. D. N. Y., August 14, 1962).

### *Treaty interpretation*

The question whether Canadian corporations had a "permanent establishment" in the United States, as the term was used in the Tax Convention of 1942 between the United States and Canada, was the principal point of *Donroy, Inc. v. United States*, 301 F. 2d 200 (9th Cir., April 2, 1962). The Conventions of the Postal Union of the Americas and Spain were dealt with in *Moore-McCormack Lines, Inc. v. United States*, 301 F. 2d 342 (Ct. Claims, April 4, 1962).

When decedent died in an airplane crash on a flight between two Canadian points, the Warsaw Convention was held not applicable, despite contentions that the flight was part of an international trip from a point in the United States. *Stratton v. Trans-Canada Air Lines*, 32 D.L.R. 2d 736 (Brit. Col. Ct. App., Feb. 21, 1962).

### *Failure of Department of State to request immunity—refusal of effect to Cuban confiscatory law with respect to property in New York*

A Cuban refugee brought an action in New York to recover on a draft drawn on a Cuban bank, which bank was dissolved pursuant to Cuban law and the Banco Nacional de Cuba declared its successor. The court gave judgment for the refugee and refused to give effect to dissolution of defendant Cuban bank. The Czechoslovak Ambassador applied to appear specially and assert a plea of sovereign immunity on behalf of Cuba and its instrumentality, the Banco Nacional. This motion was dismissed, *Gonzalez v. Industrial Bank (of Cuba)*, 33 Misc. 2d 283; 227 N.Y.S. 2d 456 (N.Y. County, Dec. 26, 1961). Justice McGivern said in part:

The State Department of the United States has not filed any suggestion that sovereign immunity be considered in this case. Its failure or refusal to suggest such immunity is accorded significant weight. . . .

The court has decided that Law Decree 891<sup>1</sup> is confiscatory in nature, ineffectual to deprive plaintiff of her property, and is in violation of the public policies of the State of New York. . . .<sup>2</sup>

No recognition will be given to such expropriation decrees as apply to assets located in New York. . . .<sup>3</sup>

<sup>1</sup> Nationalizing defendant Industrial Bank.

<sup>2</sup> Citing and quoting from *Russian Reinsurance Co. v. Stoddard*, 240 N.Y. 149, 163, 147 N.E. 703, 707; and *Vladikavkazsky Ry. v. New York Trust Co.*, 263 N.Y. 369, 378, 189 N.E. 456, 460.

<sup>3</sup> Citing *Bollack v. Société Générale*, 263 App. Div. 601, 33 N.Y.S. 2d 986; *Plesch v. Banque Nationale de la République d'Haiti*, 273 App. Div. 224, 77 N.Y.S. 2d 43.

The United States Government does not have an overriding public policy requiring recognition of the lawless act of the Cuban regime which is clearly repugnant to our public policy. The decree is offensive and will not be given effect.

*Diplomatic immunity—intra-Commonwealth relations—immunity from legal process of person acquiring diplomatic status after suit commenced*

Defendant Indian counselor for education on the staff of the Indian Commissioner to the United Kingdom allegedly made defamatory statements in 1956 concerning plaintiff Indian doctor, who was connected with an Indian Government hostel for Indian students. In 1959, after the defendant ceased to have diplomatic status,<sup>4</sup> he was served with process in a civil action for the 1956 slander as well as for alleged fresh slanders in 1959. After the defendant had taken procedural steps to obtain particulars and have the actions consolidated, defendant in July, 1960, was appointed and served as scientific adviser on the staff of the High Commissioner for India. This was held to give him immunity, despite the procedural steps previously taken in the case. *Ghosh v. D'Rozario*, [1962] 2 All E. R. 640 (Court of Appeal, April 12, 1962).

*Extradition—intra-Commonwealth—political offenses or motives for seeking surrender*

The Republic of Cyprus sought the surrender of a Cypriot who had fled Cyprus (with Cyprus Government approval) in January, 1961. Since Cyprus remained within the Commonwealth, neither the Extradition Act nor any extradition treaty applied, but merely the British Fugitive Offenders Act, 1881. This made no exception for political crimes. The Cypriot sought had been prominent in struggles in Cyprus, before independence, as an opponent of the group now in power, and his surrender was sought to stand trial for alleged offenses in connection with the struggles. The House of Lords dismissed his appeal from a decision below denying him habeas corpus against surrender to Cyprus. The majority of the Court was willing to assume that there were no improper motives behind the attempt to obtain him for trial, and that he would be adequately protected against assassination in Cyprus before or during trial. *Zacharia v. Republic of Cyprus*, [1962] 2 All E. R. 438 (April 17, 1962).<sup>5</sup>

<sup>4</sup> The British Diplomatic Immunities (Commonwealth Countries and Republic of Ireland) Act, 1952, provides: "such members of the official staff of a chief representative as are performing duties substantially corresponding to those performed by members of the official staff of an envoy of a foreign sovereign power shall be entitled to the like immunity from suit and legal process as is accorded to members of the official staff of such an envoy."

<sup>5</sup> On a somewhat similar point, see *Regina v. Secretary of State for Home Affairs (Ex parte Soblen)*, [1962] 3 All E. R. 373 (Q.B.Div., and Ct. App., July 26, 1962), denying habeas corpus to an alien sentenced to life imprisonment in the United States for espionage, who had fled to Israel while on bail and who severely injured himself, while being taken back to the United States, for the purpose of being hospitalized in England. He was denied "leave to land," though he had been taken from the plane on medical emergency grounds.

## GERMAN AND SWISS CASES \*

*Killing of Russian slave laborers by German soldiers in 1945—murder under Penal Code—no defense under international law—no defense of superior orders—section 47, I, No. 2, Military Penal Code*

DECISION OF THE FEDERAL SUPREME COURT. September 30, 1960.  
4 St R 242/60. Juristenzeitung 1962, p. 28 *et seq.*

The accused, a former officer in the German Army, was convicted of murder and sentenced to life imprisonment at hard labor<sup>1</sup> for participating in the shooting of Russian slave laborers at the end of March, 1945. The workers, after having lost their employment in the Rhineland and Westphalia, had proceeded to hike toward the east; they had been picked up by the German military and placed in an assembly camp under guard. The division commander ordered them to be shot, allegedly out of fear that they might become dangerous to the German population after the division had retreated. Before one of the shootings the accused explained to the soldiers in the firing squad that the shootings were necessary because the precarious food situation of the German population was worsened by the presence of the foreign workers, and there was one alternative only: "Either we or they."

The Supreme Court sustained the verdict and the sentence of the lower court on the following grounds:

1. The lower court was right in finding that the order of the division commander was criminal, since the foreign workers had not been sentenced by a court and the necessities of war did not justify the shootings.

(a) The order cannot be excused as a reprisal, since the shootings were kept secret.

(b) The killings would not have been lawful even if, as was argued, the Polish and Russian workers could have been treated as "enemies" because their native countries in radio messages and pamphlets had incited them to inimical acts against Germany. The German Government itself had taken the foreign workers to Germany for peaceful purposes and had placed them in camp custody under armed guards. To kill them without a death sentence pronounced by a court was, under universal principles of international law and the law of war, at least as unlawful as was the execution of defenseless prisoners of war.

(c) Self-defense cannot be pleaded vis-a-vis these people, since there was no present attack from their side. Nor can it be said that there was a war emergency. The foreign workers did not represent a present danger to life or limb of the German population. As stated in the judgment of the trial court, they willingly obeyed the orders of the German guards and were even willing to continue working for the German people.

(d) There is no general principle of retaliation in international law which would exculpate the accused, *e.g.*, in view of the air raids of the

\* Reported by M. Magdalena Schoch, United States Department of Justice, Washington, D. C.

<sup>1</sup> Germany has abolished the death penalty.—Reporter's note.

Allies against German cities or the cruelties committed by the Soviet troops against defenseless Germans after the occupation of the German Eastern territories. This so-called principle of "*tu quoque*" means, first of all, only that no state may charge another state with violations of international law and try the other state's citizens for such acts, if it has committed the same violations against the other state or its allies. The right and duty of a state to try and punish its own citizens for violations of international law according to its own criminal law are not affected by this principle. In the Nuremberg trials of war criminals, the defense of "*tu quoque*" was successful only in the proceedings against Grand Admirals Dönitz and Raeder with regard to the unrestricted U-boat war; in all other cases it was rejected. Moreover, the principle of "*tu quoque*" is generally understood to be restricted in the sense that it applies only in cases where both sides committed exactly the same violations of international law and where there exists a direct intrinsic connection between such violations. The standards to be applied must be particularly strict where attacks against life are concerned. Killing a person without a death sentence pronounced by a court is permissible only where it results from a use of force that is absolutely necessary under the circumstances (Art. 2, II, of the Human Rights Convention). Any close connection between enemy air raids or cruelties of enemy fighting forces after their invasion of German territory, on the one hand, and the killing of defenseless, docile civil workers who were in safe custody, on the other hand, must be emphatically denied. Thus the only question that remains to be examined is whether the accused possibly succumbed to the erroneous belief that the shootings were justified by some rule of international law, and whether he was culpable in so doing.

(e) The trial court did not err in holding that the shooting of innocent persons ordered to prevent any possible future dangers is criminal.

2. All the arguments on appeal which attack the judgment for its failure to make findings as to whether the division commander knew that he was giving an order to commit a crime and whether the accused was aware of the mental attitude of his superior, are irrelevant. This alleged criterion is immaterial under section 47, I, No. 2, of the Military Penal Code; which provides:

"Where the execution of an order in a military matter violates a penal law, the superior who gave the order is alone responsible therefor. However, the subordinate who obeyed the order shall be punished as a participant

- (1) if he has exceeded the order given to him, or
- (2) if he knew that the order regarded an act which aimed at the commission of a civil or military crime or misdemeanor."

The fact that the superior may be blind to the law does not relieve the subordinate from his own responsibility for the execution of an order which he himself knew to be criminal.

*Export control—violation of undertaking against transshipment to embargoed areas—seizure of cargo by U. S. authorities—contract of insurance of cargo in case of “seizure” void as being contra bonos mores*

JUDGMENT OF THE FEDERAL SUPREME COURT. May 24, 1962. II ZR 199/60. 15 Neue Juristische Wochenschrift 1436 (No. 32).

The firm X G.m.b.H. entered into a marine insurance contract with the defendant insurance company for the shipment of 500 tons of boric acid from Los Angeles to Hamburg. The policy, dated February 5, 1955, referred to the General German Marine Insurance Conditions and a number of supplementary provisions, among them the Institute War Clauses, which include the risk of “seizure.” The policy was made out “in favor of the bearer” and “for account of whom it may concern.” The plaintiff on behalf of X company issued a letter of credit for the purchase price of the merchandise in favor of the seller. The X company assigned all rights under the insurance policy to the plaintiff as security, and handed the policy over to the plaintiff. The exportation of borates from the United States is subject to a license under the American embargo regulations, hence the application for a license must indicate the proposed use and the ultimate user of the borates.

In 1954 the American seller applied for and obtained licenses for the exportation of 900 tons of borax and 500 tons of boric acid to West Germany, indicating the X company as the ultimate consignee. Appended to the applications were statements of the X company in which it confirmed the ultimate use of the borates in West Germany and obligated itself to notify immediately the Office of International Trade in Washington, D. C., of any change in the proposed use. When it made these declarations the X company had the intention not to use the borates in West Germany but to export them to Poland. For this purpose it obtained a special transit license of the Land Central Bank of Hesse, which bore the following notice: “There is an embargo in the United States on the exportation of borates to the countries of the East bloc. This involves the risk that both the U. S. exporter and the German transit dealer may run into difficulties with U. S. authorities.”

The insured 500 tons of boric acid were stopped by the American authorities on their way from Los Angeles to Hamburg in New York on February 24, 1955, because the Department of Commerce had temporarily withdrawn the export license on February 15, 1955, on the ground of violation of American embargo provisions. Subsequently the merchandise was confiscated by the United States. The plaintiff sued the insurance company for payment of the insurance money for loss of the merchandise through seizure. The two lower courts dismissed the action. On final appeal, the dismissal was sustained for the following reasons:

II. The plaintiff's own allegations show that the contract of insurance was void as being *contra bonos mores* (Section 138, par. 1, German Civil

Code). . . . The purpose of the embargo on borates is to prevent this raw material and the finished products made out of it from increasing the armament potential of the East bloc; thus it serves to maintain peace and freedom in the Western world. These measures are taken not merely in the interest of the United States but also in the interest of the entire free Western world and thus the Federal Republic of Germany as well (see decision of this Court of December 21, 1960, 34 BGHZ 169, 14 N.J.W. 822)<sup>1</sup>. . . . It should be mentioned that in the meantime the Federal Republic has expressly adopted the American embargo policy and issued the necessary prohibitions. It has joined the Co-ordinating Committee for East and West Trade Policy, in which a number of states have joined to prevent the circumvention of the embargo by transit shipments of strategic materials to the states of the East bloc (see Runderlass Aussenwirtschaft No. 8/57; BAnz. of February 2, 1957, No. 41, in the appendix to which borax and borates are listed; see also BB 55, 49; 56, 20).

. . . according to plaintiff's own statements, the contract of insurance was intended by both parties to further exports from the United States which violated the embargo, for the insurance relieves the insured of a large portion of the risk and he is, therefore, more easily inclined to enter into such a transaction than if he alone had to bear the considerable risk. In this manner the contract of insurance took on an immoral character by reason of its substance, its motive and its purpose. This result is not changed by the license of the Land Central Bank. The question whether the parties realized that they violated *boni mores* is immaterial to the application of Section 138, par. 1, of the Civil Code. In any event, they were aware in this case of the facts which constituted such a violation. . . .

*Continued validity of administrative action of occupation authorities—  
JEIA decisions—Convention on the Settlement of Matters arising out  
of the War and the Occupation—Allied High Commission Law No.  
19/56—constitutionality of German ratifying legislation*

DECISION OF FEDERAL CONSTITUTIONAL COURT, FIRST DIVISION. February 6, 1962. I BvL 52/55.

A District Court submitted to the Constitutional Court the question of the constitutionality of Article 2, par. 1, of Chapter I of the Convention on the Settlement of Matters arising out of the War and the Occupation or, more precisely, of the German law which put the Convention into effect (Law of March 24, 1955, BGBl.II, 213).

Article 2, paragraph 1, of the Settlement Convention reads as follows:

ARTICLE 2

1. All rights and obligations created or established by or under legislative, administrative or judicial action of the Occupation Authorities are and shall remain valid for all purposes under German law whether or not their creation or establishment was in conformity with

<sup>1</sup> Reported in 56 A.J.I.L. 562 (1962).

other legislation. Such rights and obligations shall be subject without discrimination to the same future legislative, judicial and administrative measures as similar rights and obligations created or established by or under German municipal law.

The litigation had arisen out of a decision rendered by the Joint Export-Import Agency (JEIA) in December, 1953, in a dispute over an export agreement made between a German firm and the *Office du Commerce Extérieur*, which originally handled all export business in the French Zone of Occupation. In October, 1948, this Office ("Oficomex") was merged with JEIA, whose liquidation began on October 15, 1949. The Allied High Commission, on January 26, 1950, issued Law No. 19, which was subsequently amended by Law No. 56 of June 29, 1951 (referred to herein as Law No. 19/56). This law ordered all claims against JEIA to be filed by June 29, 1951; any claims not so filed were deemed extinguished. Article 6 of the law read:

#### ARTICLE 6

All decisions which have been or will be made by the Joint Export-Import Agency, or by its liquidators, or by the Allied High Commission in respect of claims within the purview of this Law shall be final and conclusive and shall not be subject to review by any process whatsoever.

Under Article 7, the assets of JEIA were transferred to the Federal Republic, which had to satisfy out of these assets such claims as the liquidators of JEIA or the Allied High Commission allowed, but was not to be otherwise liable to creditors of JEIA out of the assets transferred or any other Federal assets. These provisions were confirmed in Chapter IX, Article 4, of the Settlement Convention. Since May 5, 1955, the Federal Republic has administered the JEIA assets in a fiduciary capacity and handled their liquidation. But it cannot render any decisions under Article 6; only after termination of the liquidation will the Federal Republic be entitled to dispose of any remaining assets, in agreement with the former occupying Powers.

The original litigation concerned claims arising from an export contract made by "Oficomex" with a German firm in 1947. Plaintiff, the legal successor of "Oficomex" and JEIA, sued the firm for unjustified enrichment. The firm filed a counterclaim for damages. The District Court was of the opinion that paragraph 1 of Article 2 of Chapter I of the Settlement Convention violated the Basic Law in that it perpetuated decisions of JEIA or its liquidators beyond the termination of the occupation regime and that it permitted JEIA to render final decisions regarding claims arising from JEIA transactions, thus denying its contract partners access to the courts. The District Court specifically relied on Article 3, paragraph 1 (equality before the law), and Article 19, paragraph 4, of the Basic Law (guaranty of access to the courts for "anyone who is injured in his rights by public authority") as well as Article 6, paragraph 1, of the Human Rights Convention which provides: "In the determination of his civil rights and obligations or of any criminal charge against him everyone is entitled to a



fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. . . .” It therefore stayed the litigation and referred the question of constitutionality to the Federal Constitutional Court.<sup>1</sup> The Federal Government joined the proceeding, asserting that the contested provisions of the Convention did not violate the Basic Law.

The Federal Constitutional Court held that the law putting the Settlement Convention into effect, and Article 2, paragraph 1, of Chapter I of the Convention, insofar as applicable here, were not contrary to the Basic Law. In the opinion it reasoned as follows:

1. The letter of JEIA of December 17, 1952, which denied the defendant's counterclaim, constitutes a decision within the meaning of Art. 6 of AHC Law No. 19/56. The legal validity of this Law cannot be doubted. There is no general rule of international law which would have prevented the occupying powers from referring to an occupation authority the final decision on private-law claims which arose against it out of the organization of German foreign trade.

2. Thus the decision of December 17, 1953, determined—in any event for the duration of the occupation regime—that the defendant had no claim against JEIA. Art. 2, para. 1 of Chapter I of the Settlement Convention merely maintained this legal state of affairs. Its obvious purpose was to prevent subsequent review by German agencies of measures of the occupation authorities. It can be assumed with certainty that the occupying powers considered this provision to be of decisive importance. The Federal Minister of Finance has stated that on this particular point it was not possible for the German negotiators to attain a provision which would have been in full harmony with our present views of the rule of law. Under these circumstances the provision was accepted because it served the liquidation of the occupation regime in general, because it terminated the method objected to at least for the future, and thus paved the way for a state of affairs approximating the Basic Law.

3. Art. 6, par. 1, of the Convention on Human Rights of November 4, 1950, has no immediate relevance for the question to be decided here. In this connection it need not be decided whether the provision contains a general guaranty of access to the courts for private-law claims at all. In any event, it envisages the future shaping of the national laws of the signatories and does not refer to exceptional situations such as are the necessary consequences of a prolonged occupation regime and of a period of transition during which such a regime is transformed into a normal state of legal affairs. Therefore, the legislature of the Federal Republic was not prevented, even after the effective date of the Convention on Human Rights (September 3, 1953), from consenting to the provision in question which had been agreed upon with the occupying powers (among which the U.S.A.,

<sup>1</sup> Under Art. 100, par. 1, of the Basic Law, whenever a court in a pending case comes to the conclusion that a statute which is pertinent to the adjudication of the case violates the Basic Law, it must stay the proceeding and *ex officio* refer the constitutional question to the Federal Constitutional Court.—Reporter's note.

incidentally, is not a party to the Convention on Human Rights). The question of what rank that Convention occupies within the German legal system generally need not be discussed here.

*Application by British Crown for revalidation of Reichsmark bonds issued by Conversion Office for Foreign Debts—bonds seized as prize by British in 1941—situs of obligation embodied in bearer bonds—Allied High Commission Law No. 63—Convention on the Settlement of Matters arising out of the War and the Occupation*

ORDER OF THE KAMMERGERICHT (COURT OF APPEALS FOR WEST BERLIN).  
February 3, 1961. 2 W 760/58. 14 Neue Juristische Wochenschrift 1214.\*

This was a proceeding, under postwar legislation, for the revalidation of a parcel of Reichsmark bonds issued by the German Conversion Office for German Foreign Debts in 1937. The bonds were submitted in 1955 by the British Crown, represented by the Admiralty Marshal, Royal Courts of Justice. The bonds had been seized in Trinidad in 1941 and condemned by a prize court, and the Admiralty Marshal had held them in his possession at all subsequent times. The lower court (*Landgericht* Berlin) decided that the British Crown had shown ownership at the decisive date, January 1, 1945, and granted revalidation. On appeal by the competent authority of Berlin, the Court of Appeals reversed on the following grounds:

The lower court erred in holding that the British Crown was the owner of the bonds on the decisive date. It is true that a chose in action evidenced by an instrument made out to bearer can be transferred in the same manner as ownership in things is transferred, and that the acquisition of creditors' rights is dependent on the acquisition of the paper. Thus the former Supreme Court has held that the general principle that a chose in action is located at the domicile of the obligor does not apply where a chose in action is embodied in a negotiable instrument (decision of June 2, 1923, 107 RGZ 44, at 46). As regards the right under a bill of exchange, it held, such right is merged in the instrument to such an extent that it cannot be asserted by anyone who does not have possession of the instrument. Hence the right under a bill of exchange is located at the place where the bill is held.

If this rule were generally applicable, the confiscation abroad of a security<sup>1</sup> would be able to deprive the owner of his property and transfer it to another, despite the generally recognized rule of international law that the power and authority of a state cannot reach beyond its borders.

The view of the former Supreme Court is, however, no longer accepted today. Both the courts and legal scholars take the position that a chose

\* The Editor of the *Neue Juristische Wochenschrift* was kind enough to make the full text of the decision available to the reporter.

<sup>1</sup> Reporter's note: It should be pointed out that the German generic term "Wertpapier" is broader than the concept of "securities." It includes bills of exchange, bills of lading and checks, in addition to stocks, bonds, debentures, etc.

in action, even though merged in an instrument, is located where the debtor or the maker is domiciled (KEGEL, *Internationales Privatrecht*, 1960, pp. 357, 361; VANNOD, *Fragen des Internationalen Enteignungs- und Konfiskationsrechts*, 1959, pp. 61-63; SEIDL-HOHENVELDERN, *Internationales Konfiskations- und Enteignungsrecht*, 1952, p. 99; DUDEN, *Enteignung deutschen Auslandsvermögens*, *Festschrift für Raape*, 1949, pp. 126-127). This position was apparently taken by the English courts, too. SEIDL-HOHENVELDERN (op. cit. p. 91) mentions two decisions (*Sutherland v. Administrator of German Property* [1934] 1 K.B. 423, and *Administrator of German Property v. Russian Bank for Foreign Trade*, in which the claim of the British Administrator was recognized on the ground of the English domicile of the debtor, although the instruments evidencing the debt were outside England).

Under these circumstances the Court need not decide the merits of the view expounded by the Federal Minister of Finance in a letter to the Office for Securities Revalidation dated May 16, 1951, on the subject of Control Council Law No. 5, which seized all German external assets and transferred them to a Commission for German Foreign Assets. In this letter the Minister argued that the principle of conflict of laws according to which rights embodied in an instrument are located at the place where the instrument is situated, applied only to securities still in circulation, but not to those already invalidated.

The rule in the law of securities and negotiable instruments, that the rights represented by the instrument and the document are inseparably connected, can be effective only to the extent that it is required in the interests of negotiability and transferability. Beyond these limits it cannot be asserted, especially not where its application would grossly violate other interests and would lead to inequitable results (MÜLLER, *Zur Belegenheit von Vermögensrechten*, in BB 1951, p. 186 et seq.). In view of the fact that the rule of law could be restored only gradually in the period after January 1, 1945, the courts in revalidation proceedings have been expressly charged with a duty to examine whether the act in question was legally valid under constitutional, administrative or international law (see EICH-HORN, *Handbuch für die Wertpapierbereinigung*, Part 1, 2 § 21 Note 6, p. 123 et seq.).

It follows that the order of the Prize Court seizing the bonds or transferring them to the British Crown could reach the instruments only, but could not reach the chose in action incorporated in the bonds. This conclusion is supported by Law No. 63, of the Allied High Commission of August 31, 1951.<sup>2</sup> This law, in Articles 1 and 2,<sup>3</sup> lays down rules which

<sup>2</sup> Law No. 63 "clarifying the status of German external assets and of other property taken by way of reparation or restitution" of Aug. 31, 1951 (*Official Gazette of the Allied High Commission for Germany*, No. 64, p. 1107 et seq.).—Reporter's note.

<sup>3</sup> Art. 1, par. 2, exempts from the definition of "external assets":

(a) securities issued in Germany, instruments of title relating to property located in Germany, or commercial instruments payable by an obligor residing or having its situs in Germany unless such securities or instruments are denominated in non-German currency, or

conform to the principles which the Allies have applied among themselves in conventions for the settlement of inter-custodial conflicts. The decisive criterion for the determination of rights in external assets is now the domicile of the issuer or the debtor. The foreign securities surrendered according to Law No. 63 have, therefore, definitely become external assets, while the securities having German issuers or obligors are German property, even if they are located abroad. Accordingly, Great Britain has authorized their return upon application (announcement of the Board of Trade of July 26, 1951), since their confiscation is not sanctioned by Law No. 63.

The Convention on the Settlement of Matters arising out of the War and the Occupation, of October 23, 1954, maintains Law No. 63 in effect (Chapter VI, Art. 2). Art. 3 of Chapter VI provides that the Federal Republic shall in the future raise no objections against the measures which have been or will be carried out with regard to German external assets or other property seized for the purpose of reparation or restitution. Art. 4, however, provides in paragraph 1 that the Federal Republic may negotiate agreements with all countries which have been at war with Germany since September 1, 1939, but which are not members of the Interallied Reparation Agency (IARA), regarding German external assets which have not yet been transferred or liquidated or whose liquidation proceeds have not yet been disposed of. Art. 4, par. 2, contains the further provision that the Federal Republic may negotiate agreements with the members of IARA concerning, *inter alia*, securities issued in Germany in Reichsmarks. Thus the Settlement Convention likewise proceeds on the theory that such securities are situated within Germany and are, therefore, not subject to seizure abroad (citing, with approval, the decision of the District Court of Hamburg of February 15, 1956, *Recht der internationalen Wirtschaft* 1957, p. 75 et seq.).

Consequently, while the seizure or the condemnation by the British Prize Court could result in the acquisition of ownership of the bond instruments by the British Crown, it was ineffective to transfer the obligation of the Conversion Office for German Foreign Debts itself.

*Execution of German default judgment in Switzerland—Swiss-German Convention on Execution of Judgments of November 2, 1929—Swiss public policy*

DECISION OF SWISS SUPREME COURT IN THE MATTER OF HAGEN v. GRITSCHNEDER AND SUPERIOR COURT OF THE CANTON OF THURGAU. March 29, 1961. 87 Entscheidungen des Schweizerischen Bundesgerichtes I, 73.

Plaintiff, a Swiss resident, gave a power of attorney to appellee, an attorney in Munich, Germany, for the purpose of prosecuting a claim in the

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(b) securities issued by a German obligor, if the documents evidencing the obligation were located in Germany on January 1, 1945, . . .

Art. 2 declares that all rights, title or interests of former owners to or in property to which this Law extends shall be deemed to be extinguished at defined dates.—Reporter's note.

German courts, and agreed that the place of performance and the forum for the attorney-client contract was to be Munich. The attorney sued for his fee in the District Court (*Landgericht*) of Munich. The Swiss defendant in that action was properly served through the intermediary of the local Swiss court. He wrote a letter to the Munich court saying that he had withdrawn the power of attorney the previous year, that he therefore did not recognize the jurisdiction of the Munich court, and would not enter an appearance. The Munich court notified him that he could assert his defenses only through an attorney admitted to practice before the District Court, and that if he failed to do so, a judgment in default could be rendered against him. The Swiss party did not appear and a default judgment was entered. The attorney sought execution of the judgment in Switzerland, which was granted by the Superior Court of Thurgau. The Swiss party filed a constitutional complaint under Articles 4<sup>1</sup> and 59<sup>2</sup> of the Swiss Federal Constitution and Articles 2 and 4 of the Swiss-German Convention on Execution of Judgments of November 2, 1929 (RGBl. 1930, II, 1065).<sup>3</sup> He argued that the jurisdiction of the Munich court, which had been agreed upon between the parties in accordance with Art. 2(2) of the Convention, came to an end when he withdrew his power of attorney, and that, furthermore, execution of the judgment would violate Swiss public policy and must, therefore, be refused by the Swiss authorities under Art. 4, par. 1, of the Convention (see note 3). He regarded as violations of Swiss public policy the rule of German law which requires representation by counsel in a District Court, and the fact that the judgment in default was rendered without an opinion.

The Supreme Court dismissed the complaint for the following reasons:

2-4. The question whether a German judgment is capable of execution in Switzerland is governed exclusively by the Convention. By signing the power of attorney, which included an express consent to the jurisdiction of the Munich courts, the plaintiff subjected himself to that jurisdiction in accordance with Art. 2(2) of the Convention.

5. An agreement on jurisdiction made in connection with a contract remains in effect as long as rights and obligations under the contract exist, even though the contract itself may have been terminated. If the plaintiff should have withdrawn his power of attorney, which defendant denies, this would not result in depriving the Munich courts of jurisdiction in matters pertaining to the contract, for which that jurisdiction was agreed upon between the parties.

6 (a). Plaintiff's argument that the recognition of the judgment would

<sup>1</sup> Art. 4 proclaims equality before the law of all Swiss citizens.—Reporter's note.

<sup>2</sup> Art. 59, par. 1, of the Constitution provides:

"Any solvent debtor having his permanent residence in Switzerland may be sued for personal claims in the courts of his residence only; consequently his property may not be attached outside the canton of his residence for the satisfaction of his debts." —Reporter's note.

<sup>3</sup> Art. 2 of the Swiss-German Convention lays down the criteria for jurisdiction, one of which is submission by express agreement. Art. 4 sanctions non-recognition for reasons of public policy.—Reporter's note.

violate Swiss public policy is based on the allegation that the requirement of representation by counsel and the absence of an opinion in a default judgment are unknown to Swiss law. This, however, is not sufficient to show a violation of Swiss public policy. Public policy can be asserted only where the national sense of justice would be offended to an intolerable degree by the recognition and enforcement of foreign judgments (Decisions of this Court, 84 BGE I, 121, cons. 2, with authorities; 85 I 47, cons. 4). Such an offense cannot be seen in a situation where procedural rules of the applicable foreign law are unknown to Swiss law; the plaintiff would have to show in addition that these foreign rules of procedure are clearly incompatible with our national sense of justice. This he has not done.

(b). German law required representation by an attorney in the District Courts and all higher courts long before the conclusion of the Convention, and this was well known as a material difference between German and Swiss procedure. The fact that the Convention lists the requirements of a judgment which the judgment state must meet (Art. 4, par. 3) without naming the right of a party to conduct its own case, can be understood to mean only that the requirement of representation by an attorney shall not be deemed to be an impermissible encroachment on a party's right to defend himself. The right to be heard in court is, of course, an important constitutional right in Switzerland, which flows directly from the general constitutional principle of equality before the law (see, e.g., 85 BGE I, 202 and 207). But in a civil proceeding all a party can demand is the opportunity to plead his case before the judge and to defend himself; he cannot claim the right to do this in every case personally, without the aid of counsel.

(c). According to Art. 7, subs. 1 of the Convention the party seeking execution must submit a "complete" copy of the decision. Under the German Code of Civil Procedure judgments in default which are rendered in accordance with the request in the complaint need not contain a finding of facts nor an opinion explaining the reasons for the decision (Section 313 par. 3, German Code of Civil Procedure); and where the judgment is rendered in this abbreviated form, the copy issued to the plaintiff is in this same form (Section 317, par. 4). This Court, in a previous unpublished decision in the matter of *André Dewald & Sohn*, rendered on March 6, 1936, has already held that such a copy of a German default judgment must be recognized as "complete" within the meaning of the Convention, since there was nothing in the Convention to indicate that it intended to create an independent notion of a "complete" copy whose requirements could not be met by a default judgment rendered under Section 317, par. 4, of the German Code of Civil Procedure. Since the copy filed by the defendant complies with Art. 7 of the Convention, the plaintiff cannot be heard to argue that the absence of an opinion in the judgment violates Swiss public policy; for international treaties concluded by Switzerland are considered municipal law and, therefore, cannot violate Swiss public policy. (72 BGE I 275 b).

*Divorce of Egyptian husband from Swiss wife, obtained in Soviet Union, not recognized in Switzerland because of public policy*

F. v. CIVIL STATUS COMMISSION OF APPENZEL I.R.H. 88 Entscheidungen des Schweizerischen Bundesgerichtes, I, 48.

Swiss Federal Supreme Court, Second Civil Division, Feb. 8, 1962.

An Egyptian Army officer, married to a Swiss woman who kept her Swiss nationality, was repeatedly ordered to Moscow for training, his wife staying in Switzerland. The parties agreed that he would obtain a divorce in Moscow, which he did, in accordance with the formalities of Moslem law, by a declaration before a consular official in the Embassy of the United Arab Republic and two lieutenants as witnesses. When the wife sought to have this divorce entered in the Register of Vital Statistics in Switzerland, the competent Cantonal authority there denied registration on the ground that the wife had Swiss domicile at the time of the purported divorce, and that the unilateral dissolution of the marriage according to Moslem law was opposed to basic concepts of Swiss law. Upon appeal by the wife, the Federal Supreme Court confirmed this administrative decision. It held that, even if she were domiciled in Egypt at the time, the proceeding in Moscow did not meet the requirement of Swiss law that, in order to be entitled to recognition, a divorce must have been *pronounced* by a court having jurisdiction. Even though an administrative authority might suffice, there must have been an examination by the authority that pronounces the divorce, not merely a unilateral repudiation by the husband. Such is incompatible with Swiss public policy.

## BOOK REVIEWS AND NOTES

*The Political Foundations of International Law.* By Morton A. Kaplan and Nicholas deB. Katzenbach. New York: John Wiley & Sons, 1961. pp. xi, 372. Index. \$6.95.

This book by a political scientist and a lawyer is an outstanding contribution to the understanding of the relation of international law to the world political process. "The political foundations" of international law are discussed within the framework of the models of world politics previously developed by one of the authors in another book (Kaplan, *System and Process in International Politics*). International law is seen as reflecting in large part the system of power relationships characteristic of an epoch. Many of the recent changes in international law and its rôle in international affairs are interpreted as products of the shift from the classical "balance of power" system as it existed before 1870 to the "loose bipolar" system of the "Cold War" era. The period between 1870 and 1945 is regarded as one of transition in which the traditional "balancing process" broke down. Some terms and concepts are borrowed from the theory of games.

The attention of the authors is thus focused on the rôle of international politics in the shaping of international law. The influence of other factors, such as domestic political processes, economic interests, technological change and ideology, is recognized but not explored in depth. The authors perform a valuable service in identifying the many effects of political change on international law, but it may be doubted that the rôle of any one factor, including the political, can be fully understood without a thorough study of the influence of other factors. Preoccupation with one factor leads the authors at times to exaggerate its importance or to oversimplify its operation. They suggest, for example, that the growth of arbitral institutions after 1870 was a "vague" response to the need for a substitute for the "balancing process" which had been broken down, in large part, by the Franco-German antagonism stemming from the Franco-Prussian War (p. 42). This suggestion is not only unsupported by historical data, but overlooks the typical exclusion of disputes involving the "vital interests" or "honor" of states from the scope of arbitration. Yet it was to precisely such disputes that the "balancing process" would have been applied in its heyday.

The book is said to have been written for three audiences: scholars, "statesmen and the public in general," and students (p. vi). The authors attempt to survey broadly the whole field of international law. Their concentration on the political factor, however, results in one-sidedness which may be misleading to the uninitiated. The amount of attention devoted to the various topics is very uneven. Topics of high "political"



content, such as recognition, are treated in considerable detail and depth, while other complex and important problems (*e.g.*, those of protection of foreign economic interests and of "contiguous zones" at sea) are little more than mentioned. There is a tendency to exaggerate the impact of the "Cold War" on international law and on important political processes such as de-colonization. The style and mode of presentation are also uneven. Some topics are covered so concisely and in such simple terms as to give the impression of almost breathless haste. Other sections are written on a much higher level of legal analysis. Political scientists who are not also lawyers may find much of the chapter on jurisdiction difficult to understand. Certain views of questionable legal soundness (*e.g.*, the view that a state can free itself from the duty to comply with the rules of diplomatic immunity by giving notice to that effect, p. 254) are asserted with dogmatic finality. There are numerous factual errors (*e.g.*, the attribution to Chile of the imposition of the large fine on the Onassis whaling fleet, and the assertion that the U.N. Military Staff Committee has not been established), misleading omissions (*e.g.*, the lack of mention of American administration of Okinawa and some other Japanese islands on p. 170, and of Latin American organizations for economic integration in Chapter 12), and imprecisions of language (*e.g.*, the references to a "Permanent Court of Justice," and to the New Hebrides as "the Hebrides"). The non-word "signator" is used interchangeably with "signatory." The familiar expression "sector claims" becomes transmuted, deliberately but without explanation, into mysterious "vector claims." The "Bibliographical Notes" omit some of the most important books on a number of topics.

The authors' sensitivity to the political factor enables them to note innumerable instances of the impact of that factor on the development and operation of international law. Many of the valuable insights and elucidations in the book stem, however, not from the effort to relate international law to the particular models of international politics adopted by the authors, but from the application of modern modes of jurisprudential analysis. The authors' attitude toward the nature of law is similar to that of McDougal and Lasswell, whose influence they explicitly acknowledge, although they seem to attach much greater significance to "rules" than McDougal does. The reality and importance of international law are affirmed, although, with doubtful consistency, the authors assert that "the presence or absence of institutional means of enforcement of legal principles determines whether a system of law exists or not" (p. 291).

This remarkable effort to explain international law in terms of the political structure of the international society, and to bridge the gap between the study of law and the study of world politics, deserves not only the attention of the audiences to which it is addressed, but also republication in a thoroughly revised edition. If a revision is undertaken, it is to be hoped that the authors will reconsider their decision to write for audiences at three different levels, from which many of the faults of the book stem.

OLIVER J. LISSITZYN

*Postwar Negotiations for Arms Control.* By Bernhard C. Bechhoefer. Washington, D. C.: The Brookings Institution, 1961. pp. xiv, 641. Index. \$8.75.

*Arms Control, Disarmament, and National Security.* Edited by Donald G. Brennan. New York: George Braziller, 1961. pp. ii, 475. Index. \$6.00.

*Arms Control: Issues for the Public.* Edited by Louis Henkin. (The American Assembly.) Englewood Cliffs, N. J.: Prentice-Hall, 1961. pp. ix, 207. \$3.50.

*Soviet Policy toward International Control of Atomic Energy.* By Joseph L. Nogee. Notre Dame, Ind.: University of Notre Dame Press, 1961. pp. xiv, 306. Index. \$6.50.

Janus-like, the international lawyer must look in two directions—into the past and into the future. As an expositor of how we have behaved in the past so that we may behave in the same way in the future, he surveys the established practices of men and of nations. As the creator of new law and of new institutions, his concern is with the necessities and possibilities of the future. His perception of what appears in one direction of time is sharpened by what his eye discerns in the other.

These four volumes, two of them collections of essays and two of them histories of negotiations, show the lawyer mainly in his creative rôle as he deals with the problems of disarmament and arms control. This is not to say—and the point cannot be emphasized too emphatically—that he has any monopoly or near-monopoly of skill or interest or experience in this field, for the area is one in which physical scientists, economists, sociologists, political scientists, diplomats, psychologists, military men, and lawyers all have a contribution to make. The very diversity of the backgrounds of the contributors to *Arms Control, Disarmament, and National Security* (a substantial proportion of which originally appeared in *Daedalus*, a publication of the American Academy of Arts and Sciences) bears witness to this. But the law and lawyers nevertheless have an important concern with arms control and disarmament, as the perceptive reader of these volumes may see for himself.

The list of the principal architects and negotiators for the disarmament and arms control policies of the United States is studded with the names of lawyers—Acheson, Benjamin Cohen, Eaton, and Dean prominent among them. Here the lawyer appears in his rôle as negotiator, with the professional or semi-professional diplomat his only rival. The complexity of the negotiations, which have now been in progress for sixteen years in various fora within and outside the United Nations, calls for the skills of a lawyer who has had to deal with negotiations of equal intricacy in the national sphere. Mr. Bechhoefer does his best to separate out the various threads in his history of the negotiations, but it is still a tangled skein. As in any negotiations with the Russians, much of the substantive battle may be won or lost on procedural ground. A favorite tactic of the Rus-



the lawyer, as the architect of constitutions, has a particularly important duty to perform.

Within this wider range of constitution-making, there are areas which have come to be regarded as peculiarly "lawyers' law." Courts, dispute-settlement, and sanctions are among these, and they are, appropriately enough, discussed by three international lawyers, Professors Fisher, Larson, and Sohn, in the American Academy symposium. Here the accumulated experience of international law can be brought to bear, and all three rightly allude to the significance of existing techniques and institutions for a system of arms control and disarmament.

So quickly does technology advance and national policy change, that the useful life of some of these volumes will be a short one. *Arms Control, Disarmament, and National Security* has already had a heavy impact. It has educated many who needed to be educated on this subject, and a number of its authors exercise an even more important influence on the policy of the United States than they did at the time when the essays were written. *Arms Control: Issues for the Public*, containing papers submitted to an American Assembly program at Arden House, is shorter, narrower in scope, and generally more elementary than the volume edited by Mr. Brennan. In years to come, both will probably be consulted for the views of the contributors in 1960 and 1961 rather than for the truth of the matters asserted, to use the terminology of the law of evidence. The volumes by Bechhoefer and Nogee, being oriented more toward history than contemporary international relations, will maintain their importance even after their immediate significance for current negotiations has faded. The volume by Bechhoefer, in particular, should be required reading for any person participating in disarmament negotiations, now or hereafter. There may in time be reason to supplement it with an account of United States and foreign policy-making at the highest levels of government, which Mr. Bechhoefer, as a career civil servant, was not always in a position to observe. The volume by Nogee is actually a history of the negotiations themselves, since it is impossible to describe a national policy in isolation. Its pace leaves something to be desired; the attention given to the earlier dealings between the West and the U.S.S.R. is much greater than that given to the later stages of the negotiations.

The intellectual world has its fashions, too, and books on disarmament are now in flood. The volumes referred to in this review are four of the best, if not the best, on what is by now a long list. They are not likely to suffer by comparison with later volumes.

R. R. BAXTER

*When Nations Disagree. A Handbook on Peace through Law.* By Arthur Larson. Baton Rouge: Louisiana State University Press, 1961. pp. x, 251. Index. \$3.95.

Mr. Larson's book is a plea for strengthening peace through law. What he calls world law is essentially a body of international law designed to maintain peace, based on all existing legal systems so as to be broadly

representative, and composed largely of treaties, whose elaboration Mr. Larson would like to accelerate. The two key elements in this conception are adjudication and an international police force; but it is on the former that he lays most of the stress. He notes that almost all decisions of international tribunals have been obeyed. Consequently, priority ought to be given, not to the establishment of a world force to guarantee enforcement, but to the improvement of the body and machinery of law, so as to make states more willing to settle their disputes through adjudication. In this respect, the best and longest section of the book is a plea for the repeal of the Connally Amendment.

The trouble with Mr. Larson's argument is depressingly familiar. It is legalism—the Liberal delusion about international relations, analyzed as if some mild institutional changes (and, of course, more research) were all that is needed to make them more like domestic affairs. Mr. Larson's book is a primer of international law without pain; but the Coué method is not more helpful against world tensions than against toothaches. Mr. Larson states that all legal systems recognize the same basic principles, which are the main ingredients of world law. Does this mean that all states interpret those principles (such as the condemnation of aggression, and *pacta sunt servanda*) in the same way? Mr. Larson writes that judicial interpretation of the legal issues involved in such disputes as Berlin, Aqaba, the Sino-Indian border, et cetera, would help. No doubt; but do all parties recognize that it would help not only peace but them? Mr. Larson rejoices over increased Soviet preoccupation with legality and private property. This may imply that Soviet ideas on the substance of law have become less "heretical," but not that the Soviet Union has given up behaving as a state, i.e., using law as an instrument of policy. The Liberal depreciation of force is also in evidence here. Mr. Larson's account of the Suez crisis of November, 1956, is, to put it mildly, startling. "The General Assembly had no power to send a force against the British and the French. It could only send a resolution against them. But a resolution did the job." *Sancta simplicitas!*

The more one approves of Mr. Larson's objective, the less one can endorse such a journey on the road to an international Miltown. There are political pre-conditions to world law; they are practically never mentioned in this book, whose message is that, were the world ready for world law, it would be a more pleasant place to live in. Amen.

STANLEY HOFFMANN

*The World Court. What It Is and How It Works.* By Shabtai Rosenne. New York: Oceana Publications; Leiden: A. W. Sijthoff, 1962. pp. 232. Index. \$6.00; Fl. 17.50.

*The International Court of Justice.* By Peter J. Liacouras. 2 vols. Preliminary mimeo. ed. Durham: World Rule of Law Center, Duke University, 1962. (Book Series No. 4.) pp. 637. Index. \$5.00.

Ambassador Rosenne (who is now a member of the International Law Commission) followed up his excellent treatise on *The International Court*

of *Justice*<sup>1</sup> with this slim volume on *The World Court*. As the former is the worthy successor to the late Judge Hudson's standard work on *The Permanent Court of International Justice*, so the latter is the counterpart to Hudson's little handbook on *The World Court*. It is, however, of a much less documentary nature and much more analytical than its predecessor and, fortunately, could dispense with the latter's extensive section on the proposed participation of the United States in the Court, which, formally, no longer is a problem.

As the subtitle of Rosenne's book indicates, it deals only with the present Court and not also with the Permanent Court, as its main title, taken together with the late Judge's well-known series of articles in this JOURNAL on the World Court (which is to be continued and expanded), might suggest. It is intended as a "guide and introduction" to the International Court, which purpose it serves very well; and although the author has "tried as far as possible to be descriptive rather than contemplative" (Foreword), the book is based on much contemplation, and on practical experience, too. The two major parts of the volume deal with "what the Court is" (forerunners, relations to the United Nations, the Judges and the Registry) and with "how it works" (jurisdiction and how a case is tried, illustrated in the *Right of Passage* case), while the third part contains succinct summaries of the cases which have come before the Court. In evaluating the first fifteen years of the Court, the author notes a substantial decline of its advisory activities but a virtual maintenance of its contentious work, as compared with that of its predecessor. He concludes that the "States continue to show (a) willingness to refer a number of major disputes to its (the Court's) decision," and that "its permanency as an international organ enables it to play its own constructive role in the pacific settlement of international disputes despite the constantly disintegrating international situation" (p. 174). Interesting illustrations, tables and appendices enhance the value of the volume, a paperback edition of which would be desirable. In future editions the Rules of the Court might perhaps replace the Charter of the United Nations, which is more easily accessible.

The two volumes by Peter Liacouras emanated from a memorandum concerning the position taken by national judges (regular and *ad hoc*) in contentious cases, and thus contain only material concerning such cases. The anticipated printed edition will also deal with the advisory proceedings which are also relevant, though to a lesser degree. The record for each case includes a summary and, *verbatim*, the basis for the Court's jurisdiction, the principal contentions of the parties, the operational decision of the Court, and the votes of the judges, in particular the national judges. Analyzing and collating this material, which, of course, can be found in the publications of the Court (although not in one convenient book), and which covers about three-fourths of the two volumes, the diligent author gives in very detailed and interesting tables the record of the Court as a whole in contentious proceedings, that of the individual judges and that of each national judge, followed by a record of the so-

<sup>1</sup> Reviewed by O. J. Lissitzyn in 54 A.J.I.L. 904 (1960).

called Optional Clause which, formally, no longer exists. If one of the purposes of the publication is to set the record of the Court and its rôle in international affairs straight, it is suggested that the author, in the printed edition, elaborate on the tables and present the data contained therein and the conclusions resulting therefrom in easily understandable descriptive form. Even with these publications there is thus room for a continuation of Hudson's *World Court Reports* and for a new edition of von Stauffenberg's *Éléments d'Interprétation* of the Court's Statute and Rules.

SALO ENGEL

*Dual Nationality.* By Nissim Bar-Yaacov. (Library of World Affairs, No. 54.) New York: Frederick A. Praeger, 1962; London: Stevens & Sons, Ltd., 1961. pp. xxviii, 297. Index. \$11.75.

The problem of dual nationality has long been a thorny issue in international law and relations and, despite sustained efforts at its elimination or, at least effective curtailment, it has continued to elude a practical solution to this very day. The reason for this failure, as the author of the present study makes quite clear, lies principally in the fact that individual states persist in regarding matters of nationality as properly subject to regulation by municipal, and not by international, law. Lack of inter-state co-ordination, general emphasis on unilateral domestic action, absence of universally recognized rules on nationality, makeshift and *ad hoc* remedies in the guise of occasional bilateral agreements which ease, but do not resolve, the basic difficulties, all have equally contributed to the emergence and persistence of the undesirable phenomenon of dual citizenship. Nevertheless, it is a question which continues to attract diplomatic interest, thereby at least offering some hope of an eventual meeting of the minds on a matter which, while perhaps not crucial, still manages to engender considerable acrimony in inter-state relations, not to mention the inconvenience it causes its victims and the injustices it often entails.

The purpose of the work under review here, according to the publisher, is to make "responsible authorities mindful of the problem and of the need for its solution." The author divides his topic into three parts, treating each one separately: dual nationality acquired at birth; dual nationality caused by naturalization; and other aspects of dual nationality. The first two sections, in turn, are broken down into chapters analyzing: (1) pertinent municipal legislation, primarily that of the United States, the United Kingdom, France, and the Soviet Union, with a quick survey of the practice of a few other states as well; (2) judicial decisions; and (3) techniques of diplomatic protection. Each closes with an over-all description of hitherto attempted solutions. Under "other aspects," the author covers questions of dual nationality of married persons, problems arising out of territorial cessions and the emergence of new states, espousal of claims, and, in a special chapter, examines in detail the Nationality Law of Israel.

On the whole, it is an extremely useful and handy survey of the main points of the subject, somewhat selective in the choice of states the practice of which is analyzed but, within these limits, reasonably exhaustive in its use of bibliographical sources and its treatment of the component elements of the topic. The section on the Nationality Law of Israel is particularly welcome. On the other hand, the handling of options of nationality as a device for resolving potential or existing citizenship conflicts is altogether too brief to be of much good. Likewise, differences arising from mass denaturalizations of refugees and displaced persons (where other states refuse to accept the validity of such policies) or, conversely, state refusal to acknowledge the right of such persons to obtain a new citizenship, deserved at least to be mentioned.

Since the purpose of the book is to focus attention on the need for further efforts in the field of dual nationality, rather than to elaborate a code of principles *de lege ferenda*, the concluding "suggested solutions" are fittingly modest. Bowing apparently to the inevitable, the author simply calls for more enlightened action on the part of national legislators in drafting nationality statutes and for greater awareness of the international implications of state laws in this sphere, coupled with universal recognition of the abnormality of the status of dual citizenship, and systematic efforts, both unilateral and international, to insure minimum incidence of its occurrence from now on. On that basis, one can fully share the work's cautious optimism on the prospects for future improvements in this area of international law, in which reforms are already long overdue, and subscribe to its tentative proposals on how best to proceed to achieve that end.

GEORGE GINSBURGS

*Priznanie Pravitel'stv v Mezhdunarodnom Prave* [Recognition of Governments in International Law]. By D. I. Fel'dman. Kazan, U.S.S.R.: Kazan University Press, 1961.. pp. 90. 36 kop.

Recognition as an instrument of international politics is made the theme of a monograph, of added importance because it comes from Kazan University, demonstrating the extension of international legal research to the smaller capitals of the Soviet republics.

Since the author chooses to treat politics within the traditional Soviet framework, he emphasizes conflict between what he calls the progressive peaceful camp of socialism and the aggressive imperialist camp led by the United States and England. His study uses, consequently, two criteria of legality for recognition policies. What is right for one camp is wrong for the other. Take the discussion of the constitutive theory, for example. It is "reactionary and contrary to real life," when used by the United States to deny recognition to the Chinese People's Republic and the German Democratic Republic. Without seeing the connection with the constitutive theory, the author favors the earliest possible recognition of a new government, even before the calling of a constituent assembly,



when there has been manifestation of the "real will of the people." The author finds such manifestation in workers' meetings and demonstrations in support of a liberation movement. What this means in practice has been recently demonstrated by U.S.S.R. recognition of the Algerian Government in the spring of 1962, thus angering President DeGaulle to the point of recalling his Ambassador from Moscow. Here recognition seemed premature to the French. The same might be said of the U.S.S.R.'s recognition of the "Terijoki Government" in Finland at the outset of the winter war of 1940. Recognition seems to have been designed in that instance to aid establishment of a new government and to have been constitutive in character.

Extension of the constitutive concept in the opposite direction to delay or prevent establishment of governments disliked by the U.S.S.R. is justified by the explanation that "Operating on the basis of these criteria the Soviet Union refused to recognize the fascist 'government' of Franco in Spain, the many marionets of fascist Germany, Italy and Imperialist Japan during the war, and the no less numerous creatures of Wall Street and of the City after the end of the War." (p. 29.) Many Americans supported their Government's refusal to recognize Fascist conquests before the war, but they did so with full understanding of the political implications of recognition and non-recognition. Dr. Fel'dman wants it both ways, and in justification of his position, he declares:

Only in the practice of socialist states has the instrument [of recognition] acquired a fundamental democratic substance, and has it been applied in the interests of international friendship, the struggle for national liberation, and the cause of peace. (p. 22.)

Philosophical positions sometimes cause difficulties for Soviet lawyers. Thus the author restates the view that regimes created by a Communist-led revolution are a new phenomenon in the world, and so recognition of a proletarian government is, in effect, recognition of a new state, since continuity with the past has been broken (p. 28). Yet, when the author subsequently writes his brief in support of seating the Chinese People's Republic in the United Nations, he adopts the widely favored view that the problem is not one of recognition of a new state but of a new government for a state already a Member of the United Nations (p. 58). His first position might seem to hamper adoption of his second position, but he has separated the two by thirty pages, and that may be sufficient insulation.

Britain is criticized for her part in voting against "restoration of the Chinese People's Republic's indefeasible rights in the United Nations" on the ground that recognition of a government carries with it the duty to support that state for admission to an international organization. Nothing is said of other criteria for admission, and it would have been enlightening to hear discussion of the application of the concept to states with which one has diplomatic relations. What of the popular "package deals" under which some states have been vetoed for admission until their particular package could be brought together?

Should a Communist movement win an election by constitutional means, there would be no problem of recognition, in the author's view. He takes the usual position that recognition is in issue only after unconstitutional seizure of power (p. 28). Recognition of a local government *de facto* is denounced as a weapon of imperialists leading to annexation, and the author uses as examples recognition of the "governments of Kolchak, Deniken and Wrangel," and, more recently, recognition by the United States of a government in Sumatra. Again, it may be noted that the text is silent on recognition by the U.S.S.R. of the Terijoki government in 1940.

National liberation movements are treated specially with the argument that recognition of these governments introduces a new kind of recognition. It is not recognition of belligerency, for that applies only to civil war. Rather it is recognition of an instrument transitional to recognition of a new government. It is said to be favored especially by the U.S.S.R. as a manifestation of self-determination, and hence it is progressive.

Non-Soviet readers of this volume will have difficulty in seeing how recognition in Soviet hands is more uniformly declarative of the existing power situation in a state than when used by the United States, which admits frankly that recognition has a political function. Probably few will quarrel with the author's constant support of his fatherland's position, since authors elsewhere tend to do the same, but those who dream of a world community where major issues are decided by the whole community rather than by individual foreign ministries will find no cause to anticipate early adoption by the Soviet legal fraternity of their dream.

JOHN N. HAZARD

*Südtirol als Völkerrechtsproblem.* By Herbert Miehsler. Graz, Vienna, Cologne: Verlag Styria, 1962. pp. 288. Index. S. 118.50.

South Tyrol as a problem of international law is the topic of this excellent book, published under the auspices of the *Forschungsinstitut der Österreichischen Gesellschaft für Aussenpolitik und Internationale Beziehungen*. It is a complete study, giving all the necessary information, materials and documents, the most important of which are printed in the annex, analyzing the many legal problems involved, extremely rich, as far as all the relevant literature is concerned, although the enormous amount of material forced the author to write in a very concise way. The book consists of two parts: the first providing the theoretical basis (pp. 19-115); the second applying this theory to the concrete problem of South Tyrol.

The Tyrol problem was created when the German-speaking South Tyrol was given to Italy by the Peace Treaty of St. Germain, not only in violation of Wilson's principle of self-determination of nations, but also in open contradiction to Point 9 of Wilson's Fourteen Points. We know from Wilson's *Memoirs* how much he later regretted having given his consent before he had studied the problem. Nor was Italy obligated by

a special minority treaty. But Italy made the most solemn promises for the liberal treatment of the German-speaking inhabitants which became internationally binding by being embodied in President Clemenceau's note to the Austrian Peace Delegation at St. Germain. It is well known that after the advent of Mussolini's Fascism, a cruel policy of completely denationalizing the South Tyrolese set in; finally they were also abandoned by Hitler for reasons of political expediency.

The first part of the book essays to expound a general theory of self-determination, and tries to show that, contrary to the inter-war doctrine on the international protection of national minorities, the latter and self-determination are not contrasts. We agree with the author that neither in Wilson's time nor under the U. N. Charter does the self-determination of nations or peoples constitute a norm of international law. There are lacking a clear definition of the contents, a determining of the holder of this right; there is no legally binding obligation, there are no sanctions. Even today self-determination is only a political, programatic principle. That is why the author studies self-determination from a historical, sociological point of view and develops the theory that there is a scale of realizations of self-determination, according to the cultural status of the minority concerned. At the bottom stands a mere guarantee of existence; higher up there is a guarantee of the preservation of national culture through the granting of special minority rights to the individual members of a national minority; finally there are collective minority rights (cultural, territorial autonomy). At the top, and under special conditions, there is the claim of a national minority to complete separation from the foreign national state through its own decision, whether by creating a new state or by joining a co-national state.

The German-speaking South Tyrolese had proved that no Mussolinian tyranny can denationalize them. During the negotiation of the Italian Peace Treaty of 1947 Austria and Italy started negotiations to find a satisfactory solution of this problem. These negotiations, carried on under pressure for time, led to the Austro-Italian Treaty on the South Tyrol of September 5, 1946, which became also the legally binding Annex IV of the Italian Peace Treaty of 1947. It is this treaty, and particularly its interpretation and implementation by Italy, that are at the center of the present Italo-Austrian dispute. There are already points of conflict as to the carrying out of certain parts of Article 1 of the treaty (as to elementary and secondary teaching in the mother tongue, as to the "parification" of the German and Italian languages, as to equality of rights in respect to entering upon public office). It is fundamental that the interpretation of a treaty must be guided by the clearly expressed intention of the parties. This intention of the parties is very clearly expressed in paragraph 1: "the assurance to the German-speaking inhabitants of the Province of Bozen, within the framework of special provisions, to safeguard the ethnical character and the cultural and economic development of the German-speaking element." In this spirit Article 2 provides for the grant of "autonomous legislative and executive regional power to

the population of the *Province of Bozen*." But Italy created the region of "Trento-Alto Adige," of which the Province of Bozen is only a subdivision. The South Tyrolese are on the way to become a minority even in the Province of Bozen, and are particularly crowded out of the cities; in 1953 there were in the three largest cities of South Tyrol only 33,000 South Tyrolese against 84,000 Italians. How shall the South Tyrolese have regional autonomy, if they are a minority in the Province of Bozen which is a subdivision of the region? As the implementation of the treaty and the carrying out of the autonomy of the Province of Bozen have not only been slow, but also small and without the slightest benevolence or good will to the South Tyrolese, Austria has, since 1956, insisted that only the creation of an autonomous Province of Bozen as such will be recognized as the execution of Article 2 of the treaty. The Italians have always rejected this claim, and a diplomatic deadlock was the consequence. That is why Austria brought this problem before the United Nations in 1960 and 1961. In spite of the U. N. resolution on the matter, no solution of the conflict has been found up to the present time.

In the interest of friendly relations between Austria and Italy, which are blocked only by the South Tyrol problem, in the interest of the growing unity of Western Europe, and last, not least, as a matter of justice in the light of the tragedy of the South Tyrolese, it is earnestly to be hoped that a just and satisfactory solution will finally be reached.

JOSEF L. KUNZ

*The Making of the Good Neighbor Policy.* By Bryce Wood. New York: Columbia University Press, 1961. pp. x, 438. Index. \$7.50.

The preface accurately anticipates dealing only with the period 1926-1943 and chiefly with the abandonment of the use of force by the United States in its relations with Latin American countries. The book expounds with perception and scholarly comprehensiveness the proposition delimited in time and scope by the preface; for the broad title would normally give rise to greater expectations. This explanation is necessary, for the Good Neighbor Policy was also made by Acheson, Berle and Rockefeller in addition to Roosevelt, Hull and Welles. It encompassed improved economic relations, a system of consultation, and hemispheric security and solidarity illustrated by the Rio Treaty of Reciprocal Assistance and the Charter of the Organization of American States.

In view of present preoccupations with Cuba, it is notable that Part One devotes substantial space to developments in Cuba, 1933-1935, as the laboratory in which experiments were conducted regarding ways and means of implementing the non-intervention policy which had, after the Montevideo Conference of 1933, taken on aspects of an international commitment. There were some false starts before this stable element in the Good Neighbor Policy was isolated. Realization that intervention was the inevitable consequence of interference in domestic matters, Dr. Wood identified the second element, *i.e.*, non-interference. This was determined

pragmatically on the basis of test-tube experiences in Central America. The withdrawals from the Dominican Customs Receivership and the Office of the Fiscal Representative in Haiti could well have been cited here.

In Part Two (Pacific Protection) dealing with Mexican land and oil expropriations, Bolivian cancellation of concessions, and a threat of expropriation in Venezuela, a third element was observed, namely, that the protection of U. S. citizens and property, now proclaimed to be subordinate to the national interest, would be by diplomatic means, not by force, boycott, or arbitration. The catalytic agent for these three elements of the Good Neighbor Policy was hoped to be reciprocity. This appears, in Part Three (Transformation), to have been stated much more frequently by U. S. officials than by their Latin American counterparts. Indeed, "the Latin American states did not respond satisfactorily to mere exhortations of reciprocity; they confiscated or expropriated" (p. 166).

There is much for readers of this JOURNAL to ponder. Without specifying what is meant by the "international standard of justice" for the protection of foreign nationals, Dr. Wood says that in the decade following 1933 it was "abandoned by the U. S. government in favor of a new set of understandings . . ." (p. 8). The author's own opinion is clearly expressed:

. . . discourse was changed from charges of denial of justice to pleas for equitable treatment, and the techniques of settlement from courts to foreign offices and commissions . . . The Department of State ceased to be a collection agency for bondholders or bankers, and it sharply curtailed, without completely shutting off, its legal services for business firms . . . Although continuing for a time to talk of arbitration, it got no one to arbitrate . . . it found neighborly methods for dealing with these issues that substituted political compromise for legal decisions . . . (pp. 166-167.)

He adds that "the separation of the Good Neighbor Policy from the procedures of international law freed the Department of State from the legal straightjacket" (p. 236), and concludes that "the political and economic stakes were too high to permit reliance on legal procedures" (p. 281). The right of expropriation was admitted by the United States;<sup>1</sup> questions of prompt and adequate compensation were resolved by Mexican and Bolivian payments; in Venezuela, by new contracts.

The volume reflects varying degrees of devotion to the principles of international law by individuals as well as by governments. While Cordell Hull explained to Secretary Morgenthau that "he had to carry out international law," the author intimates that perhaps Mr. Hull was trying to impress the petroleum companies (p. 243). In both the Mexican and Bolivian situations, the business interests involved invoked the principles of international law repeatedly, but their contentions in Federal courts in New York and Alabama were generally not successful.

<sup>1</sup> See Baade, "Indonesian Nationalization Measures before Foreign Courts—A Reply," 54 A.J.I.L. 810, 830 (1960), and "The Validity of Foreign Confiscations: An Addendum," in 56 A.J.I.L. 504 ff. (1962), especially p. 505, quoting a memorandum of Under Secretary of State Sumner Welles, dated Feb. 9, 1940.

Not the least interesting item is the penetrating light shed on the metamorphosis of Sumner Welles, who in Cuba called for warships, and became inextricably involved in the domestic politics of Cuba, to become in later years the spokesman of non-intervention and non-interference. The irony of U. S. policy in the Caribbean area is revealed in the consequences of our policy in Cuba which brought Batista to power, the man whose subsequent administration prepared the way for Castro; and non-interference in Nicaragua and Santo Domingo afforded opportunities for the Somoza and Trujillo dynasties to establish themselves in power. The sixty pages of footnotes are highly informative, and illustrate the wealth of documentary materials which the author utilized to great advantage. Here are found nuggets of information, the personalized bits and pieces of diplomatic negotiations, such as excerpts from personal letters and telephone calls to and from the White House. Dr. Wood had access to the State Department's unpublished files, to which the notes often refer. It is to be hoped that other scholars will go further along the byways to which these references beckon enticingly. The volume is a model of careful investigation and sifting of sources, in the course of which Dr. Wood found that for his purposes memoirs and biographies were of minimum value.

WILLARD F. BARBER

*L'O.N.U. d'Hier à Demain.* By Michel Virally. Paris: Editions du Seuil, 1961. pp. 189.

The author of this essay, formerly Professor of International Law at the *Institut d'Etudes Politiques* at Strasbourg and now with the *Institut Universitaire de Hautes Etudes Internationales* in Geneva, is one of the most perceptive of younger French scholars writing on the United Nations. In addition to this book, he has published a number of articles of first-rate quality on different aspects of the United Nations. An article which first appeared in the *Annuaire Français de Droit International*, 1958, on "*Le rôle politique du Secrétaire Général des Nations Unies*" was so well received in the United Nations Secretariat that it was translated into English and widely distributed among the staff. The editors of *International Organization* broke precedent by including in the spring, 1961, number in the original French his article entitled "*Vers une Réforme du Secrétariat des Nations Unies?*"

*L'O.N.U. d'Hier à Demain* is written primarily for a French audience, but it is a book that can be read with profit by anyone interested in the United Nations. Professor Virally's primary purpose, as made clear in his preface, is to convince the French reader that French hostility to the United Nations, and the refusal of the French Government to co-operate in the work of the United Nations and even to make use of it to further national purposes, have only served to weaken France's international position and to strengthen that of its critics and opponents. He does not undertake to define a policy for France; rather he seeks to reduce some of the ignorance which has stood in the way of a proper appreciation of

the Organization. Professor Virally writes in this connection from first-hand experience, since he was in New York closely following the General Assembly's work during its critical Fifteenth Session, when the former African French colonies were admitted to membership.

Professor Virally in his analysis and evaluation of the United Nations does not take the legalistic approach which in the past has been all too characteristic of Continental European writers, particularly those with legal training. He regards the United Nations as a political organization, but nevertheless does not believe that it can be viewed simply from the angle of power conflict. "The study of international organizations," he observes, "requires, at one and the same time, an exact appreciation of political realities, recognition of the laws that govern the growth of institutions, and understanding of the juridical mechanisms necessary to their functioning." He sees the United Nations as the inevitable result of the need of multilateral diplomacy to supplement traditional bilateral diplomacy, but it is much more than a standing conference. It is an institution with its own special structure, competence and operating procedures. These have their influence upon the interplay of political forces as well as being subjected to them. Thus the understanding of the United Nations requires a detailed analysis of the relationship of forces within the Organization, the manner in which national policies influence the Organization, and the influence of the Organization upon these policies.

The chapter headings of the book are indicative of its scope as well as suggestive of its analytical character. These are: "Majority vs. Unanimity," "The End of Collective Security," "Universalism and Regionalism," "National Interests, International Institution," "International Diplomatic Action," and "What Use Has the United Nations?" Under these headings, Professor Virally gives us an exceptionally clear and realistic analysis of the changes that have taken place in the United Nations as a peace and security organization. He sees the perils of some of these changes, the too rapid expansion of membership, for example, but he is on balance convinced that a reasonable accommodation to new conditions has taken place and that the Organization today, in spite of current crises, performs and will continue to perform a necessary rôle—that of "*un modérateur de puissance*." And he makes it quite clear that the main credit for seeing and developing this rôle should go to Dag Hammarskjöld.

LELAND M. GOODRICH

*Yearbook of the European Convention on Human Rights, 1960.* Vol. III.<sup>1</sup> European Commission and European Court of Human Rights. The Hague: Martinus Nijhoff, 1961. pp. xvi, 773. Index. Gl'd. 62.50; \$17.40.

As distinct from its two predecessors, the third volume of this publication is a genuine *Yearbook*; it is devoted to material covering one year

<sup>1</sup> For the reviews of the first and second volumes see 55 A.J.I.L. 200 and 1019 (1961).

only (1960). Part I (Basic Texts and General Information) contains, *inter alia*, the Rules of Procedure of the European Commission of Human Rights as revised in 1960. The Rules had to be amended to solve problems which had arisen as a consequence of the establishment of the European Court of Human Rights. The compatibility with the Convention of one of the provisions of the new Title III, "Relations of the Commission with the Court," was challenged by the Government of Ireland in the *Lawless Case* (Preliminary Objections and Questions of Procedure), which is reported in Part II of the volume.<sup>2</sup>

The main contents of Part II are the decisions rendered by the Commission in 1960. One "inter-state" application was lodged by Austria against Italy, alleging that certain irregularities constituting a violation of the Convention occurred in the trial of six young men from the Upper Adige, accused of murdering an Italian customs officer. In the year under consideration the proceedings in this case had not progressed beyond the exchange of written observations by the two governments on the question of the admissibility of the Austrian complaint. The previous volume (II) had contained information respecting two Greek applications against the United Kingdom alleging the violation of the Convention in Cyprus.<sup>3</sup> The three cases corroborate the widely held opinion that states make use of the possibility of placing an alleged violation of human rights or of minorities protection provisions before an international authority only when they have a political stake in the matter.

As far as "individual applications" (petitions) are concerned, 291 were lodged in 1960 as against 233 in 1959 and 96 in 1958. Between July 5, 1955, when the filing of individual applications was first authorized, and December 31, 1960, 963 applications had been made to the Commission. During 1960 three applications were declared admissible (in part). All three (*Ofner*, *Pataki* and *Hopfinger*) were directed against Austria. All three relate to provisions of the Austrian Code of Criminal Procedure and supplementary legislation, mainly provisions respecting appeals procedure, enacted in 1873 and 1877 respectively. While a decision on the admissibility of a petition does not, of course, prejudice the merits of a case, the decisions do throw some doubt on the compatibility with the Rome Convention of provisions which originated in the hey-day of constitutional government and liberalism in the Habsburg Monarchy.

Part II contains the text of altogether twenty selected decisions of the Commission on the admissibility of individual petitions, in both French and English, arranged in chronological order. The Commission also had the opportunity of expressing its views on provisions of the Convention, of the 1952 Protocol thereto, and on general principles of international law in those decisions by which petitions were declared inadmissible. In the case of *X v. the Federal Republic of Germany*, the Commission dealt with Article 3 of the Protocol by which the contracting parties have undertaken to hold free elections at reasonable intervals by secret ballot. The

<sup>2</sup> Also in 56 A.J.I.L. 171 (1962).

<sup>3</sup> Cf. 55 A.J.I.L. 1019 (1961).



Commission expressed the view that an individual's right to vote is not guaranteed by the article (p. 190). In declaring inadmissible the application of *Gudmundsson v. Iceland*, the Commission stated that the general principles of international law, referred to in Article 1 of the Protocol, are the principles which have been established in general international law concerning the confiscation of the property of foreigners. It follows that measures taken by a state with respect to the property of its own nationals are not subject to these general principles of international law in the absence of a particular treaty clause specifically so providing (p. 424).

Part III (The Convention within the Member States of the Council of Europe) contains reproductions from the records of national parliaments relevant to the status of the Rome Convention. Those where the French Government explained the reasons for France not yet having become a party to the Convention are of particular interest (pp. 528 to 548). The part also contains extracts from decisions of domestic courts of states members of the Council of Europe referring to the Convention.

Part IV (The Influence of the Convention—*Le Rayonnement de la Convention*) is a new feature appearing for the first time in the 1960 volume. In this reviewer's opinion, the coverage is somewhat over-extended, *ratione materiae* as well as *ratione loci*. Not only does this part contain long quotations from the Constitutions of Cyprus and of Nigeria, but it even contains the full text of a decision of the High Court of Kano, Northern Region of Nigeria, on the constitutionality of a regional enactment.

EGON SCHWELB

*Ricorsi Individuali ad Organi Internazionali. Contributo alla Teoria della Personalità Internazionale dell'Individuo.* By Francesco Durante. Milan: Dott. A. Giuffrè, 1958. pp. viii, 176. L. 1,000.

*Das Rechtsschutzsystem der Europäischen Menschenrechtskonvention.* By Heribert Golsong. Karlsruhe: C. F. Müller, 1958. pp. iv, 118. DM. 11.

Both these studies are concerned with the right of petition established by the European Convention for the Protection of Human Rights and Fundamental Freedoms, which was signed at Rome on November 4, 1950, and came into force on September 3, 1953. This Convention established a European Commission of Human Rights and authorized it to deal not only with complaints by states but also with petitions by individuals, organizations and groups of individuals. This right of petition was subject to the condition that at least six states would accept a special optional clause to that effect. That condition was fulfilled in 1955, upon the acceptance of the clause by Belgium, Denmark, the Federal Republic of Germany, Iceland, Ireland and Sweden; later Austria, Luxembourg and Norway added their acceptances.

Mr. Durante examines this new international right of individuals within the general framework of the position of individuals in international law.

More than half of his book is devoted to a meticulous analysis of the theoretical question whether individuals can be subjects of international law. After a careful survey of the abundant literature on that problem, he comes to the conclusion that individuals are only exceptionally subjects of international law, that they are merely "secondary" subjects of that legal system, and that their rights cannot be derived from general rules of international law, but depend wholly on special treaty provisions. Though in the second part of the book the author discusses all the relevant provisions of the European Convention, even here he is preoccupied primarily with theoretical questions. He considers the right of petition under that Convention as a purely procedural rather than a substantive one. While an individual can start a procedure designed to ascertain that a state has violated its international obligations, the substantive obligations are entirely inter-state obligations, even if they impose the duty on states to grant certain rights to individuals.

Mr. Golsong's approach is entirely different. His book provides a detailed commentary on each relevant provision of the European Convention in the light of preparatory materials and some 350 decisions of the Commission. He is concerned, not so much with theoretical problems, though there are a few excursions in that direction, but with clarifying all the obscure provisions and providing guidance to future interpreters. As an official of the Council of Europe, which was primarily responsible for the preparation of the Convention and with which the Commission is intimately connected, Mr. Golsong has had an opportunity to observe closely the work of the Commission and to appreciate the problems faced by it. Consequently, his book will be indispensable to anyone interested in this novel experiment for promoting human rights through new international procedures.

Since these two books were written, another European institution has come into existence. The European Convention contained a second optional clause providing for the establishment of a European Court of Human Rights as soon as eight states should ratify that clause. Though it was generally doubted that this would ever happen, the necessary ratifications were obtained in 1958, the Court was established, and the first cases were submitted to it by the European Commission, acting on behalf of individuals, as individuals do not have direct access to the Court. Golsong's book contains a short section on the Court which would require considerable extension in a subsequent edition. The standards being developed by the Commission and the Court are likely to have effect beyond the circle of European states to which they directly apply. The concepts of a minimum standard, originally evolved in connection with the protection of aliens, are now being applied to the treatment by a state of its own nationals. The experience of the European institutions should also be of assistance to the United Nations in preparing proper enforcement procedures for the Covenants on Human Rights which are nearing their completion.

LOUIS B. SOHN

*Les Dispositions de la Constitution du 27 Octobre 1946 sur la Primauté du Droit International et Leur Effet sur la Situation des Étrangers en France sous la IVe République.* By Fred Pfloeschner. Geneva: Librairie E. Droz; Paris: Librairie Minard, 1961. pp. 210.

This well-written, scholarly little book, based on a careful examination of 450 cases decided in the French courts, is of great interest to students of both public and international law, especially with respect to the interpretation of treaties. It throws light, too, on the meaning and interpretation of the French Constitution under the Fourth Republic and even of the present Constitution.

The following matters are elucidated by the author: (1) the status of foreigners in France; (2) the solutions adopted by French tribunals and pertinent governmental agencies in case of a conflict between a treaty and a later law, especially by reason of the effect of the most-favored-nation clause; (3) significant differences in the solution of the problem just stated, depending on whether the interpretation of the treaty is made by the courts or by the Government; (4) the effect of war, under French law, on various kinds of treaties. Practically all of the cases studied arose when a foreigner resident in France, deprived of alleged rights by statute or decree, pleaded his rights under treaty, usually claiming the right to be assimilated to Frenchmen in the circumstances. Conflicts occur when certain French decrees and statutes, coming into operation under the Vichy regime or after the second World War, place certain restrictions on foreign residents with respect to farming, the leasing and buying of property both for residence, commercial purposes and farming, and engaging in business. One of the most fruitful sources of adjudication is a decree of 1938 forbidding a foreigner to engage in business in France without a special license.

The author finds that the stranger fares pretty well as long as the treaty in question is interpreted by the courts. But when the interpretation touches on a matter of public international order, usually the courts will refuse to decide, and will refer the matter to the Government for interpretation, which usually means the Ministry of Foreign Affairs. In the latter case the interpretations, many of which are severely criticized in this book, may go against the foreigner. They may also do some violence to the Constitution, which purports to give a treaty precedence over later statutes; but in general, the French courts are quite assiduous in giving effect to a treaty which is in conflict with a later law.

With respect to the interpretation of treaties under the new Constitution of October 4, 1958, the author states that, in general, the new text merely carries on the system of the preceding Constitution. But he stresses two innovations, one of which he finds regrettable, the other excellent. Article 55, while it again consecrates the superiority of international conventional law over French law, adds a clause which, while it may remain a dead letter, could be the source of future international controversy. It adds this reservation: "... on condition of the application of each accord or treaty by the other party." The innovation approved by the

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author is the grant of vastly strengthened powers to the Constitutional Council, which now may pass on the constitutionality of laws and *engagements internationaux*. Also, the President may ask the Council to determine whether a treaty is contrary to the Constitution. He is also authorized to submit a proposed treaty for popular referendum.

The task of the reader of this valuable monograph would be vastly facilitated if it contained a subject index, but especially an appendix reproducing the two Constitutions studied, plus the most important statutes and treaties cited.

JOHN B. WHITTON

*Quellen des Internationalen Privatrechts*. Vol. II: *Texte der Staatsverträge*. 2d ed. Edited by A. N. Makarov. Berlin: Walter de Gruyter & Co.; Tübingen: J. C. B. Mohr (Paul Siebeck), 1960, 1961. pp. liv, 1079. Index. DM. 70.20.

Professor Makarov's collection of source materials in the world on private international law has been an indispensable tool for work in conflicts law since it first appeared in 1929. The new edition in two volumes, brought out in the *Max-Planck-Institut* Series of Materials on Foreign and Private International Law, is even more valuable to the international lawyer because of the presentation of the materials, not in one, but in two languages, German and French, with a few items reproduced in English in appendix.

The first volume of the second edition, *Gesetzestexte*, which appeared in 1953, contains the statutory materials on conflicts; the second volume, completed in 1961, has the treaty law on conflicts. As in the first edition, only "substantive law" is covered. Among the excluded topics is recognition of foreign judgments.

The treaty volume, presently under review, does not have the merits of the first: thoroughness and wide coverage, if not completeness. Handling of treaty materials creates more difficulties. Except for general codifications, like the Bustamante Code and the Montevideo treaties, the materials have been broken up according to subject matter. The presentation, piece-meal, of provisions in one and the same treaty has great disadvantages. Recourse to the entire treaty will be necessary in most instances. Making the references to specific provisions in subject matter tables may have been the lesser evil.

A large amount of the materials presented is from treaties concluded among Eastern nations. These treaties are little known here and they may merit examination. Of the coverage of materials from treaties concluded by the United States, it must be said that it is scanty. The study by Bayitch, *Conflict Law in United States Treaties* (Chicago, 1955), does not seem to have been used. For some of the major conventions bibliographical references are given, for others they are not. In the case of older materials like the Bustamante Code, they have not been brought up to date. On occasion the presentation is misleading. Thus, for the Bustamante Code the reservations made at the time of the signing of

the convention are reprinted, but the reservations made on the occasion of the ratification are not. Important drafts like the Uniform Law on Private International Law of the Benelux countries are included, but the Hague Protocol of 1955 to amend the Warsaw Convention of 1929 for the Unification of Certain Rules relating to International Carriage by Air is not covered.

Uneven as is the treatment in the treaty volume, the usefulness of the collection cannot be doubted, and appreciation must be expressed to the distinguished editor for undertaking an unrewarding but important task like this. No less than uniform legislation, treaty law is entitled to special attention as an expression of collectively reached views on rules of law. A selective collection of such materials in the English language has long been lacking. Until the gap has been filled, the "Makarov" will be of great use.

KURT H. NADELMANN

### BRIEFER NOTICES

*International Protection of Human Rights.* By Manouchehr Ganji. (Geneva: Librairie E. Droz, 1962. pp. xvi, 317. Index. Sw. Fr. 40.) This is a thesis presented to the *Institut Universitaire de Hautes Etudes Internationales* of the University of Geneva, but it is of greater interest and usefulness than the average product of a post-graduate student. It is, as a matter of fact, the most convenient summary and fairly up-to-date description of the far-flung inter-governmental activities in the matter of human rights which is at present available in English, and, apart from Professor Guradze's distinguished work, *Der Stand der Menschenrechte im Völkerrecht* (Göttingen, 1956), in any language. Being aware of the magnitude of the subject indicated in the title of the book, the author has wisely limited himself to the treatment of five major subjects, viz.: (1) the theory and practice of humanitarian intervention; (2) international protection of minorities; (3) international prohibition of slavery and the slave trade; (4) efforts of the United Nations towards the international protection of human rights; and (5) the European Convention on Human Rights. The chapter devoted to humanitarian intervention is the best part of the book. The author succeeded particularly well in selecting statements representative of the various schools of thought. The chapter also includes the texts of pre-twentieth-century treaty provisions relating to the protection of human rights and the rights of minorities. This reviewer did not find any major error or mistake in those chapters which deal with the work of the League of Nations and of the United Nations. Misprints and misspellings of names, however, abound.

By his painstaking efforts, great industry and clear presentation, Dr. Ganji has earned the gratitude of those who are concerned with the problems to which his work is devoted.

EGON SCHWEILB

*Essays on International Jurisdiction.* By Richard A. Falk and others. (Columbus, Ohio: Ohio State University Press, 1961. pp. viii, 94. \$3.00.) This is a highly stimulating and readable collection of essays on aspects of jurisdiction in the international sphere by Richard A. Falk, Thomas M. Aron, Sigmund Timberg, and Roland J. Stanger. Few will read it

without reacting to the variety of views expressed by the authors. The volume demonstrates that there should be more such interchanges of views of specialists on different aspects of international legal problems. The publication also points to the need for an integrated study in public and private international law of the general topic of jurisdiction in international economic relations, with phases of which three of the essays are primarily concerned.

Richard Falk advanced the perspective of legal systems possessing either a horizontal character, as in inter-state relations, or a vertical character, as within states. He hoped that an improvement of the horizontal order of international law could be brought about by decisions of domestic courts. If acts of state in the economic sphere of one jurisdiction were respected by courts of other jurisdictions, but not acts of state impairing human rights, a salutary step in this direction would, in his view, take place. The papers of Thomas M. Aron and Sigmund Timberg strongly questioned the application of the principle of sovereign immunity to state-controlled bodies engaged in international trade. Each reflected an unusually perceptive approach and avoided clichés. Roland J. Stanger summarized and evaluated current practice relating to the status of armed forces of one state present in the territory of another state with the latter's consent.

KENNETH S. CARLSTON

*Internationales Privatrecht.* By Leo Raape. 5th ed. (Berlin and Frankfurt a.M.: Verlag Franz Vahlen GmbH, 1961. pp. xvi, 720. Index. DM. 45.) Professor Raape has again brought his textbook on private international law up to date in this new edition, thus maintaining its long-established reputation as a standard work on the subject. An enthusiastic teacher, the author discusses in the first part, in a lively and didactic style, the general theories of conflict of laws and, in the second part, the traditional special categories of the law of persons, formalities of legal transactions, family law, inheritance law, law of obligations and property; to this he adds special chapters on copyrights, patents, trademarks and other "absolute rights" (such as the right of privacy), as well as expropriation and confiscation (Chapters 7 and 8). Professor Raape illustrates his subjects throughout with numerous decided cases and hypothetical situations. He does not hesitate to admit on occasion that he has changed his previous opinion, and he gains the reader's sympathy for his lack of *doctrinarism*.

When comparing this volume with the slim first edition of 1938, one is struck by the changes in "current" topics which have been brought about by the course of political events. The reader is pleased by the absence of such conflict-of-laws problems as were created by the Nazi racial legislation and by the currency-control regulations (*Devisenrecht*), while he notes with interest the puzzling new questions raised by the political division of Germany ("interlocal conflicts," § 20 II), in particular the "currency split" (§ 53) and the confiscations in the Soviet zone (§ 66 II, IV, § 67), by wartime seizures of enemy property (§ 66 I), and the presence of masses of stateless persons, refugees and displaced persons in Germany (§ 10). Altogether the work is an indispensable tool in the workshop of any student (in the widest sense of the word) of German conflict of laws.

M. MAGDALENA SCHOCH

*Derecho Internacional Privado*. 5th ed. By José Joaquín Caicedo Castilla. (Bogotá: Editorial Temis, 1960. pp. xiv, 619. Index.) The appearance of a 5th edition of the standard treatise on *Private International Law* by the distinguished Colombian jurist is noteworthy, not only because of his long association with the Juridical Committee of Rio de Janeiro, but equally because of the clarity of the presentation of the topics and the relation of the fundamental principles of Colombian law to the provisions of the Bustamante Code of 1928. Particularly useful to the student is the background information in which the various topics are presented, as, for example, the status of aliens, which is traced from Roman law down to recent treaties between Colombia and other countries.

C. G. FENWICK

*Der Staat in der Rechtsgemeinschaft der Völker*. By Erich Kaufmann. (Gesammelte Schriften, Vol. II. Göttingen: Verlag Otto Schwartz & Co., 1960. pp. xxvi, 494. DM. 38.) The present volume, dedicated to Erich Kaufmann, the distinguished German international and constitutional lawyer, deviates from the traditional type of the continental *Festschrift*. Instead of honoring the octogenarian by essays of their own making, his friends and colleagues have collected and re-published writings by Erich Kaufmann himself. What has so far been buried in old magazines, newspapers and official documents has thereby been made easily accessible. In the volume under review, there are reprinted articles, memoranda and legal pleadings by Kaufmann that are related to international law, while Volumes I and III deal with problems of domestic public law and legal philosophy, respectively. At first sight one wonders whether a collection of essays that were occasioned by long past events during a period of some fifty years makes much sense from a scholarly point of view. But it takes little time for the reader to see that practically all of the writings reprinted in this volume touch upon problems that are as significant today as they were when Kaufmann originally analyzed them. Moreover, Kaufmann has the rare gift of expounding with equal insight and skill the legal, political, historical and philosophical aspects of the questions he is examining.

Erich Kaufmann's present theoretical position is perhaps best illustrated by the last essay in which he discusses the relationship between municipal and international law. The analysis of the more practical questions of international law is divided equally between problems of peace and war. A large part of the latter centers on issues raised by the Nuremberg proceedings. The chapters on customs unions and on supranational organizations in the nineteenth-century history of Germany make most useful reading for those who are interested in the issues of European integration.

ERICH HULA

*The Year Book of World Affairs, 1961*. Vol. 15. Edited by George W. Keeton and Georg Schwarzenberger. (London: Stevens & Sons, Ltd.; New York: Frederick A. Praeger, 1961. pp. xviii, 435. Index. £3 3s.; \$12.50.) Almost all the articles in the fifteenth volume of this *Year Book*, which is again presented in its familiar format, focus on aspects of the major confrontation in present-day world politics between the two dominant Communist Powers and the Western alliance. For the most part, the concern of these papers is with the great political developments and issues or with related military or socio-psychological factors. They range from "summitry" to neutralism, and from China and Russia to Western Europe and the United States. In approach and quality the papers vary from dispassionate and thoughtful arguments on present military doctrines and theories (by J. L. Richardson and by A. L. Burns) to an

essentially descriptive account of brain-washing practices (by Edgar H. Schein), and from a sober and sobering interpretation of recent Chinese foreign policy (by Lord Lindsay of Birker) and a comparative sketch of Chinese and Russian policy developments (by Karl A. Wittfogel) to a diatribe against the motivations, past and present, of American foreign policy (by Neil D. Houghton).

International law forms the major subject of one article, an analysis of its current Soviet definition and treatment, by Ivo Lapenna. He demonstrates that the newly added Soviet emphasis on peaceful co-existence does not essentially change the previous Communist concept of international law, and he suggests that the addition does nothing to reduce the theoretical weakness of Soviet legal argument nor its subservience to the shifts of official Soviet policy. International law topics are also touched on briefly in Frederick L. Schuman's comments on the legal rights and wrongs in the events surrounding the abortive summit conference of 1960, and in Georg Schwarzenberger's conceptual distinctions of neutralism and neutrality. International organization is treated in the one paper not devoted directly to the bipolar global power struggle, by Stephen S. Goodspeed, on the United Nations Economic and Social Council. His presentation persuasively argues the limitations of a non-political functionalist approach to international government and thus also leads back to the impact of the major Power rivalry today.

KURT WILK

*Het Mare Liberum van Grotius en Pattijn.* By Frans Eric René De Pauw. (Brugge: Uitgeverij voor Rechts- en Bestuurswetenschappen Die Keure N.V., 1960. pp. xii, 314. Index.) Paralleling the familiar *Mare Liberum* of Grotius, another book with the same title, published in 1726 by Karel Filips Pattijn, an official in the South Netherlands imperial government of what is now Belgium, provides the theme of the present study (a thesis presented at the Free University of Brussels). It is well known how the book by Grotius, published in 1609, was in reality a chapter from his *De Jure Praedae* (unpublished until 1868), which had been written in the interest of the Dutch East India Company. Similarly Pattijn wrote in the interest of a Belgian company at Ostend, chartered in 1722 by Emperor Karl VI to trade with the Indies. English, French, and Dutch opposition resulted in suspension of its charter in 1727. A French edition of Pattijn's book, published in 1727, had been subsidized by the company, but to no avail. The company was a sacrifice to the policy of balance of power. Pattijn's book had no influence on events (pp. 229, 247). Legal theories about freedom of the seas had no more effect upon government action in those days than today upon atomic testing. Likewise Pattijn's book had no academic importance in the development of international law (p. 250).

The chief value of De Pauw's study is his analysis of the writings of Grotius on freedom of the seas and of commerce (pp. 9-80), with which he then compares Pattijn's book (pp. 235-251). He emphasizes the extent to which Grotius in *De Jure Belli ac Pacis* views restrictions upon trade more permissively than he did in *De Jure Praedae*. This abatement of zeal for freedom of commerce is attributed to his official experience as a diplomat advocating Dutch interests in controversies with England, where it was necessary to defend Dutch monopoly of the spice trade with the Molucca Islands. Accordingly, Grotius in his later treatment of the subject classified freedom of trade as a topic of conventional law, which could be regulated by the consent of states, rather than as an indefeasible right given by the immutable law of nature (p. 77).

EDWARD DUMBAULD



*Law and the Algerian Revolution.* By Mohammed Bedjaoui. (Brussels: International Association of Democratic Lawyers, 1961. pp. xii, 260. B.Fr. 150.) This is a valuable case study of the impact of international law upon the war that has ravaged Algeria since 1954. It is candidly partisan: the author's passionate commitment to the movement for Algerian independence is the basis upon which all legal questions are resolved. Nevertheless, legal issues are clearly discerned and adversary arguments are documented with skill and erudition. In addition, the author provides a comprehensive sketch of the historical background and political foreground of the Algerian war up through April, 1961. There are particularly valuable discussions of such diverse matters as premature recognition, the status of belligerency, accession to multilateral treaties by an unrecognized government, applicability of the laws of war, duties of non-intervention, rights and duties of an insurgent government, the legitimation of domestic insurgency, relations between recognized and unrecognized governments of the same state vis-a-vis third states and international organizations, the principle of self-determination and territorial unity, and the special quality of anti-colonial belligerency. Facts and applicable legal rules are described and related with clarity and completeness.

Mohammed Bedjaoui's book amply demonstrates that excellent advocacy is a form of serious scholarship. An apt preface by Pierre Cot treats Bedjaoui's study of the Algerian war as part of the larger crisis created for international law by the twin challenges of socialism and de-colonialization.

RICHARD A. FALK

*Classification for International Law and Relations.* 2nd ed. revised and enlarged. By Kurt Schwerin. (New York: Oceana Publications, 1958. pp. xiii, 96. Index. \$3.50.) The Library Committee of the American Society of International Law adopted this manual as the classification system for the books of the Society in 1961. The Schwerin system, developed from a concept published by Elsie Basset in 1942, provides a framework into which the materials of international law and relations can be placed in order by subject on library shelves. It is a decimal system which assigns numbers from 00 to 99 to major topics and subdivides them to the right as required. Individual books are identified by adding to the subject rubric either title and author initials or country symbols. General works, treatises and other non-documentary material classify under 00 to 58, 0058 being Digests, 01 the State, 36 Treaties, for example. International Relations is 60 and runs to 73 for unofficial publications; 65 is Peace; 67 is League of Nations and 675 United Nations in this aspect. Official publications of governments and international organizations utilize 75 to 99, the international judicial organs being assigned the 85 slot and government publications 90.

D. P. M.

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ELEANOR H. FINCH

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UNITED NATIONS  
REPORT OF THE INTERNATIONAL LAW COMMISSION

COVERING THE WORK OF ITS FOURTEENTH SESSION, APRIL 24-JUNE 29, 1962 \*

CHAPTER I

ORGANIZATION OF THE SESSION

1. The International Law Commission, established in pursuance of General Assembly Resolution 174 (II) of 21 November 1947, and in accordance with its Statute annexed thereto, as subsequently amended, held its Fourteenth Session at the European Office of the United Nations, Geneva, from 24 April to 29 June 1962. The work of the Commission during the session is described in this Report. Chapter II of the Report contains twenty-nine provisional draft articles on the conclusion, entry into force and registration of treaties, with commentaries. Chapter III relates to the Commission's future work in the field of the codification and progressive development of international law. Chapter IV concerns the organization of the work of the next session. Chapter V deals with a number of administrative and other questions.

I. MEMBERSHIP AND ATTENDANCE

2. By its Resolution 1647 (XVI) of 6 November 1961, the General Assembly decided to increase the number of members of the Commission from 21 to 25. At its 1067th plenary meeting, on 28 November 1961, the Assembly elected the members listed below for a term of five years, pursuant to its Resolution 985 (X) of 3 December 1955. The term of the present members began on 1 January 1962.

3. The Commission consists of the following members:

<i>Name</i>	<i>Nationality</i>
Mr. Roberto Ago	Italy
Mr. Gilberto Amado	Brazil
Mr. Milan Bartoň	Yugoslavia
Mr. Herbert W. Briggs	United States of America
Mr. Marcel Cadieux	Canada

\* U. N. General Assembly, 17th Sess., Official Records, Supp. No. 9 (A/5209). For reports of the International Law Commission covering its previous sessions, see Supplements to this JOURNAL, Vol. 44 (1950), pp. 1, 105; Vol. 45 (1951), p. 103; Vol. 47 (1953), p. 1; Vol. 48 (1954), p. 1; Vol. 49 (1955), p. 1; and Official Documents, Vol. 50 (1956), p. 190; Vol. 51 (1957), p. 154; Vol. 52 (1958), p. 177; Vol. 53 (1959), p. 230; Vol. 54 (1960), 229; Vol. 55 (1961), p. 223; Vol. 56 (1962), p. 268.

Mr. Erik Castrén	Finland
Mr. Abdullah El-Erian	United Arab Republic
Mr. Taslim O. Elias	Nigeria
Mr. André Gros	France
Mr. Eduardo Jiménez de Aréchaga	Uruguay
Mr. Victor Kanga	Cameroon
Mr. Manfred Lachs	Poland
Mr. Liu Chieh	China
Mr. Antonio de Luna García	Spain
Mr. Luis Padilla Nervo	Mexico
Mr. Radhabinod Pal	India
Mr. Angel M. Paredes	Ecuador
Mr. Obed Pessou	Dahomey
Mr. Shabtai Rosenne	Israel
Mr. Abdul Hakim Tabibi	Afghanistan
Mr. Senjin Tsuruoka	Japan
Mr. Grigory I. Tunkin	Union of Soviet Socialist Republics
Mr. Alfred Verdross	Austria
Sir Humphrey Waldock	United Kingdom of Great Britain and Northern Ireland
Mr. Mustafa Kamil Yasseen	Iraq

4. All the members, with the exception of Mr. Victor Kanga, attended the session of the Commission.

## II. OFFICERS

5. At its 628th meeting, held on 24 April 1962, the Commission elected the following officers:

*Chairman:* Mr. Radhabinod Pal;

*First Vice-Chairman:* Mr. André Gros;

*Second Vice-Chairman:* Mr. Gilberto Amado;

*Rapporteur:* Mr. Manfred Lachs.

6. At its 634th meeting, held on 2 May 1962, the Commission appointed a drafting Committee under the chairmanship of the first Vice-Chairman of the Commission. The composition of the Committee was as follows: Mr. André Gros, Chairman, Mr. Roberto Ago, Mr. Eduardo Jiménez de Aréchaga, Mr. Manfred Lachs, Mr. Grigory I. Tunkin, Sir Humphrey Waldock, Mr. Mustafa Kamil Yasseen.

7. The Legal Counsel, Mr. Constantin Stavropoulos, was present at the meetings of the Commission and represented the Secretary-General from 29 May to 1 June. Mr. Yuen-li Liang, Director of the Codification Division of the Office of Legal Affairs, acted as Secretary to the Commission. He also represented the Secretary-General in the absence of Mr. Stavropoulos.

## III. AGENDA

8. The Commission adopted an agenda for the Fourteenth Session consisting of the following items:



1. Law of treaties.
2. Future work in the field of codification and progressive development of international law (General Assembly Resolution 1686 (XVI).
3. Question of special missions (General Assembly Resolution 1687 (XVI).
4. Co-operation with other bodies.
5. Date and place of the Fifteenth Session.
6. Other business.

9. In the course of the session, the Commission held forty-five meetings. It considered all the items on its agenda except item 3 (Question of special missions).

10. At its Twelfth Session, in 1960, the Commission had, in pursuance of General Assembly Resolution 1453 (XIV) of 7 December 1959, requested the Secretariat<sup>1</sup> to undertake a study of the juridical régime of historic waters and to extend the scope of the preliminary study outlined in paragraph 8 of the memorandum on historic bays, prepared by the Secretariat in connexion with the first United Nations Conference on the Law of the Sea.<sup>2</sup> This study (A/CN.4/143) was submitted to the present session, but as the question was not on the agenda, it was not considered by the Commission.

## CHAPTER II

### LAW OF TREATIES

#### I. INTRODUCTION

##### A. SUMMARY OF THE COMMISSION'S PROCEEDINGS<sup>3</sup>

11. At its First Session in 1949, the International Law Commission placed the "Law of treaties" amongst the topics listed in paragraphs 15 and 16 of its report for that year as being suitable for codification and appointed Mr. J. L. Brierly as Special Rapporteur for the subject.

12. At its Second Session in 1950, the Commission devoted its 49th to 53rd meetings to a preliminary discussion of Mr. J. L. Brierly's first report<sup>4</sup> which like his other reports envisaged the Commission's work on the law of treaties taking the form of a draft convention, and also had available to it replies of governments to a questionnaire addressed to them under Article 19, paragraph 2, of its Statute.<sup>5</sup> The Commission's report for that session contained *inter alia* the following observation:

"A majority of the Commission were also in favour of including in its study agreements to which international organizations are parties.

<sup>1</sup> Yearbook of the International Law Commission, 1960 (U. N. pub., Sales No.: 60.V.1), Vol. II, p. 180.

<sup>2</sup> United Nations Conference on the Law of the Sea, Official Records, Vol. I (U. N. pub., Sales No.: 58.V.4, Vol. I), Doc. A/CONF.13/1.

<sup>3</sup> This summary is based upon paragraphs 8-11 in Chapter II of the Commission's report to the General Assembly in 1959 (A/4169): Yearbook of the International Law Commission, 1959 (U. N. pub., Sales No.: 59.V.1), Vol. II, pp. 88-89.

<sup>4</sup> *Ibid.*, 1950 (U. N. pub., Sales No.: 57.V.3), Vol. II, p. 223.

<sup>5</sup> *Ibid.*, p. 196.

There was general agreement that, while the treaty-making power of certain organizations is clear, the determination of the other organizations which possess capacity for making treaties would need further consideration." (Paragraphs 161-162 of the report.)

13. At its Third Session in 1951, the Commission had before it two reports from Mr. Brierly,<sup>6</sup> one a continuation of the Commission's general work on the law of treaties and the other a special report on "reservations to multilateral conventions" called for by the General Assembly at the same time as it had requested an advisory opinion from the International Court of Justice on the particular problem of reservations to the Genocide Convention.<sup>7</sup> As to the Commission's opinions and recommendations on the special subject of reservations to multilateral conventions, there is no need to summarize them here, since this is done later in the present report in the commentary which follows Articles 18, 19 and 20.<sup>8</sup> At the Third Session of the Commission, Mr. Brierly presented a second report on the law of treaties which was discussed in the course of eight meetings. The Commission took a further decision at that session concerning the question of international organizations already mentioned in its report for 1950. It adopted "the suggestion put forward the previous year by Mr. Hudson, and supported by other members of the Commission, that it should leave aside, for the moment, the question of the capacity of international organizations to make treaties, that it should draft the articles with reference to states only and that it should examine later whether they could be applied to international organizations as they stood or whether they required modifications."<sup>9</sup>

14. At its Fourth Session in 1952, the Commission had before it a "third report on the law of treaties,"<sup>10</sup> prepared by Mr. Brierly, who, however, had meanwhile resigned his membership of the Commission. In the absence of its author the Commission did not think it expedient to discuss that report, and it confined itself to electing Mr. H. Lauterpacht to succeed Mr. Brierly as Special Rapporteur.

15. At its Fifth Session in 1953, the Commission received a report from Mr. Lauterpacht containing draft articles and commentaries on a number of topics in the law of treaties but, owing to its other commitments, was unable to take up the report at that session. It therefore instructed Mr. Lauterpacht to continue his work and present a further report. At its Sixth Session in 1954, the Commission duly received Mr. H. Lauterpacht's second report but was again unable to take up the subject. Meanwhile Mr. (by then Sir Hersch) Lauterpacht had resigned from the Commission on his election as judge of the International Court of Justice, and at its Seventh Session in 1955 the Commission elected Sir Gerald Fitzmaurice as Special Rapporteur in his place.

<sup>6</sup> *Ibid.*, 1951 (U. N. pub., Sales No.: 57.V.6), Vol. II, pp. 1 and 70.

<sup>7</sup> I.C.J. Reports 1951, p. 15.

<sup>8</sup> See par. 23 below.

<sup>9</sup> Yearbook of the International Law Commission, 1951 (U. N. pub., Sales No.: 57.V.6), Vol. I, p. 136.

<sup>10</sup> *Ibid.*, 1952 (U. N. pub., Sales No.: 58.V.5), Vol. II, p. 50.

16. At the next five sessions of the Commission, from 1956 to 1960, Sir Gerald Fitzmaurice presented five separate and comprehensive reports on the law of treaties, covering respectively: (a) the framing, conclusion and entry into force of treaties,<sup>11</sup> (b) the termination of treaties,<sup>12</sup> (c) essential and substantial validity of treaties,<sup>13</sup> (d) effects of treaties as between the parties (operation, execution and enforcement)<sup>14</sup> and (e) treaties and third states.<sup>15</sup> Although taking full account of the reports of his predecessors, Sir Gerald Fitzmaurice began preparing his drafts on the law of treaties *de novo* and framed them in the form of an expository code [rather] than of a convention. During this period the Commission's time was largely taken up with its work on the law of the sea and on diplomatic and consular intercourse and immunities, so that, apart from a brief discussion of certain general questions of treaty law at the 368th-370th meetings of its 1956 session, it was only able to concentrate upon the law of treaties at its Eleventh Session in 1959. At that session it devoted some twenty-six meetings<sup>16</sup> to a discussion of Sir Gerald Fitzmaurice's first report on the framing, conclusion and entry into force of treaties, and provisionally adopted the texts of fourteen articles, together with their commentaries. However, the time available was not sufficient to enable the Commission to complete its series of draft articles on this part of the law of treaties.<sup>17</sup> In its report for 1959 the Commission stated that, without prejudice to any eventual decision to be taken by the Commission, it had not so far envisaged its work on the law of treaties as taking the form of one or more international conventions but rather as "a code of a general character." The arguments in favour of a "code" were stated to be two-fold:

"First, it seems inappropriate that a code on the law of treaties should itself take the form of a treaty; or rather, it seems more appropriate that it should have an independent basis. In the second place, much of the law relating to treaties is not especially suitable for framing in conventional form. It consists of enunciations of principles and abstract rules, most easily stated in the form of a code; and this also has the advantage of rendering permissible the inclusion of a certain amount of declaratory and explanatory material in the body of the code, in a way that would not be possible if this had to be confined to a strict statement of obligation. Such material has considerable utility in making clear, on the face of the code itself, the legal concepts or reasoning on which the various provisions are based."<sup>18</sup>

Mention was also made of possible difficulties that might arise if the law of treaties were to be embodied in a multilateral convention and then some

<sup>11</sup> *Ibid.*, 1956 (U. N. pub., Sales No.: 56.V.3), Vol. II, p. 104.

<sup>12</sup> *Ibid.*, 1957 (U. N. pub., Sales No.: 57.V.5), Vol. II, p. 16.

<sup>13</sup> *Ibid.*, 1958 (U. N. pub., Sales No.: 58.V.1), Vol. II, p. 20.

<sup>14</sup> *Ibid.*, 1959 (U. N. pub., Sales No.: 59.V.1), Vol. II, p. 37.

<sup>15</sup> *Ibid.*, 1960 (U. N. pub., Sales No.: 60.V.1), Vol. II, p. 69.

<sup>16</sup> 480th-496th, 500th-504th and 519-522nd meetings.

<sup>17</sup> Chapter II of the Commission's report for 1959 contains Articles 1-10 and 14-17 of a proposed chapter of a comprehensive code on the law of treaties.

<sup>18</sup> Yearbook of the International Law Commission, 1956 (U. N. pub., Sales No.: 56.V.3), Vol. II, p. 107.

states did not become parties to it or, having become parties to it, subsequently denounced it. On the other hand, it recognized that these difficulties arise whenever a convention is drawn up embodying rules of customary law. Finally, it underlined that, if it were decided to cast the code in the form of a multilateral convention, considerable drafting changes, and possibly the omission of some material, would almost certainly be required.

17. The Twelfth Session, in 1960, was almost entirely taken up with consular intercourse and immunities and *ad hoc* diplomacy, so that no further progress was made with the law of treaties during that session. Sir Gerald Fitzmaurice then had himself to retire from the Commission on his election as judge of the International Court of Justice, and at the Thirteenth Session, in 1961, the Commission elected Sir Humphrey Waldock to succeed him as Special Rapporteur for the law of treaties. At the same time the Commission took the following general decisions as to its work on the law of treaties:

“(i) That its aim would be to prepare draft articles on the law of treaties intended to serve as the basis for a convention;

“(ii) That the Special Rapporteur should be requested to re-examine the work previously done in this field by the Commission and its Special Rapporteurs;

“(iii) That the Special Rapporteur should begin with the question of the conclusion of treaties and then proceed with the remainder of the subject, if possible covering the whole subject in two years.”<sup>19</sup>

By the first of these decisions the Commission changed the scheme of its work on the law of treaties from a mere expository statement of the law to the preparation of draft articles capable of serving as a basis for a multilateral convention. In doing so, it had two considerations principally in mind. First, an expository code, however well formulated, cannot in the nature of things be so effective as a convention for consolidating the law; and the consolidation of the law of treaties is of particular importance at the present time when so many new states have recently become members of the international community. Secondly, the codification of the law of treaties through a multilateral convention would give all the new states the opportunity to participate directly in the formulation of the law if they so wished; and their participation in the work of codification appears to the Commission to be extremely desirable in order that the law of treaties may be placed upon the widest and most secure foundations.

18. At the present session of the Commission the Special Rapporteur submitted a report (A/CN.4/144 and Add.1) on the conclusion, entry into force and registration of treaties which was considered by the Commission at its 636th-672nd meetings. The Commission adopted a provisional draft of articles upon these topics, which is reproduced in the present chapter together with commentaries upon the articles. Its plan is to prepare a draft of a further group of articles at its next session covering the validity and duration of treaties and a draft of a yet further group of articles at the

<sup>19</sup> Official Records of the General Assembly, 16th Sess., Supp. No. 9 (A/4843), par. 39.

subsequent session covering the application and effects of treaties. Whether all the drafts should be amalgamated to form a single draft convention or whether the codification of the law of treaties should be dealt with in a series of related conventions is a question which can be left over for decision when all the drafts are complete. Provisionally, and for the purpose of facilitating the work of drafting, the Commission is adopting the same method as in the case of the law of the sea—of preparing a series of self-contained though closely related group of draft articles.

19. In accordance with Articles 16 and 21 of its Statute, the Commission decided to transmit its draft concerning the conclusion, entry into force and registration of treaties, through the Secretary-General, to governments for their observations.

#### B. THE SCOPE OF THE PRESENT GROUP OF DRAFT ARTICLES

20. The present group of draft articles covers the broad topic of the "conclusion" of treaties. "Entry into force" has been regarded as naturally associated with, if not actually part of, "conclusion," while the subject of "registration of treaties" has been added as belonging essentially to the procedure of treaty-making and as being closely linked in point of time to entry into force.<sup>20</sup> Articles providing for the correction of errors discovered in the texts of treaties after their authentication have been included, as well as articles concerning the appointment and functions of a depositary. The depositary state or international organization plays so essential a part in the working of the procedural clauses of a multilateral treaty that reference to the functions of a depositary is almost inevitable in articles codifying the law concerning the conclusion of treaties. The Commission notes, moreover, that the General Assembly itself, in its Resolution 1452 B (XIV) of 7 December 1959 concerning reservations to multilateral conventions, emphasized the need for the practice of depositary states and organizations to be taken into account by the Commission in its work on the law of treaties. The articles (Articles 28 and 29) prepared by the Commission concerning the functions of a depositary will, however, be re-examined since the information concerning the practice of depositary states and organizations called for in the above-mentioned resolution is not yet available.

21. The Commission again considered the question of including provisions concerning the treaties of international organizations in the draft articles on the conclusion of treaties. The Special Rapporteur had prepared, for submission to the Commission at a later stage in the session, a final chapter on treaty-making by international organizations. He suggested that this chapter should specify the extent to which the articles concerning states apply to international organizations and formulate the particular rules peculiar to organizations. The Commission, however, re-

<sup>20</sup> Article 102 of the Charter requires treaties to be registered "as soon as possible," while the regulations adopted by the General Assembly on 14 December 1946 provide that they shall not be registered until they have entered into force; see Article 1, paragraph 2, of the regulations, United Nations Treaty Series, Vol. I, p. xx.

affirmed its decisions of 1951<sup>21</sup> and 1959<sup>22</sup> to defer examination of the treaties entered into by international organizations until it had made further progress with its draft on treaties concluded by states. At the same time the Commission recognized that international organizations may possess a certain capacity to enter into international agreements and that these agreements fall within the scope of the law of treaties. Accordingly, while confining the specific provisions of the present draft to the treaties of states, the Commission has made it plain in the commentaries attached to Articles 1 and 3 of the present draft articles that it considers the international agreements to which organizations are parties to fall within the scope of the law of treaties.

22. The draft articles have provisionally been arranged in five sections covering: (i) general provisions, (ii) the conclusion of treaties by states, (iii) reservations, (iv) the entry into force and registration of treaties and (v) the correction of errors and the functions of depositaries. In preparing the draft articles, the Commission has sought to codify the modern rules of international law concerning the conclusion of treaties and the articles formulated by the Commission contained elements of progressive development, as well as of codification of the law.

23. The text of draft Articles 1 to 29 and the commentaries, as adopted by the Commission on the proposal of the Special Rapporteur, are reproduced below:

## II. DRAFT ARTICLES ON THE LAW OF TREATIES

### PART I

#### CONCLUSION, ENTRY INTO FORCE AND REGISTRATION OF TREATIES

##### SECTION I: GENERAL PROVISIONS

##### ARTICLE 1

##### *Definitions*

1. For the purposes of the present articles, the following expressions shall have the meanings hereunder assigned to them:

(a) "Treaty" means any international agreement in written form, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation (treaty, convention, protocol, covenant, charter, statute, act, declaration, concordat, exchange of notes, agreed minute, memorandum of agreement, *modus vivendi* or any other appellation), concluded between two or more states or other subjects of international law and governed by international law.

(b) "Treaty in simplified form" means a treaty concluded by exchange of notes, exchange of letters, agreed minute, memorandum of agreement,

<sup>21</sup> Yearbook of the International Law Commission, 1951 (U. N. pub., Sales No.: 57.V.6), Vol. I, p. 136.

<sup>22</sup> *Ibid.*, 1959 (U. N. pub., Sales No.: 59.V.I), Vol. II, pp. 89 and 96.

joint declaration or other instrument concluded by any similar procedure.

(c) "General multilateral treaty" means a multilateral treaty which concerns general norms of international law or deals with matters of general interest to states as a whole.

(d) "Signature," "Ratification," "Accession," "Acceptance" and "Approval" mean in each case the act so named whereby a state establishes on the international plane its consent to be bound by a treaty. Signature however also means according to the context an act whereby a state authenticates the text of a treaty without establishing its consent to be bound.

(e) "Full powers" means a formal instrument issued by the competent authority of a state authorizing a given person to represent the state either for the purpose of carrying out all the acts necessary for concluding a treaty or for the particular purpose of negotiating or signing a treaty or of executing an instrument relating to a treaty.

(f) "Reservation" means a unilateral statement made by a state, when signing, ratifying, acceding to, accepting or approving a treaty, whereby it purports to exclude or vary the legal effect of some provisions of the treaty in its application to that state.

(g) "Depositary" means the state or international organization entrusted with the functions of custodian of the text of the treaty and of all instruments relating to the treaty.

2. Nothing contained in the present articles shall affect in any way the characterization or classification of international agreements under the internal law of any state.

### *Commentary*

(1) The definitions, as the introductory words of the paragraph indicate, are intended only to state the meanings with which the terms in question are used in the draft articles.

(2) *Treaty*. The term "treaty" is used throughout the draft articles as a generic term covering all forms of international agreement in writing. Although the term "treaty" in one sense connotes only the single formal instrument, there also exist international agreements, such as exchanges of notes, which are not a single formal instrument nor usually subject to ratification, and yet are certainly agreements to which the law of treaties applies. Similarly, very many single instruments in daily use, such as an "agreed minute" or a "memorandum of understanding," could not appropriately be called *formal* instruments, but they are undoubtedly international agreements subject to the law of treaties. A general convention on the law of treaties must cover all such agreements, whether embodied in one instrument or in two or more related instruments, and whether the instrument is "formal" or "informal." The question whether, for the purpose of describing all such instruments and the law relating to them, the expression "treaties" and "law of treaties" should be employed, rather than "international agreements" and "law of international agreements" is a question of terminology rather than of substance. In the

opinion of the Commission, a number of considerations point strongly in favour of using the term "treaty" for this purpose.

(3) In the first place, the treaty in simplified form, far from being at all exceptional, is very common. The number of such agreements, whether embodied in a single instrument or in two or more related instruments, is now very large and moreover their use is steadily increasing.<sup>23</sup>

(4) Secondly the juridical differences, in so far as they really exist at all, between formal treaties and treaties in simplified form lie almost exclusively in the field of form, and in the method of conclusion and entry into force. The law relating to such matters as validity, operation and effect, execution and enforcement, interpretation, and termination, applies to all classes of international agreements. In relation to these matters, there are admittedly some important differences of a juridical character between certain classes or categories of international agreements.<sup>24</sup> But these differences spring neither from the form, the appellation, nor any other outward characteristic of the instrument in which they are embodied: they spring exclusively from the content of the agreement, whatever its form. It would therefore be inadmissible to exclude certain forms of international agreements from the general scope of a convention on the law of treaties merely because, in the field of form pure and simple, and of the method of conclusion and entry into force, there may be certain differences between such agreements and formal agreements. At the most, such a situation might make it desirable, in that particular field and in the section of the convention dealing with it, to institute certain differences of treatment between different forms of international agreements.

(5) Thirdly, even in the case of single formal agreements, an extraordinarily rich and varied nomenclature has developed which serves to confuse the question of classifying international agreements. Thus, in addition to "treaty," "convention" and "protocol," one not infrequently finds titles such as "declaration," "charter," "covenant," "pact," "act," "statute," "agreement," "concordat," whilst names like "declaration" and "agreement" and "*modus vivendi*" may well be found given both to formal and less formal types of agreements. As to the latter, their nomenclature is almost illimitable, even if some names such as "agreement," "exchange of notes," "exchange of letters," "memorandum of agreement," or "agreed minutes," may be more common than others.<sup>25</sup> It is true that some types of instruments are used more frequently for some purposes

<sup>23</sup> See first report by Sir Hersch Lauterpacht, Yearbook of the International Law Commission, 1953 (U. N. pub., Sales No.: 59.V.4), Vol. II, pp. 101-106.

<sup>24</sup> See on this subject the commentaries to Sir Gerald Fitzmaurice's second report (*ibid.*, 1957 (U. N. pub., Sales No.: 57.V.5), Vol. II, p. 16, pars. 115, 120, 125-128 and 165-168); his third report (*ibid.*, 1958 (U. N. pub., Sales No.: 58.V.1), Vol. II, p. 20, pars. 90-93).

<sup>25</sup> In his article "The Names and Scope of Treaties" (American Journal of International Law, 51 (1957), No. 3, p. 574), Mr. Denys P. Myers considers no less than thirty-eight different appellations; see also the list given in Sir Hersch Lauterpacht's first report (Yearbook 1953, Vol. II, p. 101), paragraph 1 of the commentary to his Article 2. Article 1 of the General Assembly regulation concerning registration speaks of "every treaty or international agreement whatever its form and descriptive name."



rather than others; it is also true that some titles are more frequently attached to some types of transaction rather than to others. But there is no exclusive or systematic use of nomenclature for particular types of transaction.

(6) Fourthly, the use of the term "treaty" as a generic term embracing all kinds of international agreements in written form is accepted by the majority of jurists.<sup>26</sup>

(7) Even more important, the generic use of the term "treaty" is supported by two provisions of the Statute of the International Court of Justice. In Article 36, paragraph 2, amongst the matters in respect of which states parties to the Statute can accept the compulsory jurisdiction of the Court, there is listed "*a.* the interpretation of a treaty." But clearly, this cannot be intended to mean that states cannot accept the compulsory jurisdiction of the Court for purposes of the interpretation of international agreements not actually called treaties, or embodied in instruments having another designation. Again, in Article 38, paragraph 1, the Court is directed to apply in reaching its decisions, "*a.* international conventions." But equally, this cannot be intended to mean that the Court is precluded from applying other kinds of instruments embodying international agreements, but not styled "conventions." On the contrary, the Court must and does apply them. The fact that in one of these two provisions dealing with the whole range of international agreements the term employed is "treaty" and in the other the even more formal term "convention" serves to confirm that the use of the term "treaty" generically in the present articles to embrace all international agreements is perfectly legitimate. Moreover, the only real alternative would be to use for the generic term the phrase "international agreement," which would not only make the drafting more cumbersome but would sound strangely today, when the "law of treaties" is the term almost universally employed to describe this branch of international law.

(8) The term "treaty," as used in the draft article covers only international agreements made between "two or more states or other subjects of international law." The phrase "other subjects of international law" is designed to provide for treaties concluded by: (*a.*) international organizations, (*b.*) the Holy See which enters into treaties on the same basis as states, and (*c.*) other international entities, such as insurgents which may in some circumstances enter into treaties. The phrase is not intended to include individuals or corporations created under national law, for they do not possess capacity to enter into treaties nor to enter into agreements governed by public international law.<sup>27</sup>

<sup>26</sup> Lord McNair, *Law of Treaties* (1961), p. 22; Rousseau, *Principes généraux du droit international public*, p. 132 *et seq.* See also the opinion of Louis Renault as long ago as 1869: "... every agreement arrived at between . . . States, in whatever way it is recorded (treaty, convention, protocol, mutual declaration, exchange of unilateral declaration)." (translation) *Introduction à l'étude du droit international*, pp. 33-34.

<sup>27</sup> As to this point and the general question of the capacity of subjects of international law to enter into treaties, see further the commentary to Article 3.

(9) The phrase "governed by international law" serves to distinguish between international agreements regulated by public international law and those which, although concluded between two states, are regulated by the national law of one of the parties (or by some other national law system chosen by the parties).

(10) The use of the term "treaty" in the draft articles is confined to international agreements expressed in writing. This is not to deny the legal force of oral agreements under international law or that some of the principles contained in later parts of the Commission's draft articles on the law of treaties may not have relevance in regard to oral agreements. But the term "treaty" is commonly used as denoting an agreement in written form, and in any case the Commission considers that, in the interests of clarity and simplicity, its draft articles on the law of treaties must be confined to agreements in written form. On the other hand, although the classical form of treaty was a single formal instrument, in modern practice international agreements are frequently concluded not only by less formal instruments but also by means of two or more related instruments. The obvious examples are exchanges of notes and exchanges of letters. Another is the case of agreements concluded by means of "declarations" made separately but related to each other either directly or through a connecting instrument. The definition, by the phrase "whether embodied in a single instrument or two or more related instruments," brings these forms of international agreement within the term "treaty" as well as all those embodied in a single instrument.

(11) "*Treaty in simplified form.*" As already indicated in paragraph 4 of the present commentary, the law of treaties for the most part applies in the same manner to formal treaties and treaties in simplified form but in the sphere of conclusion and entry into force some differences may be found to exist. In point of fact, formal and informal treaties are so often employed for precisely the same kind of transaction that the number of cases where it can be said with truth that different principles apply to formal and informal treaties are extremely few. Nevertheless, in one or two instances a distinction needs to be drawn between treaties in simplified form and other treaties (*e.g.*, Articles 4 and 10). The distinction is not altogether easy to express owing to the great variety in the use of treaty forms and the somewhat indiscriminate nomenclature of treaties. In general, treaties in simplified form identify themselves by the absence of one or more of the characteristics of the formal treaty. But it would be difficult to base the distinction infallibly upon the absence or presence of any one of these characteristics. Ratification, for example, though not usually required for treaties in simplified form is by no means unknown. Nevertheless, the treaty forms falling under the rubric "treaties in simplified form" do in most cases identify themselves by their simplified procedure. The Commission has, therefore, defined this form of treaty by reference to its simplified procedure and by mentioning typical examples.

(12) *General multilateral treaty.* Multiplication of the number of states participating in the drawing up of a treaty may raise problems in

regard to the procedure for the adoption, signing and authentication of the treaty and in regard to the admission of additional parties, the acceptance of reservations, entry into force and other matters. The problem is also posed whether different rules may, perhaps, apply to treaties drawn up by a limited number of states and those drawn up by a large number or between those to which only a limited group of states may become parties and those to which all or a very large number of states may become parties. The Commission, having given close attention to these problems, found that for most purposes the relevant distinction is between treaties drawn up at a conference convened by the states themselves and those drawn up in an international organization or at a conference convened by an international organization. But in one or two cases the Commission found it necessary to have regard also to other criteria. One of these cases was the procedure for admitting additional states to participation in a multilateral treaty. Here, the Commission found that the relevant distinction is between "general multilateral treaties" and other multilateral treaties. Accordingly, it became necessary to define a "general multilateral treaty" and the Commission took as the basis of its definition the general character of the treaty from the point of view of the provisions of the treaty being a matter of general concern to the international community as a whole.

(13) *Reservation*. The need for this definition arises from the fact that states, when signing, ratifying, acceding to, accepting or approving a treaty, not infrequently make declarations as to their understanding of some matter or as to their interpretation of a particular provision. Such a declaration may be a mere clarification of the state's position or it may amount to a reservation, according as it does or does not vary or exclude the application of the terms of the treaty as adopted.

(14) The remaining definitions do not require comment, as they are sufficiently explained in the relevant articles and commentaries.

(15) Paragraph 2 is designed to safeguard the position of states in regard to their internal law and usages, and more especially in connexion with the ratification of treaties. In many countries, the constitution requires that international agreements in a form considered under the internal law or usage of the state to be a "treaty" must be endorsed by the legislature or have their ratification authorized by it—perhaps by a specific majority, whereas other forms of international agreement are not subject to this requirement. Accordingly, it is quite essential that the definition given to the term "treaty" in the present articles should do nothing to disturb or affect in any way the existing domestic rules or usages which govern the classification of international agreements under national law.

## ARTICLE 2

### *Scope of the present articles*

1. Except to the extent that the particular context may otherwise require, the present articles shall apply to every treaty as defined in Article 1, paragraph 1 (a).

2. The fact that the present articles do not apply to international agreements not in written form shall not be understood as affecting the legal force that such agreements possess under international law.

### *Commentary*

(1) Paragraph 1 of this article has to be read in conjunction with the definition of treaty in Article 1, from which it appears that the draft articles apply to every international agreement in written form concluded between two or more subjects of international law and governed by international law: The words "except to the extent that a particular context may otherwise require" preface the statement as to the scope of the present articles simply as a recognition of the fact that some of their provisions are, either by their express terms or by their inherent nature, only applicable to certain kinds of treaties.

(2) As already stated in paragraph 10 of the commentary to Article 1, the restriction of the draft articles to agreements in written form does not mean that the Commission considers oral international agreements to be without legal force. Accordingly, in order to remove any possibility of misunderstanding, paragraph 2 of the present article, without entering further into the matter, expressly preserves such legal force as oral agreements possess under international law.

## ARTICLE 3

### *Capacity to conclude treaties*

1. Capacity to conclude treaties under international law is possessed by states and by other subjects of international law.

2. In a federal state, the capacity of the member states of a federal union to conclude treaties depends on the federal constitution.

3. In the case of international organizations, capacity to conclude treaties depends on the constitution of the organization concerned.

### *Commentary*

(1) Some members of the Commission were doubtful about the need for an article on capacity in international law to conclude treaties. They pointed out that capacity to enter into diplomatic relations had not been dealt with in the Vienna Convention and suggested that, if it were to be dealt with in the law of treaties, the Commission might find itself codifying the whole law concerning the "subjects" of international law. Other members felt that the question of capacity is more prominent in the law of treaties than in the law of diplomatic intercourse and immunities and that the draft articles should contain at least some general provisions concerning capacity to conclude treaties. The Commission, while holding that it would not be appropriate to enter into all the detailed problems of capacity which may arise, decided to include the present article setting out three broad provisions concerning capacity to conclude treaties.

(2) Paragraph 1 lays down the general principle that treaty-making capacity is possessed by states and by other subjects of international law. The term "state" is used here with the same meaning as in the Charter of the United Nations, the Statute of the Court, the Geneva Convention on the Law of the Sea and the Vienna Convention on Diplomatic Inter-course and Immunities; *i.e.*, it means a state for the purposes of international law. The phrase "other subjects of international law" is primarily intended to cover international organizations, to remove any doubt about the Holy See and to leave room for more special cases such as an insurgent community to which a measure of recognition has been accorded.

(3) Paragraph 2<sup>28</sup> deals with the case of federal states whose constitutions, in some instances, allow to their member states a measure of treaty-making capacity. It does not cover treaties made between two units of the federation. Agreements between two member states of a federal state have a certain similarity to international treaties and in some instances certain principles of treaty law have been applied to them by analogy. However, those agreements operate within the legal régime of the constitution of the federal state, and to bring them expressly within the terms of the present articles would be to risk a conflict between international and domestic law. Paragraph 2, therefore, is concerned only with treaties made by the federal government itself, or by a unit of the federation with an outside state. More frequently, the treaty-making capacity is vested exclusively in the federal government, but there is no rule of international law which precludes the component states from being invested with the power to conclude treaties with third states. A question may arise in some cases as to whether the component state concludes the treaty as an organ of the federal state or in its own right. But on this point also the solution has to be sought in the provisions of the federal constitution.

(4) Paragraph 3 states that the treaty-making capacity of an international organization depends on its constitution. The term "constitution" has been chosen deliberately in preference to "constituent instrument." For the treaty-making capacity of an international organization does not depend exclusively on the terms of the constituent instrument of the organization but also on the decisions and rules of its competent organs. Comparatively few constituent treaties of international organizations contain provisions concerning the conclusion of treaties by the organization; nevertheless, the great majority of organizations have considered themselves competent to enter into treaties for the purpose of furthering the aims of the organization. Even when, as in the case of the Charter, the constituent treaty has contained express provisions concerning the making of certain treaties, they have not been considered to exhaust the treaty-making powers of the organization. In this connexion, it is only necessary to recall the dictum of the International Court in its opinion

<sup>28</sup> For the reasons given by him in the summary records of the 658th and 666th meetings, Mr. Briggs does not accept the provisions of paragraph 2 of Article 3.

on *Reparation for Injuries Suffered in the Service of the United Nations*.<sup>29</sup> "Under international law, the organization must be deemed to have those powers which, though not expressly provided for in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties." Accordingly, important although the provisions of the constituent treaty of an organization may be in determining the proper limits of its treaty-making activity, it is the constitution as a whole—the constituent treaty together with the rules in force in the organization—that determine the capacity of an international organization to conclude treaties.

## SECTION II: CONCLUSION OF TREATIES BY STATES

### ARTICLE 4

#### *Authority to negotiate, draw up, authenticate, sign, ratify, accede to, approve or accept a treaty*

1. Heads of state, heads of government and foreign ministers are not required to furnish any evidence of their authority to negotiate, draw up, authenticate or sign a treaty on behalf of their state.

2. (a) Heads of a diplomatic mission are not required to furnish evidence of their authority to negotiate, draw up and authenticate a treaty between their state and the state to which they are accredited.

(b) The same rule applies in the case of the heads of a permanent mission to an international organization in regard to treaties drawn up under the auspices of the organization in question or between their state and the organization to which they are accredited.

3. Any other representative of a state shall be required to furnish evidence, in the form of written credentials, of his authority to negotiate, draw up and authenticate a treaty on behalf of his state.

4. (a) Subject to the provisions of paragraph 1 above, a representative of a state shall be required to furnish evidence of his authority to sign (whether in full or *ad referendum*) a treaty on behalf of his state by producing an instrument of full powers.

(b) However, in the case of treaties in simplified form, it shall not be necessary for a representative to produce an instrument of full powers, unless called for by the other negotiating state.

5. In the event of an instrument of ratification, accession, approval or acceptance being signed by a representative of the state other than the head of state, head of government or foreign minister, that representative shall be required to furnish evidence of his authority.

6. (a) The instrument of full powers, where required, may either be one restricted to the performance of the particular act in question or a grant of full powers which covers the performance of that act.

(b) In case of delay in the transmission of the instrument of full powers, a letter or telegram evidencing the grant of full powers sent by the

<sup>29</sup> I.C.J. Reports 1949, p. 182.

competent authority of the state concerned or by the head of its diplomatic mission in the country where the treaty is negotiated shall be provisionally accepted, subject to the production in due course of an instrument of full powers, executed in proper form.

(c) The same rule applies to a letter or telegram sent by the head of a permanent mission to an international organization with reference to a treaty of the kind mentioned in paragraph 2 (b) above.

#### *Commentary*

(1) Authority to represent the state in doing any of the acts by which treaties are negotiated and concluded is a matter to be decided by each state in accordance with its own internal laws and usages. However, other states have a legitimate interest in the matter to the extent of being entitled to reassure themselves that a representative with whom they are dealing has authority from his state to carry out the transaction in question. In some cases, the very position of the representative in the state gives this assurance; where this is not so, there is normally a right to call for evidence of authority of the person concerned to act in the particular transaction on behalf of his state. The present article seeks to specify the cases when, according to modern practice, no evidence of authority is required and those when a representative either must produce evidence of his authority or is liable to do so if called upon.

(2) Heads of state, heads of government and foreign ministers are considered in virtue of their offices and functions to possess an authority to act for their states in negotiating, drawing up, authenticating or signing a treaty. In the case of foreign ministers this was expressly recognized by the Permanent Court of International Justice in the *Eastern Greenland Case*<sup>30</sup> in connexion with the "Ihlen Declaration." Accordingly, paragraph 1 lays down that no evidence is required of the authority of these officers of state for the purposes mentioned.

(3) Similarly, in accordance with accepted practice, paragraph 2 provides that the head of a diplomatic mission is to be considered to have authority to negotiate, draw up and authenticate a treaty between his state and the state to which he is accredited. Thus, Article 3 (c) of the Vienna Convention on Diplomatic Privileges and Immunities provides that "the functions of a diplomatic mission consist, *inter alia*, in . . . negotiating with the Government of the receiving State." However, the assumption does not extend in the case of the head of a diplomatic mission to signing a treaty with *binding effect*; in carrying out that act he is governed by the rule in paragraph 4 of the present article. The practice of establishing permanent missions at the headquarters of certain international organizations to represent the state and to invest the permanent representatives with powers similar to those of the head of a diplomatic mission is now extremely common. The Commission therefore considers that the rule in paragraph 3 should also apply to such permanent representatives to international organizations.

<sup>30</sup> P.C.I.J., Series A/B, 53, p. 71.

(4) Paragraph 3 lays down the general rule that representatives other than those already mentioned are under an obligation to produce evidence, in the form of written credentials, of their authority to negotiate, draw up and authenticate a treaty, even if this requirement may sometimes be overlooked or waived.

(5) As already indicated in regard to the head of a diplomatic mission, authority to negotiate, draw up and authenticate is distinct from authority to sign. While authority to sign, if possessed by the representative at the stage of negotiation, may reasonably be held to imply authority to negotiate, the reverse is not true; and in the case of treaties not in simplified form a further authority specifically empowering him to sign is necessary before signature can be affixed. The practice of governments in regard to treaties of which the Secretary-General of the United Nations is depositary indicates that no distinction is made for this purpose between signature and signature *ad referendum*, and the rule has accordingly been so stated in paragraph 4 (a) of the article.

(6) In the case of treaties in simplified form, the production of an instrument of full powers is not usually insisted upon in practice. As it is possible to imagine circumstances in which the other state might wish to assure itself of a representative's power to sign an exchange of notes or other treaty in simplified form, the Commission has proposed a rule in paragraph 4 (b) which dispenses with the production of full powers, "unless called for by the other negotiating state."

(7) Instruments of ratification, accession, acceptance and approval are normally signed by heads of state, though in modern practice this is sometimes done by heads of government or by foreign ministers. In these cases, evidence of authority to sign the instrument is not required. However, in rare cases—usually because of special urgency to deposit the instrument—the head of a mission or a permanent representative to an organization may be instructed to sign and deposit such an instrument; in these cases, according to the practice of the Secretary-General, full powers are demanded and produced. It is these cases for which paragraph 5 seeks to provide.

(8) Paragraph 6 deals with the form of full powers and with cases where less formal evidence may provisionally be accepted in lieu of full powers. Normally, full powers are issued *ad hoc* for the execution of the particular act in question, but there does not appear to be any reason why full powers should not be couched in a wider form provided that they leave no doubt as to the scope of the powers which they confer. Some countries, it is understood, may adopt the practice of issuing to certain ministers, as part of their normal commissions, wide full powers which, without mentioning any particular treaty, confer on the minister authority to sign treaties or categories of treaties on behalf of the state. In addition, some permanent representatives at the headquarters of international organizations, that are the depositaries of multilateral treaties, are clothed by their states with such wide full powers, either included in their credentials or contained in a separate instrument. The Commission will be



glad eventually to have information from governments as to their practice in regard to these forms of full powers. In the meanwhile, it seems justifiable tentatively to insert in paragraph 6 (a) a provision allowing full powers framed to cover all treaties or specific categories of treaty.

(9) Paragraphs 6 (b) and (c) recognize a practice of comparatively recent development which is of considerable utility and should serve to render initialling and signature *ad referendum* unnecessary save in exceptional circumstances. A letter or telegram is, in case of urgency, accepted as provisional evidence of authority, subject to the production in due course of full powers executed in proper form.

#### ARTICLE 5

##### *Negotiation and drawing up of a treaty*

A treaty is drawn up by a process of negotiation which may take place either through the diplomatic or some other agreed channel, or at meetings of representatives or at an international conference. In the case of treaties negotiated under the auspices of an international organization, the treaty may be drawn up either at an international conference or in some organ of the organization itself.

##### *Commentary*

The Commission, although it recognized the contents of this article to be more descriptive than normative, decided to include it, since the process of drawing up the text is an essential preliminary to the legal act of the adoption of the text dealt with in the next article. Article 5, in short, provides a logical connecting link between Article 4 and Article 6.

#### ARTICLE 6

##### *Adoption of the text of a treaty*

The adoption of the text of a treaty takes place:

(a) In the case of a treaty drawn up at an international conference convened by the states concerned or by an international organization, by the vote of two-thirds of the states participating in the conference, unless by the same majority they shall decide to adopt another voting rule;

(b) In the case of a treaty drawn up within an organization, by the voting rule applicable in the competent organ of the organization in question;

(c) In other cases, by the mutual agreement of the states participating in the negotiations.

##### *Commentary*

(1) This article deals with the voting rule by which the text of the treaty is "adopted," i.e., the voting rule by which the form and content

of the proposed treaty is settled. At this stage, the negotiating states are concerned only with drawing up the text of the treaty as a document setting out the provisions of the proposed treaty; and their votes, even when cast at the end of the negotiations in favour of adopting the text as a whole, relate solely to this process. A vote cast at this stage, therefore, is not in any sense an expression of the state's agreement to be bound by the provisions of the text, which can only become binding upon it by a further expression of its consent (signature, ratification, accession or acceptance).

(2) In former times the adoption of the text of a treaty almost always took place by the agreement of all the states participating in the negotiations and unanimity could be said to be the general rule. The growth of the practice of drawing up treaties in large international conferences or within international organizations has, however, led to so normal a use of the procedure of majority vote that, in the opinion of the Commission, it would be unrealistic to lay down unanimity as the general rule for the adoption of the texts of treaties drawn up at conferences or within organizations. Unanimity remains the general rule for bilateral treaties and for treaties drawn up between very few states. But for other multilateral treaties a different rule must be specified, although, of course, it will always be open to the states concerned to apply the rule of unanimity in a particular case, if they should so decide.

(3) Sub-paragraph (a) of the present article deals with the case of treaties drawn up at international conferences and the main questions for the Commission were: (i) whether a distinction should be drawn between conferences convened by an international organization and (ii) the principles upon which the voting rule should be determined.

(4) As to the first question, when the General Assembly convenes a conference, the practice of the Secretariat of the United Nations is, after consultation with the groups and interests mainly concerned, to prepare provisional or draft rules of procedure for the conference, including a suggested voting rule, for adoption by the conference itself.<sup>31</sup> But it is left to the conference to decide whether to adopt the suggested rule or replace it by another. The Commission therefore concluded that both in the case of a conference convened by the states themselves and of one convened by an organization the voting rule for adopting the text is a matter for the states at the conference.

(5) As to the second question, the rule proposed in sub-paragraph (a) is that a two-thirds majority should be necessary for the adoption of a text at any international conference, unless the states at the conference should by the same majority decide to apply a different voting rule. While the states at the conference must retain the ultimate power to decide the voting rule by which they will adopt the text of the treaty, it appears to the Commission to be extremely desirable to fix in the present articles the procedure by which a conference is to arrive at its decision concerning that

<sup>31</sup> Cf. General Assembly Resolution 479(V) of 12 December 1950, "Rules for the calling of non-governmental conferences by the Economic and Social Council."

voting rule. Otherwise there is some risk of the work of the conference being delayed by long procedural debates concerning the preliminary voting rule by which it is to decide upon its substantive voting rule for adopting the text of the treaty. Some members of the Commission considered that the procedural vote should be taken by simple majority. Others felt that such a rule might not afford sufficient protection to minority groups at the conference, for the other states would be able in every case to decide by a simple majority to adopt the text of the treaty by the vote of a simple majority and in that way override the views of what might be quite a substantial minority group of states at the conference. The rule in sub-paragraph (a) takes account of the interests of minorities to the extent of requiring at least two-thirds of the states to be in favour of proceeding by simple majorities before recourse can be had to simple majority votes for adopting the text of a treaty. It leaves the ultimate decision in the hands of the conference but at the same time establishes a basis upon which the procedural questions can be speedily and fairly resolved. The Commission felt all the more justified in proposing this rule, seeing that the use of a two-thirds majority for adopting the texts of multilateral treaties is now so frequent.

(6) Sub-paragraph (b) deals with the case of treaties, like the Genocide Convention or the Convention on the Political Rights of Women, which are drawn up actually within an international organization. Here, the voting rule for adopting the text of the treaty must clearly be the voting rule applicable in the particular organ in which the treaty is adopted.

(7) There remain bilateral treaties and a residue of multilateral treaties concluded between a small group of states otherwise than at an international conference. For all these treaties unanimity remains the rule.

#### ARTICLE 7

##### *Authentication of the text*

1. Unless another procedure has been prescribed in the text or otherwise agreed upon by states participating in the adoption of the text of the treaty, authentication of the text may take place in any of the following ways:

(a) Initialling of the text by the representatives of the states concerned;

(b) Incorporation of the text in the final act of the conference in which it was adopted;

(c) Incorporation of the text in a resolution of an international organization in which it was adopted or in any other form employed in the organization concerned.

2. In addition, signature of the text, whether a full signature or signature *ad referendum*, shall automatically constitute an authentication of the text of a proposed treaty, if the text has not been previously authenticated in another form under the provisions of paragraph 1 above.

3. On authentication in accordance with the foregoing provisions of the present article, the text shall become the definitive text of the treaty.

### *Commentary*

(1) Authentication of the text of a treaty is necessary in order that the negotiating states, before they are called upon to decide whether they will become parties to the treaty, may know finally and definitely what is the content of the treaty to which they will be subscribing. There must come a point, therefore, at which the draft which the parties have agreed upon is established as being the text of the proposed treaty. Whether the states concerned will eventually become bound by this treaty is of course another matter, and remains quite open. But they must have, as the basis for their decision on this question, a final text not susceptible of alteration. Authentication is the process by which this final text is established, and it consists in some act or procedure which certifies the text as the correct and authentic text.

(2) Previous drafts on the law of treaties have not recognized authentication as a distinct part of the treaty-making process. The reason appears to be that until comparatively recently signature was the normal method of authenticating a text, and that signature always has another and more important function. For it is also either a first step towards ratification, acceptance or approval of the treaty, or an expression of the state's consent to be bound by it. The authenticating function of signature is consequently masked by being merged in its other function.<sup>32</sup> In recent years, however, other methods of authenticating texts of treaties on behalf of all or most of the negotiating parties have been devised. Examples are the incorporation of unsigned texts of projected treaties in final acts of diplomatic conferences, the procedure of the International Labour Organisation under which the signatures of the President of the International Labour Conference and of the Director-General of the International Labour Office authenticate the texts of labour conventions, and treaties whose texts are authenticated by being incorporated in a resolution of an international organization. It is these developments in treaty-making practice which render it desirable to deal separately in the draft articles with authentication as a distinct procedural step in the conclusion of a treaty.

(3) Paragraph 1 of the article sets out the methods of authentication other than signature, and paragraph 2 covers signature as an act of authentication. Signature has been dealt with separately because it only operates as an authenticating act, if the treaty has not already been authenticated in one of the ways mentioned in paragraph 1.

(4) Paragraph 3 states the legal effect of authentication as an act which renders the text definitive. This means that, after authentication, any change in the wording of the text would have to be brought about by an agreed correction of the authenticated text (see Articles 26 and 27).

<sup>32</sup> See Yearbook of the International Law Commission, 1950 (U. N. pub., Sales No.: 57.V.3), Vol. II, pp. 233-234.

## ARTICLE 8

*Participation in a treaty*

1. In the case of a general multilateral treaty, every state may become a party to the treaty unless it is otherwise provided by the terms of the treaty itself or by the established rules of an international organization.

2. In all other cases, every state may become a party to the treaty:

- (a) Which took part in the adoption of its text, or
- (b) To which the treaty is expressly made open by its terms, or
- (c) Which although it did not participate in the adoption of the text was invited to attend the conference at which the treaty was drawn up, unless the treaty otherwise provides.

## ARTICLE 9

*The opening of a treaty to the participation of additional states*

1. A multilateral treaty may be opened to the participation of states other than those to which it was originally open:

(a) In the case of a treaty drawn up at an international conference convened by the states concerned, by the subsequent consent of two-thirds of the states which drew up the treaty, provided that, if the treaty is already in force and . . . years have elapsed since the date of its adoption, the consent only of two-thirds of the parties to the treaty shall be necessary;

(b) In the case of a treaty drawn up either in an international organization or at an international conference convened by an international organization, by a decision of the competent organ of the organization in question, adopted in accordance with the applicable voting rule of such organ.

2. Participation in a treaty concluded between a small group of states may be opened to states other than those mentioned in Article 8 by the subsequent agreement of all the states which adopted the treaty, provided that, if the treaty is already in force and . . . years have elapsed since the date of its adoption, the agreement only of the parties to the treaties shall be necessary.

3. (a) When the depositary of a treaty receives a formal request from a state desiring to be admitted to participation in the treaty under the provisions of paragraphs 1 and 2 above, the depositary:

(i) In a case falling under paragraph 1 (a) and paragraph 2, shall communicate the request to the states whose consent to such participation is specified in paragraph 1 (a) as being material;

(ii) In a case falling under paragraph 1 (b), shall bring the request, as soon as possible, before the competent organ of the organization in question.

(b) The consent of a state to which a request has been communicated under paragraph 3 (a) (i) above shall be presumed after the expiry of

twelve months from the date of the communication, if it has not notified the depositary of its objection to the request.

4. When a state is admitted to participation in a treaty under the provisions of the present article notwithstanding the objection of one or more states, an objecting state may, if it thinks fit, notify the state in question that the treaty shall not come into force between the two states.

#### *Commentary*

(1) Articles 8 and 9 define the states to which it is open to become a party to a treaty. Article 8<sup>33</sup> covers what may be termed original participation in a treaty; that is, it defines the states who may become a party as from the date of the adoption of the text of the treaty. Article 9 lays down the conditions under which participation in treaties may be extended to additional states by decisions subsequent to the adoption of the text.

(2) The Commission gave particular attention to the problem of participation in general multilateral treaties which it considered to be of special importance in this connexion. It was unanimous in thinking that these treaties because of their special character should, in principle, be open to participation on as wide a basis as possible. Some members of the Commission considered that as these treaties are intended to be universal in their application they should be open to participation by every state. They took the view that it is for the general good that all states should become parties to such treaties, and that in a world community of states, no state should be excluded from participation in treaties of this character. They did not think that the principle of the freedom of states to determine for themselves the extent to which they are prepared to enter into treaty relations with other states was any obstacle to the Commission formulating a rule under which general multilateral treaties would be open to participation by every state. For it not infrequently happens already that states find themselves parties to the same treaties and members of the same international organization as states with which they have no diplomatic relations or do not even recognize.

(3) Other members of the Commission did not feel justified in setting aside, even in the case of general multilateral treaties, so fundamental a principle of treaty law as the freedom of the contracting states to determine, by the clauses of the treaty itself, the states which may become a party to it. On the other hand, it was considered by many members that the special character of general multilateral treaties justifies, in those cases where the treaty does not specify the categories of states to which it is to be open, a presumption that every state may become a party to it. They recognized that the general multilateral treaties of recent years, such as the Geneva Conventions on the Law of the Sea and the Vienna Convention on Diplomatic Relations had not been made open to all states but to specified, if very wide, categories of states. Nevertheless, they considered

<sup>33</sup> For the reasons given by him in the summary records of the 648th (pars. 10-22) and 667th meetings, Mr. Briggs does not accept the provisions of Article 8.

that on grounds of principle and as a measure of progressive development of international law, the Commission should propose to governments the rule which appears in paragraph 1 of Article 8. These members also expressed the view that the problem of participation in general multilateral treaties should be kept entirely distinct from the problem of recognition of states.

(4) Another group of members, while fully sharing the view that general multilateral treaties should, in principle, be open to all states, did not think that the Commission would be justified in including such a presumption as to the intention of the contracting states, having regard to the clear indication of a contrary intention on the part of states in recent practice, and especially in United Nations practice. For it had become common form in general multilateral treaties drawn up under the auspices of the United Nations and the specialized agencies, as well as in a number of other treaties, to insert a clause opening them to all Members of the United Nations and the specialized agencies, to all parties to the Statute of the International Court of Justice and to any other state invited by the General Assembly. This formula, they considered, opens the treaty to an exceedingly wide list of states and, in effect, only excludes controversial cases. These members did not think that the Commission's proposals ought to go beyond this practice which hinges upon the decision in doubtful cases being taken by the General Assembly or by the competent organ of some other organization of world-wide membership. Accordingly, they advocated confining Article 8 to the provisions set out in paragraph 2 and leaving the case of general multilateral treaties to be covered by paragraph 1 of Article 9. The effect of the latter paragraph in regard to the large body of treaties concluded under the auspices of international organizations is to put the decision in the hands of the competent organ of the organization concerned, as under existing practice, and in other cases to make it subject to a two-thirds vote of the states concerned. These members considered that a rule putting the decision in doubtful cases in the hands of the General Assembly, or of the competent organ of some other organization or of a two-thirds majority of the interested state was also extremely desirable from the point of view of the depositary. Otherwise the Secretary-General or any other depositary would have to choose between accepting every signature, accession, etc. from any group claiming to be a state or to make delicate and perhaps controversial political appreciations more appropriate to the General Assembly or some other political organ.

(5) The view that, where a general multilateral treaty is silent concerning the states to which it is open, every state must be presumed to have a right to become a party to the treaty, prevailed in the Commission, and the rule is so stated in Article 8, paragraph 1.

(6) There still remains, however, the problem of general multilateral treaties which specify the categories of states to which they are open and thereby exclude the principle in Article 8, paragraph 1. These treaties the Commission has sought to cover in Article 9, paragraph 1, which provides for them to be made open to additional states, either by a two-thirds

majority of the states which drew up the treaty, or by the decision of the competent organ of an international organization. The formula "by a two-thirds majority of the states which drew up the treaty" is, of course, based on the fact that, as mentioned in the commentary on Article 6, the adoption of a treaty in modern practice takes place in the great majority of cases by a two-thirds majority. In other words, the proposal is that the treaty should be made open to additional states by the same majority as will normally have been applied in adopting the participation clause of the treaty. But, where the treaty has been drawn up either within an organization or at a conference convened by an organization, the proposal is that the decision should rest with its competent organ. The Commission considered that these provisions are suitable also for the case of multilateral treaties which, though not of a general character, have been concluded between a considerable number of states. Accordingly, Article 10, paragraph 1, applies to these treaties as well as to general multilateral treaties.

(7) Paragraph 2 of Article 9 is therefore limited to treaties concluded between a small group of states and for these treaties it is thought that the unanimity rule should be retained.

(8) Paragraph 3 indicates the procedures for dealing with requests for admission to treaties under the two preceding paragraphs.

(9) Paragraph 4 gives effect to the right of a state to decide whether or not it will enter into treaty relations with another state.

(10) Finally, the Commission gave particular attention to the problem of the accession of new states to general multilateral treaties, concluded in the past, whose participation clauses were limited to specific categories of states. New states may very well wish to become parties to some of these treaties and, if so, it is clearly desirable that legally they should be in a position to do so. There are, however, certain difficulties in the way of achieving this result easily through the provisions of the present draft articles. One is that, in the nature of things, there is bound to be some delay before these draft articles, assuming that ultimately a convention results from them, could become effective. Another is that a convention only binds the parties to it, and unless all the surviving parties to the older multilateral treaties in question became actual parties to the new convention on the conclusion of treaties, there might be doubt about the effectiveness of the convention to create a right of accession to the old treaties. The Commission, therefore, suggests that consideration should be given to the possibility of solving this problem more expeditiously by other procedures. It seems to be established that the opening of a treaty to accession by additional states, while it requires the consent of the states entitled to a voice in the matter, does not necessitate the negotiation of a fresh treaty amending or supplementing the earlier one. One possibility would be for administrative action to be taken through the depositaries of the individual treaties to obtain the necessary consents of the states concerned in each treaty; indeed, it is known that action of this kind has been taken in some cases. Another expedient that might be considered is whether action to obtain the necessary consents might be taken in the form of a resolution



of the General Assembly by which each Member State agreed that a specified list of multilateral treaties of a universal character should be opened to accession by new states. It is true that there might be a few non-member states whose consent might also be necessary, but it should not be impossible to devise a means of obtaining the assent of these states to the terms of the resolution.

#### ARTICLE 10

##### *Signature and initialling of the treaty*

1. Where the treaty has not been signed at the conclusion of the negotiations or of the conference at which the text was adopted, the states participating in the adoption of the text may provide either in the treaty itself or in a separate agreement:

(a) That signature shall take place on a subsequent occasion; or

(b) That the treaty shall remain open for signature at a specified place either indefinitely or until a certain date.

2. (a) The treaty may be signed unconditionally; or it may be signed *ad referendum* to the competent authorities of the state concerned, in which case the signature is subject to confirmation.

(b) Signature *ad referendum*, if and so long as it has not been confirmed, shall operate only as an act authenticating the text of the treaty.

(c) Signature *ad referendum*, when confirmed, shall have the same effect as if it had been a full signature made on the date when, and at the place where, the signature *ad referendum* was affixed to the treaty.

3. (a) The treaty, instead of being signed, may be initialled, in which event the initialling shall operate only as an authentication of the text. A further separate act of signature is required to constitute the state concerned a signatory of the treaty.

(b) When initialling is followed by the subsequent signature of the treaty, the date of the signature, not that of the initialling, shall be the date upon which the state concerned shall become a signatory of the treaty.

##### *Commentary*

(1) The antithesis in paragraph 1 of the present article is between the treaty that remains open for signature until a certain date—or else indefinitely—and the treaty that does not. Most treaties, in particular bilateral treaties and treaties negotiated between a small group of states, do not remain open for signature. They are signed either immediately on the conclusion of the negotiation, or on some later date especially appointed for the purpose. In either case, states intending to sign must do so on the occasion of the signature, and cannot do so thereafter. They may of course still be able to become parties to the treaty by some other means, *e.g.*, accession or acceptance.

(2) In the case of treaties negotiated at international conferences, there is a growing tendency to include a clause leaving them open for signature

until a certain date (usually six months after the conclusion of the conference). In theory, there is no reason why such treaties should not remain open for signature indefinitely, and cases of this are on record.<sup>34</sup> However, the more general practice is to leave multilateral treaties open for signature for a specific period and this practice has considerable advantages. The closing stages of international conferences are apt to be hurried. Often the governments are not in possession of the final text, which may only have been completed at the last moment. For that reason, many representatives do not sign the treaty in its final form. Yet, even if the treaty makes it possible to become a party by accession, many governments would prefer to do so by signature and ratification. It is also desirable to take account of the fact that governments which are not sure of being able eventually to ratify, accept or approve a treaty may nevertheless wish for an opportunity of giving that measure of support to the treaty which signature implies. These preoccupations can most easily be met by leaving the treaty open for signature at the seat of the "headquarters" government or international organization.

(3) Paragraphs 2 and 3 deal with signature *ad referendum* and initialling. Signature *ad referendum*, as indicated in paragraph 2, is not full signature, but it will rank as one if subsequently confirmed by the government on whose behalf it was made. Initialling is not normally the equivalent of signature and operates in most cases as an act authenticating the text. The principal differences between initialling and signature *ad referendum* are:

(a) Whereas signature *ad referendum* is basically both an authenticating act (where the text has not otherwise been authenticated already) and a provisional signature of the treaty, initialling is and always remains an authenticating act only, which is incapable of being transformed into full signature by mere confirmation; and

(b) Whereas confirmation of a signature *ad referendum* has retroactive effect causing the state to rank as a signatory from the date of the signature *ad referendum*, a signature subsequent to initialling has no retroactive effect and the state concerned becomes a signatory only from the date of the subsequent act of signature.

(4) There may also be a certain difference in the occasions on which these two procedures are employed. Initialling is employed for various purposes. One is to authenticate a text at a certain stage of the negotiations, pending further consideration by the governments concerned. It may also be employed by a representative who has authority to negotiate, but is not in possession of (and is not at the moment able to obtain) an

<sup>34</sup> Article 14 of the Convention on Treaties, adopted at Havana on 18 February 1928, provides as follows: "The present Convention shall be ratified by the signatory States and shall remain open for signature and for ratification by the States represented at the Conference and which have not been able to sign it." This Convention, together with seven further Conventions adopted at the Sixth Conference of American States held at Havana, merely states that the Convention shall remain open for signature and ratification, without specifying any time-limit.

actual authority to sign.<sup>35</sup> Sometimes it may be resorted to by a representative who, for whatever reasons, is acting on his own initiative and without instructions, but who nevertheless considers that he should authenticate the text. Signature *ad referendum* may also be resorted to in some of these cases, but at the present time is probably employed mainly on actual governmental instructions in cases where the government wishes to perform some act in relation to the text, but is unwilling to be committed to giving it even the provisional support that a full signature would imply.

#### ARTICLE 11

##### *Legal effects of a signature*

1. In addition to authenticating the text of the treaty in the circumstances mentioned in Article 7, paragraph 2, the signature of a treaty shall have the effects stated in the following paragraphs.

2. Where the treaty is subject to ratification, acceptance or approval, signature does not establish the consent of the signatory state to be bound by the treaty. However, the signature:

(a) Shall qualify the signatory state to proceed to the ratification, acceptance or approval of the treaty in conformity with its provisions; and

(b) Shall confirm or, as the case may be, bring into operation the obligation in Article 17, paragraph 1.

3. Where the treaty is not subject to ratification, acceptance or approval, signature shall:

(a) Establish the consent of the signatory state to be bound by the treaty; and

(b) If the treaty is not yet in force, shall bring into operation the obligation in Article 17, paragraph 2.

##### *Commentary*

(1) Paragraph 1 recalls, for the sake of completeness, the rule that, if the text has not already been authenticated in one of the ways mentioned in Article 7, paragraph 1, signature will automatically constitute an authentication of the text by the signatory state.

(2) Paragraph 2 deals with the cases where the signature does not constitute a final expression of the state's consent to be bound by the treaty but requires a further act of ratification, acceptance or approval to have that effect. This may happen either because the treaty itself provides for signature plus ratification (or acceptance or approval) or because the signature of the particular state is expressed to be subject to ratification (or acceptance or approval). The primary effect of the signature in these cases is to establish the right of the signatory state to become a party to

<sup>35</sup> Today, when a telegraphic authority, pending the arriving of written full powers, would usually be accepted (see Article 4 above, and the commentary thereto), the need for recourse to initialling on this ground ought only to arise infrequently.

the treaty by subsequently completing the necessary act of ratification or, as the case may be, acceptance or approval of the treaty; and paragraph 2 (a) so provides.

(3) Paragraph 2 (b) concerns the obligation which attaches to a state which has signed a treaty "subject to ratification, acceptance or approval" even though it has not yet established its consent to be bound by the treaty. This obligation is set out in Article 17, paragraph 1, where it is provided that such a state is "under an obligation of good faith, unless and until it shall have signified that it does not intend to become a party to the treaty, to refrain from acts calculated to frustrate the objects of the treaty, if and when it should come into force." In most cases, a signatory state will already be under this obligation by reason of having taken part in the negotiations, drawing up or adoption of the treaty; but, when a treaty is made open to signature by states which did not take part in the negotiations, drawing up or adoption of the treaty, they will come under the same obligation if they sign "subject to ratification, acceptance or approval."

(4) There is also some authority for the proposition that a state which signs a treaty "subject to ratification, acceptance or approval" comes under a certain, if somewhat intangible, obligation of good faith subsequently to give consideration to the ratification, acceptance or approval of the treaty. The precise extent of the supposed obligation is not clear. That there is no actual obligation to ratify under modern customary law is certain, but it has been suggested<sup>86</sup> that signature "implies an obligation to be fulfilled in good faith to submit the instrument to the proper constitutional authorities for examination with the view to ratification or rejection." This formulation, logical and attractive though it may be, appears to go beyond any obligation that is recognized in state practice. For there are many examples of treaties that have been signed and never submitted afterwards to the constitutional organ of the state competent to authorize the ratification of treaties, without any suggestion being made that it involved a breach of an international obligation. Governments, if political or economic difficulties present themselves, undoubtedly hold themselves free to refrain from submitting the treaty to parliament or to whatever other body is competent to authorize ratification. The Commission felt that the most that could be said on the point was that the government of a signatory state might be under some kind of obligation to examine in good faith whether it should become a party to the treaty. The Commission hesitated to include such a rule in the draft articles. The position is, of course, different if the treaty itself, or the rules in force in an international organization, place signatory states under some form of obligation to submit the question of the ratification, acceptance or approval of the treaty to their respective constitutional authorities. In those cases, there is an express obligation flowing from the particular treaty or the particular

<sup>86</sup> See first report of Sir Hersch Lauterpacht, Yearbook of the International Law Commission, 1953 (U. N. pub., Sales No.: 59.V.4), Vol. II, pp. 108-112. See also first report of Sir Gerald Fitzmaurice, *ibid.*, 1956 (U. N. pub., Sales No.: 56.V.3), Vol. II, pp. 112-113 and 121-122.

rules of the organization in question (*e.g.*, the International Labour Organisation).

(5) Paragraph 3 deals with cases where the treaty is not subject to ratification, acceptance or approval. Signature then suffices by itself to establish the state's consent to be bound by the treaty and the rule is so formulated in sub-paragraph (a). If the treaty is already in force (or is brought into force by the signature) it goes without saying that the signatory state becomes subject to the provisions of the treaty. But even if the conditions for the entry into force of the treaty have not yet been fulfilled, the signatory state is subject *a fortiori* to an obligation of good faith to refrain from acts calculated to frustrate the objects of the treaty, and sub-paragraph (b) so provides.

## ARTICLE 12

### *Ratification*

1. Treaties in principle require ratification unless they fall within one of the exceptions provided for in paragraph 2 below.

2. A treaty shall be presumed not to be subject to ratification by a signatory state where:

(a) The treaty itself provides that it shall come into force upon signature;

(b) The credentials, full powers or other instrument issued to the representative of the state in question authorize him by his signature alone to establish the consent of the state to be bound by the treaty, without ratification;

(c) The intention to dispense with ratification clearly appears from statements made in the course of the negotiations or from other circumstances evidencing such an intention;

(d) The treaty is one in simplified form.

3. However, even in cases falling under paragraphs 2 (a) and 2 (d) above, ratification is necessary where:

(a) The treaty itself expressly contemplates that it shall be subject to ratification by the signatory states;

(b) The intention that the treaty shall be subject to ratification clearly appears from statements made in the course of the negotiations or from other circumstances evidencing such an intention;

(c) The representative of the state in question has expressly signed "subject to ratification" or his credentials, full powers or other instrument duly exhibited by him to the representatives of the other negotiating states expressly limit the authority conferred upon him to signing "subject to ratification."

### *Commentary*

(1) This article sets out the rules determining the cases in which ratification is necessary in addition to signature in order to establish the state's

consent to be bound by the treaty. The word "ratification," as the definition in Article 1 indicates, is used here and throughout these draft articles exclusively in the sense of ratification on the international plane. Parliamentary "ratification" or "approval" of a treaty under municipal law is not, of course, unconnected with "ratification" on the international plane, since without it the necessary constitutional authority to perform the international act of ratification may be lacking. But it remains true that the international and constitutional ratifications of a treaty are entirely separate procedural acts carried out on two different planes.

(2) The modern institution of ratification in international law developed in the course of the nineteenth century. Earlier, ratification had been an essentially formal and limited act by which, after a treaty had been drawn up, a sovereign confirmed, or finally verified, the full powers previously issued to his representative to negotiate the treaty. It was then not an approval of the treaty itself but a confirmation that the representative had been invested with authority to negotiate it and, that being so, there was an obligation upon the sovereign to ratify his representative's full powers, if these had been in order. Ratification came, however, to be used in the majority of cases as the means of submitting the treaty-making power of the executive to parliamentary control, and ultimately the doctrine of ratification underwent a fundamental change. It was established that the treaty itself was subject to subsequent ratification by the state before it became binding. Furthermore, this development took place at a time when the great majority of international agreements were formal treaties. Not unnaturally, therefore, it came to be the opinion that the general rule is that ratification is necessary to render a treaty binding.<sup>37</sup>

(3) Meanwhile, however, the expansion of intercourse between states, especially in economic and technical fields, led to an ever-increasing use of less formal types of international agreements, amongst which were exchanges of notes, and these agreements are usually intended by the parties to become binding by signature alone. On the other hand, an exchange of notes or other informal agreement, though employed for its ease and convenience, has sometimes expressly been made subject to ratification because of constitutional requirements in one or the other of the contracting states.

(4) The general result of these developments has been to complicate the law concerning the conditions under which treaties need ratification in order to make them binding. The controversy which surrounds the subject is, however, largely theoretical, as previous rapporteurs on the law of treaties have pointed out.<sup>38</sup> The more formal types of instrument include,

<sup>37</sup> See, for example, Crandall, *Treaties, Their Making and Enforcement*, par. 3; Fauchille, *Traité de droit international public*, Tome I, part III, p. 317; Oppenheim, *International Law*, Vol. I, par. 512; Harvard Research Draft, A.J.I.L., Vol. 29, Special Supp., p. 756.

<sup>38</sup> See reports of Sir Hersch Lauterpacht, *Yearbook of the International Law Commission*, 1953 (U. N. pub., Sales No.: 59.V.4), Vol. II, p. 112; and *ibid.*, 1954 (Sales No.: 59.V.7), Vol. II, p. 127; and first report of Sir Gerald Fitzmaurice, *ibid.*, 1956 (U. N. pub., Sales No.: 56.V.8), Vol. II, p. 123.

almost without exception, express provisions on the subject of ratification, and occasionally this is so even in the case of exchanges of notes or other instruments in simplified form. Moreover, whether they are of a formal or informal type, treaties normally either provide that the instrument shall be ratified or, by laying down that it shall enter into force upon signature or upon a specified date or event, dispense with ratification. Total silence on the subject is exceptional, and the number of cases that remain to be covered by a general rule is very small. This does not necessarily mean that there is no need to formulate a rule for the small residuum of cases in which the parties have left the question open. For it is one of the purposes of codification to provide for such cases where the question is not regulated by the parties, and only if a clear presumptive rule is laid down will the parties themselves know in future whether or not an express provision is necessary to give effect to their intentions. But, if the general rule is taken to be that ratification is necessary unless it is expressly or impliedly excluded, large exceptions qualifying the rule have to be inserted in order to bring it into accord with modern practice, with the result that the number of cases calling for the operation of the general rule is small. Indeed, the practical effect of choosing that version of the general rule or the opposite rule that ratification is unnecessary unless expressly agreed upon by the parties is not very substantial.

(5) The Commission considered whether it should refrain from formulating any general rule and simply state the law by reference to the intentions of the parties or whether it should formulate a general rule to apply in cases where the treaty is silent upon the question of ratification. Some members were not in favour of stating that a treaty is to be presumed to be subject to ratification unless the contrary is indicated. They thought that in modern practice there is no specific rule concerning the need for ratification and that it is always a question of ascertaining what the parties intended. In favour of this view is the fact that in modern practice a great many treaties are concluded in simplified form and that a large percentage of the total number of treaties enter into force without ratification. The view which prevailed in the Commission, however, was that the numerical statistics may be a little misleading in that many treaties in simplified form deal with comparatively unimportant matters, and that weight should be given to the constitutional requirements for the exercise of the treaty-making power which exist in many states with respect to more important matters. The Commission felt that a general rule excluding the need for ratification unless a contrary intention was expressed would not be acceptable to these states, whereas the opposite rule would not cause the same difficulty to states without such constitutional requirements. On the other hand, there was general agreement that there is no presumption in favour of ratification being necessary in the case of treaties in simplified form.

(6) Taking account of the different considerations, the Commission decided that a general rule should be stated and that this should be a rule requiring ratification unless the case falls within one of a number of recognized exceptions; paragraph 1 of the article accordingly so provides.

(7) Paragraph 2 sets out four cases in which the general rule does not in principle apply. In the first three cases an intention to set aside the rule is to be found either in the treaty itself, the documents expressing the powers of the representatives or in the circumstances of the negotiations. In the fourth case, it is to be implied from the choice by the parties of an instrument in simplified form. This implication, as already indicated, is justified by the fact that the great majority of these forms of treaty in fact enter into force today without ratification.

(8) On the other hand, the intention to set aside the need for ratification which is found in paragraphs 2 (a) and 2 (d) are presumptions from, in the one case, the fact that the treaty is expressed to come into force upon signature and, in the other, the use of a simplified form. These presumptions, strong though they are, must give way in face of a clear expression of contrary intention, and paragraph 3 accordingly makes provision for the cases where such a contrary intention appears. It may not be very often that a treaty expressed to come into force upon signature is made subject to ratification; but this does sometimes happen in practice when a treaty, which is subject to ratification, is expressed to come into force provisionally upon signature.

#### ARTICLE 13

##### *Accession*

A state may become a party to a treaty by accession in conformity with the provisions of Articles 8 and 9 when:

(a) It has not signed the treaty and either the treaty specifies accession as the procedure to be used by such a state for becoming a party; or

(b) The treaty has become open to accession by the state in question under the provisions of Article 9.

##### *Commentary*

(1) Accession is the traditional method by which a state, in certain circumstances, becomes a party to a treaty of which it is not a signatory. One type of accession is when the treaty expressly provides that certain states or categories of states may accede to it. Another type is when a state which was not entitled to become a party to a treaty under its terms is subsequently invited to become a party under the conditions set out in Article 9.

(2) Divergent opinions have been expressed in the past as to whether it is legally possible to accede to a treaty which is not yet in force, and there is some support for the view that it is not possible.<sup>39</sup> However, an examination of the most recent treaty practice shows that in practically all modern treaties which contain accession clauses the right to accede is made independent of the entry into force of the treaty, either expressly by allow-

<sup>39</sup> See Harvard Research Draft, p. 822; Sir Gerald Fitzmaurice's first report on the law of treaties, Yearbook of the International Law Commission, 1956, Vol. II, pp. 125-126; and Professor Brierly's second report, *ibid.*, 1951, Vol. II, p. 73.



ing accession to take place before the date fixed for the entry into force of the treaty, or impliedly by making the entry into force of the treaty conditional on the deposit, *inter alia*, of instruments of accession. The modern practice has gone so far in this direction that the Commission does not consider it appropriate to give any currency, even in the form of a residuary rule, to the doctrine that treaties are not open to accession until they are in force. In this connexion it recalls the following observation of a previous special rapporteur:

"Important considerations connected with the effectiveness of the procedure of conclusion of treaties seem to call for a contrary rule. Many treaties might never enter into force but for accession. Where the entire tendency in the field of conclusion of treaties is in the direction of elasticity and elimination of restrictive rules it seems undesirable to burden the subject of accession with a presumption which practice has shown to be in the nature of an exception rather than the rule."<sup>40</sup>

Accordingly, in the present article accession is not made dependent upon the treaty having entered into force.

(3) Occasionally, a purported instrument of accession is expressed to be "subject to ratification" and the Commission considered whether anything should be said on the point either in the present article or in Article 15 dealing with instruments of accession. The question arises whether it should be indicated in the present article that the deposit of an instrument of accession in this form is ineffective as an accession. The question was considered by the Assembly of the League of Nations in 1927 which, however, contented itself with emphasizing that an instrument of accession would be taken to be final, unless the contrary were expressly stated. At the same time it said that the procedure was one which "the League should neither discourage or encourage."<sup>41</sup> As to the actual practice today, the Secretary-General has stated that he takes a position similar to that taken by the Secretariat of the League of Nations. He considers the instrument "simply as a notification of the Government's intention to become a party," and he does not notify the other states of its receipt. Furthermore, he draws the attention of the government to the fact that the instrument does not entitle it to become a party and underlines that "it is only when an instrument containing no reference to subsequent ratification is deposited that the state will be included among the parties to the agreement and the other governments concerned notified to that effect."<sup>42</sup> The attitude adopted by the Secretary-General towards an instrument of accession expressed to be "subject to ratification" is considered by the Commission to be entirely correct. The procedure of accession subject to ratification is somewhat anomalous, but it is infrequent and does not appear to cause difficulty in practice. The Commission has not, therefore, thought it necessary to deal with it specifically in those articles.

<sup>40</sup> See Sir H. Lauterpacht, *ibid.*, 1953, Vol. II, p. 120.

<sup>41</sup> Official Journal of the League of Nations, Eighth Ordinary Session, p. 141.

<sup>42</sup> Summary of the Practice of the Secretary-General as Depositary of Multilateral Agreements (ST/LEG/7), par. 48.

## ARTICLE 14

*Acceptance or approval*

A state may become a party to a treaty by acceptance or by approval in conformity with the provisions of Articles 8 and 9 when:

(a) The treaty provides that it shall be open to signature subject to acceptance or approval and the state in question has so signed the treaty; or

(b) The treaty provides that it shall be open to participation by simple acceptance or approval without prior signature.

*Commentary*

(1) Acceptance has become established in treaty practice during the past twenty years as a new procedure for becoming a party to treaties. But it would probably be more correct to say that "acceptance" has become established as a name given to two new procedures, one analogous to ratification and the other to accession. For, on the international plane "acceptance" is an innovation which is more one of terminology than of method. If a treaty provides that it shall be open to signature "subject to acceptance," the process on the international plane is very like "signature subject to ratification." Similarly, if a treaty is made to open to "acceptance" without prior signature, the process is very like accession. In either case the question whether the instrument is framed in the terms of "acceptance," on the one hand, or of ratification or acceptance, on the other, simply depends on the phraseology used in the treaty.<sup>43</sup> Accordingly, the same name is found in connection with two different procedures; but there can be no doubt that today "acceptance" takes two forms, the one an act establishing the state's consent to be bound after a prior signature and the other without any prior signature. The first of these forms is covered in sub-paragraph (a) of Article 14 and the second in sub-paragraph (b).

(2) To say that on the international plane the procedure of "acceptance," on the one hand, and the procedures of ratification and accession, on the other, differ primarily in the terminology used in the treaty is not to deny the existence of any differences in the use of "acceptance" and the other two procedures. "Signature subject to acceptance" was introduced into treaty practice principally in order to provide a simplified form of "ratification" or "accession" which would allow the government a further opportunity to examine the treaty without necessarily involving it in a submission of the treaty to the state's constitutional procedure for obtaining parliamentary sanction for concluding the treaty. Accordingly, the procedure of "signature subject to acceptance" is employed more particularly in the case of treaties whose form or subject matter is not such as would normally bring them under the constitutional requirements of parliamentary "ratification" in force in many states. In some cases, in order to make it as easy as possible for states with their varying consti-

<sup>43</sup> For examples, see Handbook of Final Clauses (ST/LEG/6, pp. 6-17).

tutional requirements to enter into the treaty, its terms provide for either ratification or acceptance. Nevertheless, it remains broadly true that "acceptance" is generally used as a simplified procedure of "ratification" or "accession."

(3) The observations in the preceding paragraph apply *mutatis mutandis* to "approval," whose introduction into the terminology of treaty-making is even more recent than that of "acceptance." "Approval," perhaps, appears more often in the form of "signature subject to approval" than in the form of a treaty which is simply made open to "approval" without signature.<sup>44</sup> But it appears in both forms. Its introduction into treaty-making practice seems, in fact, to have been inspired by the constitutional procedures or practices of approving treaties which exist in some countries.

#### ARTICLE 15

##### *The procedure of ratification, accession, acceptance and approval*

1. (a) Ratification, accession, acceptance or approval shall be carried out by means of a written instrument.

(b) Unless the treaty itself expressly contemplates that the participating states may elect to become bound by a part or parts only of the treaty, the instrument must apply to the treaty as a whole.

(c) If a treaty offers to the participating states a choice between two differing texts, the instrument of ratification must indicate to which text it refers.

2. If the treaty itself lays down the procedure by which an instrument of ratification, accession, acceptance or approval is to be communicated, the instrument becomes operative on compliance with that procedure. If no procedure has been specified in the treaty or otherwise agreed by the signatory states, the instrument shall become operative:

(a) In the case of a treaty for which there is no depositary, upon the formal communication of the instrument to the other party or parties, and in the case of a bilateral treaty normally by means of an exchange of the instrument in question, duly certified by the representatives of the states carrying out the exchange;

(b) In other cases, upon deposit of the instrument with the depositary of the treaty.

3. When an instrument of ratification, accession, acceptance or approval is deposited with a depositary in accordance with paragraph 2(b) above, the state in question shall be given an acknowledgement of the deposit of its instrument, and the other signatory states shall be notified promptly both of the fact of such deposit and the terms of the instrument.

#### *Commentary*

(1) Ratification, accession, acceptance and approval, being acts which commit the state to become a party to the treaty, must be carried out by

<sup>44</sup> The Handbook of Final Clauses (ST/LEG/6, p. 18) even gives an example of the formula "signature subject to approval followed by acceptance."

a formal instrument. The actual form of the instrument is, however, a matter which is governed by the internal law and practice of each state and paragraph 1 (a) merely provides that it must be in writing.

(2) Occasionally, treaties are found which expressly authorize states to consent to a part or parts only of the treaty or to exclude certain parts, and then, of course, partial ratification, accession, acceptance or approval is admissible. But in the absence of such a provision, the established rule is that laid down in paragraph 1 (b); the ratification, accession etc. must relate to the treaty as a whole. Although it may be admissible to formulate reservations to selected provisions of the treaty under the rules stated in Article 18, it is inadmissible to subscribe only to selected parts of the treaty.

(3) Paragraph 1 (c) takes account of a practice which is not very common but which is sometimes found in treaties concluded under the auspices of certain international organizations, e.g., the International Labour Organisation. The treaty offers to each state a choice between two different texts of the treaty.

(4) Paragraph 2 concerns the act by which an instrument of ratification, accession etc. is rendered legally effective on the international plane; namely, by its delivery—its communication—to the other states concerned. Normally, the procedure for accomplishing this is laid down in the treaty itself and paragraph 2 recognizes that fact. It goes on, however, to make provision for cases where the treaty is silent as to the procedure and specifies for such cases the procedures most commonly found in modern practice. A query might be raised whether in cases where there is a depositary the date upon which the instrument becomes effective is the date of deposit or the date when notice of the instrument actually reaches the other states concerned. The Commission considered that, by using a depositary as their agent for accepting the deposit of instruments relating to the treaty, the states which drew up the treaty give their consent to the act of deposit being regarded as the act which renders the instrument effective. Accordingly, the date of deposit has to be regarded as the effective date, even if this means that in some cases there may be a small time-lag before the other states become aware that the treaty is in force between them and the state depositing the instrument. In this connexion reference may be made to the decision of the International Court of Justice, in the *Right of Passage Case*<sup>45</sup> concerning the moment at which declarations under the optional clause take effect.

(5) Paragraph 3 does not call for any comment.

#### ARTICLE 16

##### *Legal effects of ratification, accession, acceptance and approval*

The communication of an instrument of ratification, accession, acceptance or approval in conformity with the provisions of Article 13:

(a) Establishes the consent of the ratifying, acceding, accepting or approving state to be bound by the treaty; and

<sup>45</sup> I.O.J. Reports 1956, p. 170.

(b) If the treaty is not yet in force, brings into operation the applicable provisions of Article 17, paragraph 2.

### *Commentary*

(1) The essential legal effect of the exchange or deposit of instruments of ratification, accession, acceptance or approval is to establish the consent of the state concerned to be bound by the treaty. It commits the state to becoming a party to the treaty. Whether it also has the effect of bringing the treaty into force for the state exchanging or depositing the instrument depends upon the conditions under which the treaty is to enter into force, a matter which is dealt with in Articles 24 and 25.

(2) A further effect, if the exchange or deposit of the instrument does not bring the treaty into force at once, is to place the state concerned under the obligation of good faith set out in Article 17. This, in general terms, is an obligation, pending the entry into force of the treaty, to refrain from acts calculated to frustrate its objects.

(3) The Commission considered whether it should include in this article a provision expressly declaring that, unless the treaty otherwise states, ratification has no retroactive effects. Formerly, when ratification was regarded as a confirmation of the authority to sign, it was generally said to operate retrospectively and to make the treaty effective as from signature. This view continued to be echoed by writers and by some municipal courts, even after the institution of ratification had undergone the fundamental change which has already been described in the commentary to Article 12 above. But the theory of the retroactive operation of ratification is now universally rejected and the Commission decided that it would be sufficient to mention the point in this commentary and to draw attention to Article 23, paragraph 4. This paragraph, by providing that the rights and obligations of a treaty "become effective for each party from the date when the treaty comes into force with respect to that party," excludes the doctrine of the retroactive operation of ratification.

### ARTICLE 17

#### *The rights and obligations of states prior to the entry into force of the treaty*

1. A state which takes part in the negotiation, drawing up or adoption of a treaty, or which has signed a treaty subject to ratification, acceptance or approval, is under an obligation of good faith, unless and until it shall have signified that it does not intend to become a party to the treaty, to refrain from acts calculated to frustrate the objects of the treaty, if and when it should come into force.

2. Pending the entry into force of a treaty and provided that such entry into force is not unduly delayed, the same obligation shall apply to the state which, by signature, ratification, accession, acceptance or approval, has established its consent to be bound by the treaty.

*Commentary*

(1) Reference has already been made to the provisions of this article in the commentaries to Articles 10 and 16. That an obligation of good faith to refrain from acts calculated to frustrate objects of the treaty attaches to a state which has signed a treaty subject to ratification appears to be generally accepted. Certainly, in the *Polish Upper Silesia Case*,<sup>46</sup> the Permanent Court of International Justice appears to have recognized that, if ratification takes place, a signatory state's misuse of its rights in the interval preceding ratification may amount to a violation of its obligations in respect of the treaty.<sup>47</sup> The Commission considers that this obligation begins when a state takes part in the negotiation of a treaty or in the drawing up or adoption of its text. *A fortiori*, it attaches to a state which actually ratifies, accedes to, accepts or approves a treaty if there is an interval before the treaty actually comes into force.

(2) Paragraph 1 of the article covers the cases where the state has not yet established its consent to be bound by the treaty. In those cases the obligation of good faith continues until either the state signifies that it does not intend to become a party or it establishes its consent to be bound by the treaty, when it falls under paragraph 2 of the article.

(3) Paragraph 2 deals with the cases where the state has committed itself to be bound by the treaty and then the obligation continues until either the treaty comes into force or its entry into force has been unduly delayed.

## SECTION III: RESERVATIONS

## ARTICLE 18

*Formulation of reservations*

1. A state may, when signing, ratifying, acceding to, accepting or approving a treaty, formulate a reservation unless:

(a) The making of reservations is prohibited by the terms of the treaty or by the established rules of an international organization; or

(b) The treaty expressly prohibits the making of reservations to specified provisions of the treaty and the reservation in question relates to one of the said provisions; or

(c) The treaty expressly authorizes the making of a specified category of reservations, in which case the formulation of reservations falling outside the authorized category is by implication excluded; or

(d) In the case where the treaty is silent concerning the making of reservations, the reservation is incompatible with the object and purpose of the treaty.

2. (a) Reservations, which must be in writing, may be formulated:

<sup>46</sup> P.C.I.J. Series A, No. 7, p. 30.

<sup>47</sup> See also McNair, *Law of Treaties* (1961), pp. 199-205; Fauchille, *Traité de droit international public* (1926), Tome I, part III, p. 320; Bin Cheng, *General Principles of Law*, pp. 109-111; *Megalidis v. Turkey*, (1927-1928) *Annual Digest of International Law Cases*, Case No. 272.

(i) Upon the occasion of the adoption of the text of the treaty, either on the face of the treaty itself or in the final act of the conference at which the treaty was adopted, or in some other instrument drawn up in connexion with the adoption of the treaty;

(ii) Upon signing the treaty at a subsequent date; or

(iii) Upon the occasion of the exchange or deposit of instruments of ratification, accession, acceptance or approval, either in the instrument itself or in a *procès-verbal* or other instrument accompanying it.

(b) A reservation formulated upon the occasion of the adoption of the text of a treaty or upon signing a treaty subject to ratification, acceptance or approval shall only be effective if the reserving state, when carrying out the act establishing its own consent to be bound by the treaty, confirms formally its intention to maintain its reservation.

3. A reservation formulated subsequently to the adoption of the text of the treaty must be communicated:

(a) In the case of a treaty for which there is no depositary, to every other state party to the treaty or to which it is open to become a party to the treaty; and

(b) In other cases, to the depositary which shall transmit the text of the reservation to every such state.

#### ARTICLE 19

##### *Acceptance of and objection to reservations*

1. Acceptance of a reservation not provided for by the treaty itself may be expressed or implied.

2. A reservation may be accepted expressly:

(a) In any appropriate formal manner on the occasion of the adoption or signature of a treaty, or of the exchange or deposit of instruments of ratification, accession, acceptance or approval; or

(b) By a formal notification of the acceptance of the reservation addressed to the depositary of the treaty or, if there is no depositary, to the reserving state and every other state entitled to become a party to the treaty.

3. A reservation shall be regarded as having been accepted by a state if it shall have raised no objection to the reservation during a period of twelve months after it received formal notice of the reservation.

4. An objection by a state which has not yet established its own consent to be bound by the treaty shall have no effect if after the expiry of two years from the date when it gave formal notice of its objection it has still not established its consent to be bound by the treaty.

5. An objection to a reservation shall be formulated in writing and shall be notified:

(a) In the case of a treaty for which there is no depositary, to the reserving state and to every other state party to the treaty or to which it is open to become a party; and

(b) In other cases, to the depositary.

## ARTICLE 20

*The effect of reservations*

(a) A reservation expressly or impliedly permitted by the terms of the treaty does not require any further acceptance.

(b) Where the treaty is silent in regard to the making of reservations, the provisions of paragraphs 2 to 4 below shall apply.

2. Except in cases falling under paragraphs 3 and 4 below and unless the treaty otherwise provides:

(a) Acceptance of a reservation by any state to which it is open to become a party to the treaty constitutes the reserving state a party to the treaty in relation to such state, as soon as the treaty is in force;

(b) An objection to a reservation by a state which considers it to be incompatible with the object and purpose of the treaty precludes the entry into force of the treaty as between the objecting and the reserving state, unless a contrary intention shall have been expressed by the objecting state.

3. Except in a case falling under paragraph 4 below, the effect of a reservation to a treaty, which has been concluded between a small group of states, shall be conditional upon its acceptance by all the states concerned unless:

(a) The treaty otherwise provides; or

(b) The states are members of an international organization which applies a different rule to treaties concluded under its auspices.

4. Where the treaty is the constituent instrument of an international organization and objection has been taken to a reservation, the effect of the reservation shall be determined by decision of the competent organ of the organization in question, unless the treaty otherwise provides.

*Commentary**Introduction*

(1) Articles 18, 19 and 20<sup>48</sup> have to be read together because the legal effect of a reservation, when formulated, is dependent on its acceptance or rejection by the other states concerned. A reservation to a bilateral treaty presents no problem, because it amounts to a new proposal reopening the negotiations between the two states concerning the terms of the treaty. If they arrive at an agreement—either adopting or rejecting the reservation—the treaty will be concluded; if not, it will fall to the ground. But as soon as more than two states are involved problems arise, since one state may be disposed to accept the reservation while another objects to it; and, when large multilateral treaties are in question, these problems become decidedly complex.

(2) The subject of reservations to multilateral treaties has been much discussed during the past twelve years and has been considered by the

<sup>48</sup> For the reasons given by him in the summary records of the 637th, 651st, 652nd, 656th and 667th meetings, Mr. Briggs does not accept the provisions of Article 20.



General Assembly itself on more than one occasion,<sup>49</sup> as well as by the International Court of Justice in its opinion concerning the Genocide Convention.<sup>50</sup> Divergent views have been expressed both in the Court and the General Assembly on the fundamental question of the extent to which the consent of other interested states is necessary to the effectiveness of a reservation to this type of treaty.

(3) In 1951, the doctrine under which a reservation, in order to be valid, must have the assent of all the other interested states was not accepted by the majority of the Court as applicable in the particular circumstances of the Genocide Convention; moreover, while they considered the "traditional" doctrine to be of "undisputed value," they did not consider it to have been "transformed into a rule of law."<sup>51</sup> Four judges, on the other hand, dissented from this view and set out their reasons for holding that the traditional doctrine must be regarded as a generally accepted rule of customary law. The Court's reply to the question put to it by the General Assembly was as follows:

"On Question I:

"that a State which has made and maintained a reservation which has been objected to by one or more of the parties to the Convention but not by others, can be regarded as being a party to the Convention if the reservation is compatible with the object and purpose of the Convention; otherwise, that State cannot be regarded as being a party to the Convention.

"On Question II:

"(a) That if a party to the Convention objects to a reservation which it considers to be incompatible with the object and purpose of the Convention, it can in fact consider that the reserving State is not a party to the Convention;

"(b) That if, on the other hand, a party accepts the reservation as being compatible with the object and purpose of the Convention, it can in fact consider that the reserving State is a party to the Convention.

"On Question III:

"(a) That an objection to a reservation made by a signatory State which has not yet ratified the Convention can have the legal effect indicated in the reply to Question I only upon ratification. Until that moment it merely serves as a notice to the other State of the eventual attitude of the signatory State;

"(b) That an objection to a reservation made by a State which is entitled to sign or accede but which has not yet done so, is without legal effect."<sup>52</sup>

In giving these replies to the General Assembly's questions the Court emphasized that they were strictly limited to the Genocide Convention; and

<sup>49</sup> Notably in 1951 in connexion with reservations to the Genocide Convention and in 1959 concerning the Indian "reservation" to the I.M.C.O. Convention.

<sup>50</sup> Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, I.C.J. Reports 1951, p. 15.

<sup>51</sup> *Ibid.*, p. 24.

<sup>52</sup> Official Records of the General Assembly, 6th Sess., Supp. No. 9 (A/1858), par. 16.

said that, in determining what kind of reservations might be made to the Genocide Convention and what kind of objections might be taken to such reservations, the solution must be found in the special characteristics of that Convention. Amongst these special characteristics it mentioned: (a) the fact that the principles underlying the Convention—the condemnation and punishment of genocide—are principles recognized by civilized nations as binding upon governments even without a convention; (b) the consequently universal character of the Convention; and (c) its purely humanitarian and civilizing purpose without individual advantages or disadvantages for the contracting states.

(4) Although limiting its replies to the case of the Genocide Convention itself, the Court expressed itself more generally on certain points amongst which may be mentioned:

(a) In its treaty relations a state cannot be bound without its consent and, consequently, no reservation can be effective against any state without its agreement thereto.

(b) The traditional concept, that no reservation is valid unless it has been accepted by all the contracting parties without exception, as would have been required if it had been stated during the negotiations, is of undisputed value.

(c) Nevertheless, extensive participation in conventions of the type of the Genocide Convention has already given rise to greater flexibility in the international practice concerning multilateral conventions, as manifested by the more general resort to reservations, the very great allowance made for tacit assent to reservations and the existence of practices which, despite the fact that a reservation has been rejected by certain states, go so far as to admit the reserving state as a party to the convention *vis-à-vis* those states which have accepted it.

(d) In the present state of international practice it cannot be inferred from the mere absence of any article providing for reservations in a multilateral convention that the contracting states are prohibited from making certain reservations. The character of a multilateral convention, its purpose, provisions, mode of preparation and adoption, are factors which must be considered in determining, in the absence of any express provision on the subject, the possibility of making reservations, as well as their validity and effect.

(e) The principle of the integrity of the convention, which subjects the admissibility of a reservation to the express or tacit assent of all the contracting parties, does not appear to have been transformed into a rule of law.

(5) Later in 1951, as had been requested by the General Assembly, the Commission presented a general report on reservations to multilateral conventions.<sup>53</sup> It expressed the view that the Court's criterion—"compatibility with the object and purpose of the convention" was open to objection as a criterion of general application, because it considered the question of "compatibility with the object and purpose of the convention"

<sup>53</sup> *Ibid.*, pars. 12-34.

to be too subjective for application to multilateral conventions generally. Noting that the Court's opinion was specifically confined to the Genocide Convention and recognizing that no single rule uniformly applied could be wholly satisfactory to cover all cases, the Commission recommended the adoption of the doctrine requiring unanimous consent for the admission of a state as a party to a treaty subject to a reservation. At the same time, it proposed certain minor modifications in the application of the rule.

(6) The Court's opinion and the Commission's report were considered together at the Sixth Session of the General Assembly, which adopted Resolution 598 (VI) dealing with the particular question of reservations to the Genocide Convention separately from that of reservations to other multilateral conventions. With regard to the Genocide Convention it requested the Secretary-General to conform his practice to the Court's Advisory Opinion and recommended to states that they should be guided by it. With regard to all other future multilateral conventions concluded under the auspices of the United Nations of which he is the depositary, it requested the Secretary-General:

“(i) To continue to act as depositary in connexion with the deposit of documents containing reservations or objections, without passing upon the legal effect of such documents; and

“(ii) To communicate the text of such documents relating to reservations or objections to all States concerned, leaving it to each State to draw legal consequences from such communications.”

The resolution, being confined to future conventions, was limited to conventions concluded after 12 January 1952, the date of the adoption of the resolution, so that the former practice still applied to conventions concluded before that date. As to future conventions, the General Assembly did not endorse the Commission's proposal to retain the former practice subject to minor modifications. Instead, it directed the Secretary-General, in effect, to act simply as an agent for receiving and circulating instruments containing reservations or objections to reservations, without drawing any legal consequences from them.

(7) In the General Assembly, as already mentioned, opinion was divided in the debates on this question in 1951. One group of states favoured the unanimity doctrine, though there was some support in this group for replacing the need for unanimous consent by one of acceptance by a two-thirds majority of the states concerned. Another group of states, however, was definitely opposed to the unanimity doctrine and favoured a flexible system making the acceptance and rejection of reservations a matter for each state individually. They argued that such a system would safeguard the position of outvoted minorities and make possible a wider acceptance of conventions. The opposing group maintained, on the other hand, that a flexible system of this kind, although it might be suitable for a homogeneous community like the Pan American Union, was not suitable for universal application. Opinion being divided in the United Nations, the only concrete result was the directives given to the Secretary-General for the performance of his depositary functions with respect to reservations.

(8) The situation with regard to this whole question has changed in certain respects since 1951. First, the international community has undergone rapid expansion since 1951, so that the very number of potential participants in multilateral treaties now seems to make the unanimity principle less appropriate and less practicable. Secondly, since 12 January 1952, *i.e.*, during the past ten years, the system which has been in operation *de facto* for all new multilateral treaties of which the Secretary-General is the depositary has approximated to the "flexible" system. For the Secretariat's practice with regard to all treaties concluded after the General Assembly's resolution of 12 January 1952 has been officially stated to be as follows:

"In the absence of any clause on reservations in agreements concluded after the General Assembly resolution on reservations to multilateral conventions, the Secretary-General adheres to the provisions of that resolution and communicates to the States concerned the text of the reservation accompanying an instrument of ratification or accession without passing on the legal effect of such documents, and 'leaving it to each State to draw legal consequences from such communications'. He transmits the observations received on reservations to the States concerned, also without comment. A general table is kept up to date for each convention, showing the reservations made and the observations transmitted thereon by the States concerned. A State which has deposited an instrument accompanied by reservations is counted among the parties required for the entry into force of the agreement." <sup>54</sup>

It is true that the Secretary-General, in compliance with the General Assembly's resolution, does not "pass upon" the legal effect either of reservations or of objections to reservations, and each state is free to draw its own conclusions regarding their legal effects. But, having regard to the opposition of many states to the unanimity principle and to the Court's refusal to consider that principle as having been "transformed into a rule of law," a state making a reservation is now in practice considered a party to the convention by the majority of those states which do not give notice of their objection to the reservation.

(9) A further point is that in 1959 the question of reservations to multilateral conventions again came before the General Assembly in the particular context of a convention which was the constituent instrument of an international organization—namely, the Inter-Governmental Maritime Consultative Organization. The actual issue raised by India's declaration in accepting that Convention was remitted to I.M.C.O. and settled without the legal questions having been resolved. But the General Assembly reaffirmed its previous directive to the Secretary-General concerning his depositary functions and extended it to cover all conventions concluded under the auspices of the United Nations (unless they contain contrary provisions), not merely those concluded after 12 January 1952.

(10) At the present session, the Commission was agreed that, where the treaty itself deals with the question of reservations, the matter is con-

<sup>54</sup> Summary of the Practice of the Secretary-General as Depositary of Multilateral Agreements (ST/LEG/7, par. 80).

cluded by the terms of the treaty. Reservations expressly or impliedly prohibited by the terms of the treaty are excluded, while those expressly or impliedly authorized are *ipso facto* effective. The problem concerns only the cases where the treaty is silent in regard to reservations, and here the Commission was agreed that the Court's principle of "compatibility with the object and purpose of the treaty" is one suitable for adoption as a general criterion of the legitimacy of reservations to multilateral treaties and of objection to them. The difficulty lies in the process by which that principle is to be applied, and especially where there is no tribunal or other organ invested with standing competence to interpret the treaty. Where the treaty is a constituent instrument of an international organization, the Commission was agreed that the question is one for determination by its competent organ. It was also agreed that where the treaty is one concluded between a small group of states, unanimous agreement to the acceptance of a reservation must be presumed to be necessary in the absence of any contrary indication. Accordingly the problem essentially concerns multilateral treaties which are not constituent instruments of international organizations and which contain no provisions in regard to reservations. On this problem, opinion in the Commission, as in the Court and the General Assembly, was divided.

(11) Some members of the Commission considered it essential that the effectiveness of a reservation to a multilateral treaty should be dependent on at least some measure of common acceptance of it by the other states concerned. They thought it inadmissible that a state, having formulated a reservation incompatible with the objects of a multilateral treaty, should be entitled to regard itself as a party to the treaty, on the basis of the acceptance of the reservation by a single state or by very few states. The reservation might be one which other states consider to undermine the basis of the treaty or a clause embodying a compromise to obtain which the states concerned had all sacrificed part of their interests. As tacit consent, derived from a failure to object to a reservation, plays a large rôle in the practice concerning multilateral treaties and is provided for in the draft articles, such a rule would mean in practice that a reserving state, however objectionable its reservation, could always be sure of being able to consider itself a party to the treaty *vis-à-vis* a certain number of states. Accordingly, these members advocated a rule under which, if more than a certain proportion of the interested states (for example, one third) objected to a reservation, the reserving state would be barred altogether from considering itself a party to the treaty unless it withdrew the reservation.

(12) The other members of the Commission, however, did not share this view, especially with respect to general multilateral treaties. These members, while giving full weight to the arguments in favour of maintaining the integrity of the convention as adopted to the greatest extent possible, felt that the detrimental effect of reservations upon the integrity of the treaty could easily be exaggerated. The treaty itself remains the sole authentic statement of the common agreement between the participating states. The majority of reservations relate to a particular point

which a particular state for one reason or another finds difficult to accept, and the effect of the reservation on the general integrity of the treaty is minimal; the same is true even if the reservation in question relates to a comparatively important provision of the treaty, so long as the reservation is not made by more than a few states. In short, the integrity of the treaty would only be materially affected if a reservation of a somewhat substantial kind were to be formulated by a number of states. This might, no doubt, happen; but even then the treaty itself would remain the master agreement between the other participating states. What is essential to ensure both the effectiveness and the integrity of the treaty is that a sufficient number of states should become parties to it, accepting the great bulk of its provisions. The Commission in 1951 said that the history of the conventions adopted by the Conference of American States had failed to convince it "that an approach to universality is necessarily assured or promoted by permitting a state which offers a reservation to which objection is taken to become a party *vis-à-vis* non-objecting States."<sup>55</sup> Nevertheless, a power to formulate reservations must in the nature of things tend to make it easier for some states to execute the act necessary to bind themselves finally to participating in the treaty and therefore tend to promote a greater measure of universality in the application of the treaty. Moreover, in the case of general multilateral treaties, it appears that not infrequently a number of states have, to all appearances, only found it possible to participate in the treaty, subject to one or more reservations. Whether these states, if objection had been taken to their reservations, would have preferred to remain outside the treaty rather than to withdraw their reservation is a matter which is not known. But when today the number of the negotiating states may not be far short of one hundred states with very diverse cultural, economic and political conditions, it seems legitimate to assume that the power to make reservations without the risk of being totally excluded by the objection of one or even of a few states may be a factor in promoting a more general acceptance of multilateral treaties. It may not unreasonably be thought that the failure of negotiating states to take the necessary steps to become parties to multilateral treaties at all is a greater obstacle to the development of international law through the medium of treaties than the possibility that the integrity of such treaties may be unduly weakened by the free admission of reserving states as parties to them. There may also perhaps be some justification for the view that, in the present era of change and of challenge to traditional concepts, the rule calculated to promote the widest possible acceptance of whatever measure of common agreement can be achieved and expressed in a multilateral treaty may be the one most suited to the immediate needs of the international community.

(13) Another consideration which influenced these members of the Commission is that, in any event, the essential interests of individual states are in large measure safeguarded by the two well-established rules:

<sup>55</sup> Official Records of the General Assembly, 6th Sess., Supp. No. 9 (A/1858), par. 22.

(a) That a state which within a reasonable time signifies its objection to a reservation is entitled to regard the treaty as not in force between itself and the reserving state;

(b) That a state which assents to another state's reservation is nevertheless entitled to object to any attempt by the reserving state to invoke against it the obligations of the treaty from which the reserving state has exempted itself by its reservation.

It has, it is true, been suggested that the equality between a reserving and non-reserving state, which is the aim of the above-mentioned rules, may in practice be less than complete. For a non-reserving state, by reason of its obligations towards other non-reserving states, may feel bound to comply with the whole of the treaty, including the provisions from which the reserving state has exempted itself by its reservation. Accordingly, the reserving state may be in the position of being exempt itself from certain of the provisions of the treaty, while having the assurance that the non-reserving states will observe those provisions. Normally, however, a state wishing to make a reservation would equally have the assurance that the non-reserving state would be obliged to comply with the provisions of the treaty by reason of its obligations to other states, even if the reserving state remained completely outside the treaty. By entering into the treaty subject to its reservation, the reserving state at least submits itself in some measure to the régime of the treaty. The position of the non-reserving state is not therefore made more onerous if the reserving state becomes a party to the treaty on a limited basis by reason of its reservation. Even in those cases where there is such a close connexion between the provisions to which the reservation relates and other parts of the treaty that the non-reserving state is not prepared to become a party to the treaty at all *vis-à-vis* the reserving state on the limited basis which the latter proposes, the non-reserving state can prevent the treaty coming into force between itself and the reserving state by objecting to the reservation. Thus, the point only appears to have significance in cases where the non-reserving state would never itself have consented to become a party to the treaty, if it had known that the other state would do so subject to the reservation in question. And it may not be unreasonable to suggest that, if a state attaches so much importance to maintaining the absolute integrity of particular provisions, its appropriate course is to protect itself during the drafting of the treaty by obtaining the insertion of an express clause prohibiting the making of the reservations which it considers to be so objectionable.

(14) The Commission concluded that, in the case of general multilateral treaties, the considerations in favour of a flexible system, under which it is for each state individually to decide whether to accept a reservation and to regard the reserving state as a party to the treaty for the purpose of the relations between the two states, outweigh the arguments advanced in favour of retaining a "collegiate" system under which the reserving state would only become a party if the reservation were accepted by a

given proportion of the other states concerned. Having arrived at this decision, the Commission also decided that there were insufficient reasons for making a distinction between multilateral treaties not of a general character between a considerable number of states and general multilateral treaties. The rules proposed by the Commission therefore cover all multilateral treaties except those concluded between a small number of states for which the unanimity rule is retained.

*Commentary to Article 18*

(15) This article deals with the conditions under which a state may formulate a reservation. Paragraph 1 sets out the general principle that the formulation of reservations is permitted except in four cases. The first three are cases in which the reservation is expressly or impliedly prohibited by the treaty itself. The fourth case, mentioned under (d), is where the treaty is silent in regard to reservations but the particular reservation is incompatible with the object and purpose of the treaty. Paragraph 1 (d), in short, adopts the Court's criterion as a general rule governing the formulation of reservations not provided for in the treaty. Paragraph 1 (d) has to be read in conjunction with Article 20 which deals with the effect of a reservation formulated in cases where the treaty contains no provisions concerning reservations.

(16) Paragraph 2 deals with the modalities of formulating reservations and only requires two comments. The first relates to paragraph 2(a) (i) which concerns reservations formulated at the time of the adoption of the text of the treaty, that is, at the conclusion of the negotiations. A statement of reservation is sometimes made during the negotiation and duly recorded in the *procès-verbaux*. Such embryo reservations have sometimes been relied upon afterwards as amounting to formal reservations. It seems essential, however, that the state concerned should formally reiterate the statement in some manner in order that its intention actually to formulate a reservation should be clear. Accordingly, a statement during the negotiations expressing a reservation has not been included in paragraph 2 as one of the methods of formulating a reservation. The second comment relates to an analogous point in paragraph 2 (b), where it is expressly provided that a reservation formulated upon the adoption of the text or upon a signature, subject to ratification, acceptance or approval must, if it is to be effective, be formally maintained when the state establishes its consent to be bound.

(17) Paragraph 3 provides for the communication of the reservation to the other interested states.

*Commentary to Article 19*

(18) Paragraphs 1, 2 and 5 of this article do not appear to require comment.

(19) Paragraph 3 deals with implied consent to a reservation. That the principle of implying consent to a reservation from absence of ob-



jection has been admitted into state practice cannot be doubted; for the Court itself in the *Reservations to the Genocide Convention* case spoke of "very great allowance" being made in international practice for "tacit assent to reservations." Moreover, a rule specifically stating that consent will be presumed after a period of three, or in some cases six, months is to be found in some modern conventions,<sup>56</sup> while other conventions achieve the same result by limiting the right of objection to a period of three months.<sup>57</sup> Again, in 1959, the Inter-American Council of Jurists<sup>58</sup> recommended that, if no reply had been received from a state to which a reservation had been communicated, it should be presumed after one year that the state concerned had no objection to the reservation.

(20) It has to be admitted that there may be a certain degree of rigidity in a rule under which tacit consent will be presumed after the lapse of a fixed period. Nevertheless, it seems undesirable that a state, by refraining from making any comment upon a reservation, should be enabled more or less indefinitely to maintain an equivocal attitude as to the relations between itself and the reserving state under a multilateral treaty. The risk would be that a state which had kept silent in regard to another state's reservation would only take a clear position in the matter after a dispute had arisen between it and the reserving state. Seeing that in a number of treaties states had found it possible to accept periods as short as three or six months, the question may be asked why it has been considered necessary to propose a period of twelve months in the present draft. But there are, it is thought, good reasons for proposing the adoption of the longer period. First, it is one thing to agree upon a short period for the purposes of a particular treaty whose contents are known, another to agree upon it as a general rule applicable to every treaty which does not lay down a rule on the point.

(21) Paragraph 4 proposes, *de lege ferenda*, a rule under which an objection to a reservation will lapse if the objecting state does not, within two years after lodging its objection, establish its own consent to be bound. The application of the rule would be of particular importance in connexion with treaties concluded between a small group of states where the objection of one state suffices to exclude a reserving state from becoming a party to the treaty. But it is thought that, in general, an objection should lapse if the objecting state does not itself become bound within a reasonable period. The Commission hesitated as to the length of the period and has proposed two years, pending the comments by governments upon the point.

<sup>56</sup> *E.g.*, International Convention to Facilitate the Importation of Commercial Samples and Advertising Material, 1952 (90 days); and International Convention for the Suppression of Counterfeiting Currency, 1929 (6 months).

<sup>57</sup> *E.g.*, Conventions on the Declaration of Death of Missing Persons, 1950, and on the Nationality of Married Women, 1957 (both 90 days).

<sup>58</sup> Final Act of the Fourth Meeting of the Inter-American Council of Jurists, p. 29.

*Commentary to Article 20*

(22) Paragraph 1 requires no comment. Paragraph 2, in conjunction with Article 18, paragraph 1 (d), contains the essence of the Commission's proposals concerning reservations to multilateral treaties which are silent upon the question of reservations. Article 18, paragraph 1 (d), it may be recalled, permits the formulation of reservations in such cases provided that they are not incompatible with the object and purpose of the treaty. The criterion of "compatibility with the object and purpose of the treaty," as pointed out in the introduction to these three articles, is to some extent a matter of subjective appreciation and yet, in the absence of a tribunal or organ with standing competence, the only means of applying it in most cases will be through the individual state's acceptance or rejection of the reservation. This necessarily means that there may be divergent interpretations of the compatibility of a particular reservation with the object and purpose of a given treaty. But such a result seems to the Commission to be almost inevitable in the circumstances and the only question is what are to be the effects of the determinations made by individual states.

(23) Paragraph 2 (a) provides that acceptance of a reservation is conclusive as to the effectiveness of the reservation as between the accepting and the reserving state. Paragraph 2 (b) equally provides that an objection operates only as between the objecting and the reserving state and precludes the treaty coming into force between them, unless the objecting state should express a contrary intention. These are the two basic rules of the "flexible" system. They may certainly have the result that a reserving state may be a party to the treaty with regard to state X, but not to state Y, although states X and Y are mutually bound by the treaty. But in the case of a general multilateral treaty or of a treaty concluded between a considerable number of states, this result appears to the Commission not to be as unsatisfactory as allowing state Y, by its objection, to prevent the treaty from coming into force between the reserving state and state X, which has accepted the reservation.

(24) Paragraph 3, as foreshadowed in the introduction to the commentary of these three articles, excludes treaties between a small group of states from the operation of the "flexible" system and applies the rule of unanimity. In treaties between small groups, consultation is easier concerning the acceptability of a reservation, while the considerations in favour of maintaining the integrity of the convention may be more compelling than in the case of general multilateral treaties or other treaties between large groups of states. The Commission appreciated that the expression "a small group of states" lacks precision, but felt that it was a sufficient general description by which it would be possible to distinguish most treaties falling outside the "flexible" system.

(25) Paragraph 4 states the rule, also foreshadowed in the introduction to the commentary of these three articles, whereby an objection to a reservation to the constituent instrument of an international organization is to be determined by the competent organ of the organization in question,

The question has arisen a number of times and the Secretary-General's report in 1959 in regard to his handling of an alleged "reservation" to the IMCO Convention stated that it had "invariably been treated as one for reference to the body having authority to interpret the Convention in question."<sup>59</sup> The Commission considers that in the case of instruments which form the constitutions of international organizations, the integrity of the instrument is a consideration which outweighs other considerations and that it must be for the members of the organization, acting through its competent organ, to determine how far any relaxation of the integrity of the instrument is acceptable.

#### ARTICLE 21

##### *The application of reservations*

1. A reservation established in accordance with the provisions of Article 20 operates:

(a) To modify for the reserving state the provisions of the treaty to which the reservation relates to the extent of the reservation; and

(b) Reciprocally to entitle any other state party to the treaty to claim the same modification of the provisions of the treaty in its relations with the reserving state.

2. A reservation operates only in the relations between the other parties to the treaty which have accepted the reservation and the reserving state; it does not affect in any way the rights or obligations of the other parties to the treaty *inter se*.

#### *Commentary*

This article sets out the rules concerning the legal effects of a reservation, which has been established under the provisions of Articles 18, 19 and 20, assuming that the treaty is in force. These rules, which appear not to be questioned, follow directly from the consensual basis of the relations between parties to a treaty. A reservation operates reciprocally between the reserving state and any other party, so that it modifies the application of the treaty for both of them in their mutual relations to the extent of the reserved provisions, but has no effect on the application of the treaty to the other parties to the treaty, *inter se*, since they have not accepted it as a term of the treaty in their mutual relations.

#### ARTICLE 22

##### *The withdrawal of reservations*

1. A reservation may be withdrawn at any time and the consent of a state which has accepted the reservation is not required for its withdrawal. Such withdrawal takes effect when notice of it has been received by the other states concerned.

<sup>59</sup> Official Records of the General Assembly, 14th Sess., Annexes, Agenda Item 65, Doc. A/4235.

2. Upon withdrawal of a reservation the provisions of Article 21 cease to apply.

*Commentary*

(1) It has sometimes been contended that when a reservation has been accepted by another state it may not be withdrawn without the latter's consent, as the acceptance of the reservation establishes a régime between the two states which cannot be changed without the agreement of both. The Commission, however, considers that the preferable rule is that the reserving state should in all cases be authorized, if it is willing to do so, to bring its position into full conformity with the provisions of the treaty as adopted.

(2) Another point in this article perhaps calling for comment is the provision concerning the time at which the withdrawal of a reservation is to take effect. Since a reservation is a modification from the treaty made at the instance of the reserving state, the Commission considers that the onus should lie upon that state to bring the withdrawal to the notice of the other states; and that the latter could not be held responsible for a breach of a term of the treaty, to which the reservation relates, committed in ignorance of the withdrawal of the reservation.

SECTION IV: ENTRY INTO FORCE AND REGISTRATION

ARTICLE 23

*Entry into force of treaties*

1. A treaty enters into force in such manner and on such date as the treaty itself may prescribe.

2. (a) Where a treaty, without specifying the date upon which it is to come into force, fixes a date by which ratification, acceptance, or approval is to take place, it shall come into force upon that date if the exchange or deposit of the instruments in question shall have taken place.

(b) The same rule applies *mutatis mutandis* where a treaty, which is not subject to ratification, acceptance or approval, fixes a date by which signature is to take place.

(c) However, where the treaty specifies that its entry into force is conditional upon a given number, or a given category, of states having signed, ratified, acceded to, accepted or approved the treaty and this has not yet occurred, the treaty shall not come into force until the condition shall have been fulfilled.

3. In other cases, where a treaty does not specify the date of its entry into force, the date shall be determined by agreement between the states which took part in the adoption of the text.

4. The rights and obligations contained in a treaty become effective for each party as from the date when the treaty enters into force with respect to that party, unless the treaty expressly provides otherwise.

*Commentary*

(1) Paragraph 1 concerns the case where the treaty itself provides for the manner and date of its entry into force. Paragraph 2 covers the case where the treaty does not do so specifically, but does fix a date by which the acts establishing consent to be bound are to take place. In that case, it seems to be accepted that the treaty is to be presumed to have been intended to come into force upon that date, provided that the necessary instruments of ratification, acceptance etc. have been exchanged or deposited or the necessary signatures have been affixed to the treaty. On the other hand, if the treaty also specifies that a certain number of states must have signed, ratified etc. before it enters into force, this condition must of course also have been fulfilled.

(2) The Commission considered whether other provisions in a treaty might be said to raise presumptions as to the date of its entry into force, but it concluded that it should not try to fill in all the gaps which the drafting of treaties might leave in regard to its entry into force. To do this would be to go too far into the interpretation of the intention of the parties in particular treaties. Moreover, it considered that in the event of a treaty failing to give a clear indication as to the date, it was a matter for agreement between the parties, and paragraph 3 so provides.

(3) Paragraph 4 lays down what is believed to be an undisputed rule of modern treaty law, namely, that a treaty becomes effective for each party on the date when it enters into force with respect to that party. The rule in this paragraph therefore excludes the idea that ratification may have retroactive effect to the date of signature. It requires a clear provision in the treaty itself to give the treaty retroactive effect, as it does also to suspend its effectiveness until a future date.

## ARTICLE 24

*Provisional entry into force*

A treaty may prescribe that, pending its entry into force by the exchange or deposit of instruments of ratification, accession, acceptance or approval, it shall come into force provisionally, in whole or in part, on a given date or on the fulfilment of specified requirements. In that case the treaty shall come into force as prescribed and shall continue in force on a provisional basis until either the treaty shall have entered into force definitively or the states concerned shall have agreed to terminate the provisional application of the treaty.

*Commentary*

(1) This article recognizes a practice which occurs with some frequency today and requires notice in the draft articles. Owing to the urgency of the matters dealt with in the treaty or for other reasons the states concerned may provide in a treaty, which it is necessary for them to bring before their constitutional authorities for ratification or approval, that it

shall come into force provisionally. Whether in these cases the treaty is to be considered as entering into force in virtue of the treaty or of a subsidiary agreement concluded between the states concerned in adopting the text may be a question. But there can be no doubt that such clauses have legal effect and bring the treaty into force on a provisional basis.

(2) Clearly, the "provisional" application of the treaty will terminate upon the treaty being duly ratified or approved in accordance with the terms of the treaty or upon it becoming clear that the treaty is not going to be ratified or approved by one of the parties. It may sometimes happen that the event is delayed and that the states concerned agree to put an end to the provisional application of the treaty, if not to annul the treaty itself.

#### ARTICLE 25

##### *The registration and publication of treaties*

1. The registration and publication of treaties entered into by Members of the United Nations shall be governed by the provisions of Article 102 of the Charter of the United Nations.

2. Treaties entered into by any party to the present articles, not a Member of the United Nations, shall as soon as possible be registered with the Secretariat of the United Nations and published by it.

3. The procedure for the registration and publication of treaties shall be governed by the regulations in force for the application of Article 102 of the Charter.

##### *Commentary*

(1) This article recalls, in paragraph 1, the obligation of Members of the United Nations under Article 102 of the Charter to register treaties entered into by them.

(2) Paragraph 2 also places an obligation on states, not Members of the United Nations, to register treaties entered into by them. Although the Charter obligation is limited to Member States, many non-member states have in practice "registered" their treaties habitually with the Secretariat of the United Nations. Under Article 10 of the General Assembly's regulations governing the registration of treaties (see next paragraph), the term given to such "registration" by non-members is "filing and recording," but in substance it is a form of voluntary registration. The Commission considers that it would be appropriate that states becoming a party to a convention on the conclusion of treaties should undertake a positive obligation to register their treaties. Whether this should then continue to be termed "filing" rather than registration in United Nations regulation of the General Assembly would be a matter for the General Assembly and the Secretary-General to decide. The Commission hesitated to propose that the sanction applicable under Article 102 of the Charter should also be applied to non-members; since it is a matter which touches the procedures of organs of the United Nations it also thought that breach of such

an obligation accepted by non-members in a general convention could logically be regarded in practice as attracting that sanction.

(3) The Commission also considered whether it should incorporate in the draft articles the provisions of the General Assembly's regulations adopted in its Resolution 97 (I) of 14 December 1946 (as amended by its Resolution 482 (V) of 12 December 1950). These regulations are important as they define the conditions for the application of Article 102 of the Charter. However, having regard to the administrative character of these regulations and to the fact that they are subject to amendment by the General Assembly, the Commission concluded that it should limit itself to incorporating the regulations in Article 22 by reference to them in general terms. At the same time, as these regulations can only be found in two separate volumes of the United Nations Treaty Series or in the original resolutions of the Assembly, the Commission thought that it might be useful to attach them as an annex to the present report.

#### SECTION V: CORRECTION OF ERRORS AND THE FUNCTIONS OF DEPOSITARIES

##### ARTICLE 26

##### *The correction of errors in the texts of treaties for which there is no depositary*

1. Where an error is discovered in the text of a treaty for which there is no depositary after the text has been authenticated, the interested states shall by mutual agreement correct the error either:

(a) By having the appropriate correction made in the text of the treaty and causing the correction to be initialled in the margin by representatives duly authorized for that purpose;

(b) By executing a separate protocol, a *procès-verbal*, an exchange of notes or similar instrument, setting out the error in the text of the treaty and the corrections which the parties have agreed to make; or

(c) By executing a corrected text of the whole treaty by the same procedure as was employed for the erroneous text.

2. The provisions of paragraph 1 above shall also apply where there are two or more authentic texts of a treaty which are not concordant and where it is proposed to correct the wording of one of the texts.

3. Whenever the text of a treaty has been corrected under paragraphs 1 and 2 above, the corrected text shall replace the original text as from the date the latter was adopted, unless the parties shall otherwise determine.

4. Notice of any correction to the text of a treaty made under the provisions of this article shall be communicated to the Secretariat of the United Nations.

##### *Commentary*

(1) Errors and inconsistencies are not uncommonly found in the text of treaties and it seems desirable to include provisions in the draft articles concerning methods of rectifying them. The present article deals with

the situation where an error is discovered in a treaty for which there is no depositary, and also with the situation where there are two or more authentic texts of such a treaty and they are discovered not to be concordant. In these cases the correction of the error or inconsistencies would seem to be essentially a matter for agreement between the signatories to the treaty. There is a certain amount of evidence of the practice in the matter<sup>60</sup> and the provisions of the present article are based on that evidence and on information available to members of the Commission.

(2) The correction of errors in the text is dealt with in paragraph 1. The errors in question may be due either to typographical mistakes or to a misdescription or misstatement due to a misunderstanding and the correction may affect the substantive meaning of the text as authenticated. If the states concerned are not agreed as to the text being erroneous, there cannot, of course, be any question of a unilateral correction of the text. In that case, there is a dispute and it becomes a problem of "mistake" which belongs to another branch of the law of treaties. It is only when the states are agreed as to the existence of the error that the matter is one simply of correction of errors falling under the present article. The normal techniques used for correcting error appear to be those in paragraphs 1 (a) and 1 (b). Only in the extreme case of a whole series of errors would there be any occasion for starting afresh with a new text as contemplated in paragraph 1 (c); since, however, one such instance is given in Hackworth, the United States-Liberia Extradition Treaty of 1937, the Commission has included a provision allowing for the substitution of a completely new text.

(3) The same techniques appear to be appropriate for the rectification of discordant texts where there are two or more authentic texts in different languages. Thus, a number of precedents concern the rectification of discordant passages in one of two authentic texts.<sup>61</sup>

(4) Since what is involved is merely the correction or rectification of an already accepted text, it seems clear that, unless the parties otherwise agree, the corrected or rectified text should be deemed to operate from the date when the original text came into force. Whether such a correction or rectification falls under the terms of Article 2 of the General Assembly's regulations concerning the registration and publication of treaties and international agreements, when it takes the form merely of an alteration made to the text itself, is perhaps open to question.<sup>62</sup> But it would clearly be in accordance with the spirit of that article that a correction to a treaty should be registered with the Secretary-General and this has therefore been provided for in paragraph 3 (b) of the present article.

<sup>60</sup> Hackworth's Digest of International Law, Vol. 5, pp. 93-101.

<sup>61</sup> See, for example, the Commercial Treaty of 1938 between the United States and Norway and the Naturalisation Convention of 1907 between the United States and Peru, in Hackworth, *op. cit.*, pp. 93 and 96.

<sup>62</sup> Article 2 reads: "When a treaty or international agreement has been registered with the Secretariat, a certified statement regarding any subsequent action which effects a change in the parties thereto, or the terms, scope or application thereof, shall also be registered with the Secretariat."



(5) The procedure for correction of errors is also applicable to the correction of a lack of concordance in different language versions of the authentic text, where such lack of concordance is merely the result of errors made before the adoption of the authentic text. The Commission noted that the question may also arise of correcting not the authentic text itself but versions of it prepared in other languages; in other words, of correcting errors of translation. As, however, this is not a matter of altering an authentic text of the treaty, the Commission did not think it necessary that the article should cover the point. In these cases, it would be open to the states concerned to modify the translation by mutual agreement without any special formality. Accordingly, the Commission thought it sufficient to mention the point in the present commentary.

#### ARTICLE 27

##### *The correction of errors in the texts of treaties for which there is a depositary*

1. (a) Where an error is discovered in the text of a treaty for which there is a depositary, after the text has been authenticated, the depositary shall bring the error to the attention of all the states which participated in the adoption of the text and to the attention of any other states which may subsequently have signed or accepted the treaty, and shall inform them that it is proposed to correct the error if within a specified time limit no objection shall have been raised to the making of the correction.

(b) If on the expiry of the specified time limit no objection has been raised to the correction of the text, the depositary shall make the correction in the text of the treaty, initialling the correction in the margin, and shall draw up and execute a *procès-verbal* of the rectification of the text and transmit a copy of the *procès-verbal* to each of the states which are or may become parties to the treaty.

2. Where an error is discovered in a certified copy of a treaty, the depositary shall draw up and execute a *procès-verbal* specifying both the error and the correct version of the text, and shall transmit a copy of the *procès-verbal* to all the states mentioned in paragraph 1 (b) above.

3. The provisions of paragraph 1 above shall likewise apply where two or more authentic texts of a treaty are not concordant and a proposal is made that the wording of one of the texts should be corrected.

4. If an objection is raised to a proposal to correct a text under the provisions of paragraphs 1 or 3 above, the depositary shall notify the objection to all the states concerned, together with any other replies received in response to the notifications mentioned in paragraphs 1 and 3. However, if the treaty is one drawn up either within an international organization or at a conference convened by an international organization, the depositary shall also refer the proposal to correct the text and the objection to such proposal to the competent organ of the organization concerned.

5. Whenever the text of a treaty has been corrected under the preceding paragraphs of the present article, the corrected text shall replace

the faulty text as from the date on which the latter text was adopted, unless the states concerned shall otherwise decide.

6. Notice of any correction to the text of a treaty made under the provisions of this article shall be communicated to the Secretariat of the United Nations.

### *Commentary*

(1) This article covers the same problems as Article 26, but in cases where the treaty is a multilateral treaty for which there is a depositary. Here the process of obtaining the agreement of the interested states to the correction or rectification of the text is affected by the number of the states and it is only natural that the techniques used should hinge upon the depositary. In formulating the provisions set out in the article, the Commission has based itself upon the information contained in the *Summary of the Practice of the Secretary-General as Depositary of Multilateral Agreements*.<sup>63</sup>

(2) The technique employed is for the depositary to notify all the states that took part in the adoption of the treaty or have subsequently signed or accepted it of the error or inconsistency and of the proposal to correct the text, while at the same time specifying an appropriate time limit within which any objection must be raised. Then, if no objection is raised, the depositary, as agent for the interested states, proceeds to make the correction, draw up a *procès-verbal* recording the fact and circulate a copy of the *procès-verbal* to the states concerned. The precedent on page 9 of the *Summary of Practice* perhaps suggests that the Secretary-General considers it enough, in the case of a typographical error, to obtain the consent of those states which have already signed the offending text. In laying down a general rule, however, it seems safer to say that notifications should be sent to all the interested states, since it is conceivable that arguments might arise as to whether the text did or did not contain a typographical error, e.g., in the case of punctuation that may affect the meaning.

(3) A further point that may call for comments is, perhaps, the mention in paragraph 4 of the reference of a difference concerning the correction of a text to the competent organ of the international organization concerned, where the treaty was either drawn up in the organization or at a conference convened by it. This provision is inspired by the precedent of the rectification of the Chinese text of the Genocide Convention mentioned on page 10 of the *Summary of Practice*.

(4) Paragraphs 4 and 5 of the commentary to Article 26 also apply to the present article.

### ARTICLE 28

#### *The depositary of multilateral treaties*

1. Where a multilateral treaty fails to designate a depositary of the treaty, and unless the states which adopted it shall have otherwise determined, the depositary shall be:

<sup>63</sup> See pp. 8-10, 12, 19-20, 39 (footnote), and Annexes 1 and 2.

(a) In the case of a treaty drawn up within an international organization or at an international conference convened by an international organization, the competent organ of that international organization;

(b) In the case of a treaty drawn up at a conference convened by the states concerned, the state on whose territory the conference is convened.

2. In the event of a depositary declining, failing or ceasing to take up its functions, the negotiating states shall consult together concerning the nomination of another depositary.

#### *Commentary*

(1) A multilateral treaty normally designates a particular state or international organization as depositary. However, if the states concerned should fail to nominate a depositary in the treaty itself, paragraph 1 of this article provides either for an international organization or for the "host" state of the conference at which the treaty was drawn up to act as depositary. The actual provisions of paragraph 1 reflect existing practice in the designation of depositaries in multilateral treaties.

(2) Cases may possibly occur where a depositary declines, fails or ceases to act, and cases of the last type are known to have occurred. Accordingly, the Commission thought it prudent to cover this possibility in paragraph 2 of the present article.

#### ARTICLE 29

##### *The functions of a depositary*

1. A depositary exercises the functions of custodian of the authentic text and of all instruments relating to the treaty on behalf of all states parties to the treaty or to which it is open to become parties. A depositary is therefore under an obligation to act impartially in the performance of these functions.

2. In addition to any functions expressly provided for in the treaty, and unless the treaty otherwise provides, a depositary has the functions set out in paragraphs 3 to 8 below.

3. The depositary shall have the duty:

(a) To prepare any further texts in such additional language as may be required either under the terms of the treaty or the rules in force in an international organization;

(b) To prepare certified copies of the original text or texts and transmit such copies to the states mentioned in paragraph 1 above;

(c) To receive in deposit all instruments and ratifications relating to the treaty and to execute a *procès-verbal* of any signature of the treaty or of the deposit of any instrument relating to the treaty;

(d) To furnish to the state concerned an acknowledgment in writing of the receipt of any instrument or notification relating to the treaty and promptly to inform the other states mentioned in paragraph 1 of the receipt of such instrument or notification.

4. On a signature of the treaty or on the deposit of an instrument of ratification, accession, acceptance or approval, the depositary shall have the duty of examining whether the signature or instrument is in conformity with the provisions of the treaty in question, as well as with the provisions of the present articles relating to signature and to the execution and deposit of such instruments.

5. On a reservation having been formulated, the depositary shall have the duty:

(a) To examine whether the formulation of the reservation is in conformity with the provisions of the treaty and of the present articles relating to the formulation of reservations, and, if need be, to communicate on the point with the state which formulated the reservations;

(b) To communicate the text of any reservation and any notifications of its acceptance or objection to the interested states as prescribed in Articles 18 and 19.

6. On receiving a request from a state desiring to accede to a treaty under the provisions of Article 9, the depositary shall as soon as possible carry out the duties mentioned in paragraph 3 of that article.

7. Where a treaty is to come into force upon its signature by a specified number of states or upon the deposit of a specified number of instruments of ratification, acceptance or accession or upon some uncertain event, the depositary shall have the duty:

(a) Promptly to inform all the states mentioned in paragraph 1 above when, in the opinion of the depositary, the conditions laid down in the treaty for its entry into force have been fulfilled;

(b) To draw up a *procès-verbal* of the entry into force of the treaty, if the provisions of the treaty so require.

8. In the event of any difference arising between a state and the depositary as to the performance of these functions or as to the application of the provisions of the treaty concerning signature, the execution or deposit of instruments, reservations, ratifications or any such matters, the depositary shall, if the state concerned or the depositary itself deems it necessary, bring the question to the attention of the other interested states or of the competent organ of the organization concerned.

#### *Commentary*

(1) The depositary of a treaty plays a significant rôle in what is really the administration of the procedural clauses of the treaty, and a number of the functions of a depositary have already been mentioned in connexion with preceding provisions of the present articles. It is thought convenient, however, to collect together in a single article the main functions of a depositary relating to the conclusion and entry into force of treaties and that is the purpose of Article 28. In drafting its provisions the Commission has naturally paid particular attention to the *Summary of the Practice of the Secretary-General as Depositary of Multilateral Agreements*.

(2) Paragraph 1 states the general principles that a depositary, whether a state or an international organization, acts on behalf of all the parties to the treaty as their delegate to hold the authentic text of the treaty and to receive and communicate all instruments and notifications relating to the treaty. In this capacity, the depositary must be impartial and perform its functions with objectivity. On the other hand, the fact that a state is a depositary does not disqualify it from exercising the normal rights of a state which is a party to a treaty, or took part in the adoption of its text, in regard to the procedural clauses of the treaty. In that capacity it may express its own policies, but it must carry out its duties as depositary with impartiality and objectivity.

(3) Paragraph 2 of the article requires no comment. Paragraph 3 deals with the functions of the depositary in relation to the original text of the treaty, and as to all instruments and notifications relating to the treaty. Paragraph 4 makes it clear that the depositary has a certain duty to examine whether any signatures or instruments are in due form.

(4) Paragraph 5 recalls the duties of depositary under Article 18 concerning reservations. Here again it is made clear that the depositary has a certain duty to examine whether a reservation has been formulated in conformity with the provisions of the treaty. On the other hand, it is not the function of a depositary to adjudicate upon the validity of a reservation. If a reservation appears to be irregular, the proper course of a depositary is to draw the attention of the reserving state to the matter and, if the latter does not concur with the depositary, to communicate the reservation to the other interested states and bring the question of the apparent irregularity to their attention in accordance with paragraph 8 of the present article.

(5) Paragraph 6 recalls the duties placed upon a depositary in the event of a state applying to become a party to a treaty under Article 9.

(6) Paragraph 7 deals with the depositary's duty to notify the interested states of the coming into force of the treaty, when the conditions for its entry into force have been fulfilled. The question whether the required number of signatures or of instruments of ratification, accession, etc. has been reached may sometimes pose a problem, as when questionable reservations have been made. In this connexion, as in others, although the depositary has the function of making a preliminary examination of the matter, it is not invested with competence to make a final determination of the entry into force of the treaty binding upon the other states concerned. However normal it may be for states to accept the depositary's appreciation of the date of the entry into force of a treaty, it seems clear that this appreciation may be challenged by another state and that then it would be the duty of the depositary to consult all the other interested states as provided in paragraph 8 of the present article. Accordingly, paragraph 7 does not go beyond requiring the depositary to inform the interested states of the date when, in its opinion, the conditions for the entry into force of the treaty have been fulfilled.

(7) Paragraph 8 lays down the general principle that, in the event of any difference arising between the depositary and another state, the duty

of the depositary is to consult all the other interested states. Since the depositary is not invested with competence to make final determinations on matters arising out of the performance of its functions, the matter must be referred to all the states interested in the treaty. If the state concerned or the depositary itself deems it necessary, they may bring the question to the attention of the other interested states. The rule has been formulated in that way because there might be cases where the state having a difference with a depositary might prefer not to insist upon the matter being referred to the other states.

### CHAPTER III

#### FUTURE WORK IN THE FIELD OF THE CODIFICATION AND PROGRESSIVE DEVELOPMENT OF INTERNATIONAL LAW

24. In its Resolution 1505 (XV) of 12 December 1960, the General Assembly decided to place on the provisional agenda of its Sixteenth Session the item "Future work in the field of the codification and progressive development of international law," "in order to study and survey the whole field of international law and make necessary suggestions with regard to the preparation of a new list of topics for codification and for the progressive development of international law."

25. The resolution also invited Member States to submit in writing to the Secretary-General, before 1 July 1961, any views or suggestions they might have on this question for consideration by the General Assembly.

26. In reply to a circular letter dated 25 January 1961, the Secretary-General received the observations of seventeen governments, which were communicated to Member States.<sup>64</sup> An analysis of these observations, prepared by the Secretariat, has been published.<sup>65</sup>

27. The International Law Commission devoted its 614th-616th meetings to this question at its Thirteenth Session, in 1961.<sup>66</sup>

28. In accordance with Resolution 1505 (XV), the General Assembly placed the question on the agenda of its Sixteenth Session and referred it, for study and report, to the Sixth Committee, which considered it at its 713th-730th meetings, from 14 November to 13 December 1961.

29. On the recommendation of the Sixth Committee, the General Assembly, on 18 December 1961, adopted Resolution 1686 (XVI), reading as follows:

*"The General Assembly,*  
*"Recalling its resolution 1505 (XV) of 12 December 1960,*  
*"Considering that the conditions prevailing in the world today give increased importance to the role of international law in relations among nations,*  
*"Emphasizing the important role of codification and progressive development of international law with a view to making international law a more effective means of furthering the purposes and principles set forth in Articles 1 and 2 of the Charter of the United Nations,*

<sup>64</sup> Official Records of the General Assembly, 16th Sess., Annexes, Agenda Item 70, Docs. A/4796 and Add.1-8.

<sup>65</sup> *Ibid.*, Doc. A/C.6/L.491.

<sup>66</sup> *Ibid.*, 16th Sess., Supp. No. 9 (A/4843), paras. 40 and 41.

"*Mindful* of its responsibilities under Article 13, paragraph 1 a, of the Charter to encourage the progressive development of international law and its codification,

"*Having surveyed* the present state of international law with particular regard to the preparation of a new list of topics for codification and progressive development of international law,

"1. *Expresses its appreciation* to the International Law Commission for the valuable work it has already accomplished in the codification and progressive development of international law;

"2. *Takes note* of chapter III of the report of the International Law Commission covering the work of its thirteenth session;

"3. *Recommends* the International Law Commission:

"(a) To continue its work in the field of the law of treaties and of State responsibility and to include on its priority list the topic of succession of States and Governments;

"(b) To consider at its fourteenth session its future programme of work, on the basis of sub-paragraph (a) above and in the light of the discussion in the Sixth Committee at the fifteenth and sixteenth sessions of the General Assembly and of the observations of Member States submitted pursuant to resolution 1505 (XV), and to report to the Assembly at its seventeenth session on the conclusions it has reached;

"4. *Decides* to place on the provisional agenda of its seventeenth session the question entitled 'Consideration of principles of international law concerning friendly relations and co-operation among States in accordance with the Charter of the United Nations'."

30. The question of future work in the field of the codification and progressive development of international law was placed on the agenda of the Fourteenth Session of the Commission, which discussed it at its 629th-637th meetings, from 25 April to 7 May 1962, and at its 668th meeting, on 26 June 1962.

31. The Commission held a general debate on its whole programme of future work, including the topics mentioned in paragraph 3 (a) of Resolution 1686 (XVI). It had before it a working paper prepared by the Secretariat (A/CN.4/145). The introduction to the working paper enumerates the topics referred to the Commission by the General Assembly. Parts I and II of the document set out the topics proposed for codification by governments in their replies, which were transmitted in accordance with General Assembly Resolution 1505 (XV) (see above, par. 26). Some of these topics are included either among those whose codification the Commission had considered in 1949,<sup>67</sup> or in the provisional list of fourteen topics selected by the Commission for codification.<sup>68</sup> The other topics proposed by governments are new, in the sense that the Commission has never considered their codification.

#### I. TOPICS REFERRED TO IN PARAGRAPH 3 (A) OF GENERAL ASSEMBLY RESOLUTION 1686 (XVI)

##### LAW OF TREATIES

32. It was agreed that the Commission should continue the study of the law of treaties, which was on the agenda of the present session and which

<sup>67</sup> *Ibid.*, par. 15.

<sup>68</sup> *Ibid.*, par. 16.

it had discussed at several earlier sessions. It was also agreed that this topic would receive priority at both the present and future sessions. The Commission considered that no change should be made in the plan of work which it had followed up to the present in its consideration of the topic. It will therefore continue its consideration of the topic on the basis of the report prepared by the Special Rapporteur (see Chapters II and IV of this report).

#### STATE RESPONSIBILITY

33. The idea that the topic of state responsibility should be one of those which are to receive priority in the Commission's work met with the approval of all the members. There were divergent views at the outset, however, concerning the best approach to the study of the question and the issues which the study should cover.

34. Some members pointed out that it would not be a question, as the General Assembly recommended, of merely continuing work already begun on state responsibility; the reports of the preceding Special Rapporteur, who is no longer a member of the Commission, could not now serve as a basis for the Commission's work, as it had not accepted them in principle; the study of the topic would therefore have to start from the beginning, and the first thing to determine was how the study should be approached.

35. Other members pointed out that state responsibility was an extremely complex subject and covered such a large part of international law that the Commission should first enumerate certain general principles. They considered that it would be possible to prepare such a draft, but they were doubtful whether an acceptable draft concerning responsibility for damages caused to aliens could be produced within a reasonable period of time.

36. Other members considered that if the Commission intended to examine only one particular aspect of the question of state responsibility it could not choose a more appropriate aspect than the responsibility for damages caused to aliens.

37. When studying the problem one cannot but be impressed by the great number of cases in which international tribunals did pronounce themselves on the question of responsibility for damages caused to aliens. The violation of rules of international law in this respect had given rise to very numerous international claims in which the responsibility of states was involved. These problems are of particular importance today in connexion with the treatment of foreign property and foreign investments, which play so important a part.

38. While it was true that the responsibility for damages caused to aliens was not the only aspect of international responsibility, it had to be admitted that if the Commission prepared a draft on international responsibility in which this aspect was ignored its work would be incomplete.

39. The opinion was also expressed that, in defining the subject, the Commission should not allow itself to be led astray by historical considerations. While admittedly the theory of the responsibility of the state had evolved from a body of case-law concerned particularly with violations of rights of aliens, nevertheless the distinction between the two questions



should be stressed. Those two questions were, firstly, the international responsibility of the state in general, and, secondly, the state's treatment of aliens. It was necessary first to establish what were the basic rules and what were the obligations of states with regard to aliens. By contrast, the state's international responsibility as such arose in circumstances in which a subject of international law infringed a rule of international law—any rule whatever. Still other members, while agreeing that certain problems which are usually dealt with under the heading "responsibility of states"—such as the responsibility of a state for damages caused to person or property of aliens, expropriation and nationalisation included—would fall under the heading "treatment of aliens," they considered however that as such they ought to be dealt with by the Commission.

40. Some members pointed out that it was the Commission's duty to examine all aspects of the question in the light of recent developments in international life. In the past, the theory of state responsibility had been centered on the treatment of aliens. Under modern international law, state responsibility arose less in connexion with the treatment of aliens than as a result of acts which endangered or might endanger international peace, such as aggression, denial of national independence, or exchange of friendly relations with states and violations of provisions of the United Nations Charter. In the traditional international law concerning state responsibility, attention had been focused on such problems as denial of justice, the rule on the exhaustion of local remedies and indemnification. Those problems had not become obsolete but their relative importance had greatly diminished in modern international law. The Commission would of course be doing useful work by studying those problems but it should not stop there; it should go further and study particularly the problems arising in practice. Some other members expressed the view that the Commission should not confine its study to more theoretical and less controversial subjects such as general principles governing the responsibility of states. By doing so it would unduly limit the problem which the General Assembly requested it to study. Finally it was suggested that the Commission should first engage in a study of the general principles of responsibility and then proceed to a more detailed analysis within which the responsibility for damages caused to aliens and their redress would find their proper place.

41. Different opinions were also expressed concerning the method of work which should be adopted for consideration of the question of state responsibility.

42. In the view of some members, the Commission should follow its usual method of work and appoint a special rapporteur for the study of the topic. Other members considered that, owing to the particular difficulty involved in the study of state responsibility, the Commission should vary its practice and appoint a sub-committee composed of a small number of its members, which would be asked to submit a report not on the substance of the matter but on purely preliminary questions, the approach to the subject and the aspects which should be considered.

43. Some of the members who favoured the appointment of a special rapporteur believed that he should be appointed at the present session. The immediate appointment of a special rapporteur should not prevent the adoption of constructive suggestions to improve the Commission's methods of work. For example, the special rapporteur would find it useful to draw on the knowledge and experience of his colleagues on the Commission. Possibly, it was said, the members interested in the question of international responsibility might meet a few days before the beginning of the Fifteenth Session to discuss the results of the special rapporteur's work with him before the session actually opened.

44. In another view, it would be unwise to set up a sub-committee before appointing a special rapporteur. If the Commission should decide to set up such a sub-committee, it should logically first appoint a special rapporteur, who might be assisted by an advisory sub-committee. The sub-committee would hold a few meetings during the present session in order to consider, jointly with the special rapporteur, the scope of the study to be undertaken. At the next session the special rapporteur would submit a preliminary report after having consulted the Committee. As soon as the report was submitted, the sub-committee would cease to exist.

45. Some members had doubts on the advisability of appointing a special rapporteur on state responsibility forthwith. The topic was so complex and so ill-defined, they said, that the Commission could not embark on a study without the necessary preparatory work. It was lack of preparation which, in their opinion, had led to the present situation, after years of work and a succession of reports. Accordingly, they considered that the Commission should set up a small sub-committee to define the scope of the subject and deal with other preliminary matters. The sub-committee should be set up at the present session and be allowed sufficient time to give a considered opinion on the various preliminary aspects of the question. It should not be a standing body, but should cease to exist as soon as it had reported to the Commission. After discussing the sub-committee's report, the Commission would decide on the best method of dealing with the subject.

46. Article 19, paragraph 1, of the Commission's Statute, which provides that the Commission should "adopt a plan of work appropriate to each case," was quoted in support of the proposal to set up such a sub-committee. Supporters of the proposal also claimed that it was desirable for the Commission to revise its method of work in respect of state responsibility and not to appoint a special rapporteur until preliminary research carried out by an adequately representative sub-committee was available.

47. As a result of the discussion, the Commission agreed that it would be necessary to undertake preparatory work before a special rapporteur was appointed. Accordingly, at its 637th meeting on 7 May 1962, the Commission decided to set up a Sub-Committee with the following ten members: Mr. Ago (Chairman), Mr. Briggs, Mr. Gros, Mr. Jiménez de Aréchaga, Mr. Lachs, Mr. de Luna, Mr. Paredes, Mr. Tsuruoka, Mr. Tunkin and Mr. Yasseen. The task of the Sub-Committee was to submit to the Commission

at its next session a preliminary report containing suggestions concerning the scope and approach of the future study. The Sub-Committee met on 21 June 1962 and made a number of suggestions which were submitted to the Commission at its 668th meeting on 26 June 1962.

48. The Commission approved a suggestion that the Sub-Committee should confine its debates to the general aspects of state responsibility. It also adopted a number of other suggestions concerning the organization of the Sub-Committee's work (see par. 68 below).

#### SUCCESION OF STATES AND GOVERNMENTS

49. In principle, all members were in favour of including the topic of succession of states and governments in the list of priorities for the Commission's work.

50. Some members, however, indicated that they were not entirely convinced that general principles governing the subject existed in international law, though they were prepared to admit that it would be possible to derive certain rules from practice and from the provisions of existing treaties. They considered the subject extremely important, especially at the present time, and since the last war, when the independence of a large number of states had given rise to so many problems concerning the succession of states. Many examples were quoted to illustrate the variety of succession problems which these new states had to face and for which a general solution was necessary. It was stressed that the subject was of practical even more than theoretical importance and that the Commission should therefore not relegate it to second place and should not postpone its investigation.

51. Other members, while in favour of the study, pointed out that the Commission must first obtain the necessary documentation. To obtain the relevant information, it was proposed that a questionnaire should be sent to governments and that the Secretariat should be requested to prepare some documents on the subject.

52. Some members considered that the succession of states and of governments comprised two distinct questions and that at the present juncture the Commission should take up the question of succession of states, leaving the question of succession of governments until later. Others, on the contrary, considered that the succession of states should, at least in the preliminary stage, be studied at the same time as the succession of governments, since international practice proved that it was not always easy to draw a distinction between the two. The Commission has not yet taken a decision on this issue.

53. With that consideration in mind, some members drew the Commission's attention to the complexity of the subject and proposed that a start should be made by defining its scope. They believed that the Commission would be wise to draw up at the current session a list of items to be covered by the future study, to facilitate the task of the special rapporteur and serve as a basis for his report. Suggestions for a new method of work concerning the succession of states and governments were similar to those

made in connexion with the method of work on state responsibility (see pars. 41-46 above).

54. In the light of these observations, the Commission, at its 637th meeting on 7 May 1962, decided to set up a Sub-Committee composed of the following ten of its members: Mr. Lachs (Chairman), Mr. Bartoš, Mr. Briggs, Mr. Castrén, Mr. El-Erian, Mr. Elias, Mr. Liu, Mr. Rosenne, Mr. Tabibi and Mr. Tunkin. The task of the Sub-Committee was to submit to the Commission a preliminary report containing suggestions on the scope of the subject, the method of approach for a study and the means of providing the necessary documentation.

55. The Sub-Committee held two meetings, on 16 May and 21 June 1962, and drew up a number of suggestions, which were submitted to the Commission at its 668th meeting on 26 June 1962.

56. At that meeting the Commission took certain decisions concerning the organization of the Sub-Committee's work (see par. 72 below).

## II. THE COMMISSION'S FUTURE PROGRAMME OF WORK (GENERAL ASSEMBLY RESOLUTION 1886 (XVI), PARAGRAPH 3(B))

57. In the course of the discussion, some members referred to General Assembly Resolution 1686 (XVI) on the Commission's future programme of work and said that that programme did not need to be enlarged. Others argued that, in view of recent developments in international law and of the need for promoting friendly relations and co-operation among states, the Commission's programme should be reviewed and amended so as to include additional topics of definite current interest.

58. Various comments were also made on the possible choice of additional topics. Some members thought that the Commission might consider studying certain topics on which opinions were divided, though not topics of a markedly political nature. Other members pointed out, on the other hand, that, as its task comprised both the codification and the progressive development of international law, the Commission should not rule out complex topics, even though they had political overtones. The Commission would be the most appropriate body to formulate principles of international law capable of serving the cause of international co-operation.

59. As its 634th meeting held on 2 May 1962, the Commission set up a Committee of eight members to consider the future programme of work in accordance with General Assembly Resolution 1686 (XVI), paragraph 3 (b). The Committee, which was composed of Mr. Amado (Chairman), Mr. Ago, Mr. Bartoš, Mr. Cadieux, Mr. Castrén, Mr. Jiménez de Aréchaga, Mr. Pessou and Mr. Tunkin, met on 21 June 1962 when it considered the question on the basis of the working paper prepared by the Secretariat (see par. 31 above). The Committee formulated a number of suggestions which were submitted to the plenary Commission at its 668th meeting on 26 June 1962.

60. The Commission, on the recommendation of the Committee, agreed to limit the future programme of work for the time being to the three main topics under study or to be studied pursuant to General Assembly Resolu-

tion 1686 (XVI), paragraph 3 (a), namely, the law of treaties, state responsibility, and succession of states and governments. It further decided to include in the programme four additional topics of more limited scope which had been referred to it by earlier General Assembly resolutions, namely, the question of special missions (Resolution 1687 (XVI)), the question of relations between states and inter-governmental organizations (Resolution 1289 (XIII)), the right of asylum (Resolution 1400 (XIV)), and the juridical régime of historic waters, including historic bays (Resolution 1453 (XIV)).

61. The Commission considered that many of the topics proposed by governments deserved study with a view to codification. In drawing up its future programme of work, however, it is obliged to take account of its resources. The law of treaties, state responsibility and succession of states and governments are such broad topics that they alone are likely to keep it occupied for several sessions. The Commission accordingly considers it inadvisable for the time being to add anything further to the already long list of topics on its agenda.

62. The Commission established two Sub-Committees, which are to meet between this session and the next for the purpose of undertaking the necessary preparatory work on the topics of state responsibility and the succession of states and governments.

#### CHAPTER IV

##### PLANNING OF THE WORK OF THE COMMISSION FOR THE NEXT SESSION

63. As stated in paragraph 60 above, the Commission decided to include the following seven subjects in the programme for its future work: (1) Law of treaties; (2) State responsibility; (3) Succession of states and governments; (4) Special missions; (5) Relations between states and inter-governmental organizations; (6) Principles and rules of international law relating to the right of asylum; (7) Juridical régime of historic waters, including historic bays.

64. The Commission adopted a number of decisions relating to the planning of its work on the law of treaties, on state responsibility, on the succession of states and governments, on the relations between states and inter-governmental organizations and on special missions. To facilitate its work on the responsibility of states and the succession of states and governments, the Commission established two Sub-Committees to undertake the necessary preparatory work (see pars. 47, 54 and 62 above).

##### I. LAW OF TREATIES

65. The Commission, having studied at the present session the report of the Special Rapporteur, Sir Humphrey Waldock, on the conclusion, entry into force and registration of treaties, will proceed to the consideration of his second report dealing with the validity and duration of treaties.

66. In connexion with its future work on the law of treaties, the Commission requested the Secretariat to present to its next session a memo-

random reproducing various decisions taken by the General Assembly on the law of treaties and pertinent extracts from the reports of the Sixth Committee to the plenary Assembly, which constituted an explanation of the Assembly's decisions.

## II. STATE RESPONSIBILITY

67. The Sub-Committee on State Responsibility held one private meeting on 21 June 1962. It had two working papers before it, one entitled "The duty to compensate for the nationalization of foreign property," submitted by Mr. Jiménez de Aréchaga, the other entitled "An approach to state responsibility," submitted by Mr. Paredes.

68. During the meeting, views were expressed on the organization of the Sub-Committee's work. The Sub-Committee formulated a number of suggestions which were submitted to the Commission at its 668th meeting on 26 June 1962. In the light of these suggestions, the Commission adopted the following decisions: (1) the Sub-Committee will meet at Geneva between the Commission's current session and its next session from 7 to 16 January 1963; (2) its work will be devoted primarily to the general aspects of state responsibility; (3) the members of the Sub-Committee will prepare for it specific memoranda relating to the main aspects of the subject, these memoranda to be submitted to the Secretariat not later than 1 December 1962 so that they may be reproduced and circulated before the meeting of the Sub-Committee in January 1963; (4) the Chairman of the Sub-Committee will prepare a report on the results of its work to be submitted to the Commission at its next session.

69. At its 669th meeting on 27 June 1962, the Commission decided to include an item entitled "Report of the Sub-Committee on State Responsibility" in the agenda of its next session.

## III. SUCCESSION OF STATES AND GOVERNMENTS

70. The Sub-Committee on the Succession of States and Governments held two private meetings, on 16 May and 21 June 1962 respectively.

71. At its first meeting, the Sub-Committee held an exchange of views on the question. A certain number of problems had been suggested which might constitute elements of a future report by the Sub-Committee. At the second meeting, after a further exchange of views, it was decided that more thought must be given to the scope of and approach to the subject. Accordingly, the Sub-Committee confined itself to considerations regarding the preparatory work that would be required. At the same meeting, the Chairman drew attention to a working paper submitted by Mr. Elias, entitled "Delimitation of the scope of succession of states and governments."

72. In the light of the Sub-Committee's suggestions, the Commission took the following decisions at its 668th meeting on 26 June 1962: (1) The Sub-Committee will meet at Geneva on 17 January 1963, immediately after the session of the Sub-Committee on State Responsibility, for as long as necessary but not beyond 25 January 1963; (2) the Commission took

note of the Secretary's statement in the Sub-Committee regarding the following three studies to be undertaken by the Secretariat: (a) a memorandum on the problem of succession in relation to membership of the United Nations, (b) a paper on the succession of states under general multilateral treaties of which the Secretary-General is the depositary, (c) a digest of the decisions of international tribunals in the matter of state succession; (3) the members of the Sub-Committee will submit individual memoranda dealing essentially with the scope of and approach to the subject, the reports to be submitted to the Secretariat not later than 1 December 1962 to permit reproduction and circulation before the January 1963 meeting of the Sub-Committee; (4) its Chairman will submit to the Sub-Committee, at its next meeting or, if possible, a few days in advance, a working paper containing a summary of the views expressed in the individual reports; (5) the Chairman of the Sub-Committee will prepare a report on the results achieved for submission to the next session of the Commission.

73. The Secretary-General has sent a circular note to governments inviting them to submit the texts of any treaties, laws, decrees, regulations, diplomatic correspondence, etc. concerning the procedure of succession relating to the states which have achieved independence after the Second World War.

74. At its 669th meeting on 27 June 1962, the Commission decided to place on the agenda of its next session the item entitled "Report of the Sub-Committee on Succession of States and Governments."

#### IV. RELATIONS BETWEEN STATES AND INTER-GOVERNMENTAL ORGANIZATIONS

75. At its 669th meeting on 27 June 1962, the Commission appointed Mr. El-Erian Special Rapporteur on relations between states and inter-governmental organizations. The Special Rapporteur will submit a report on this subject to the next session of the Commission. The Commission decided to place the question on the agenda of its next session.

#### V. SPECIAL MISSIONS

76. The Commission decided, at its 669th meeting on 27 June 1962, to place the question of special missions on the agenda of its next session. The Secretariat will prepare a working paper on this subject.

### CHAPTER V

#### OTHER DECISIONS AND CONCLUSIONS OF THE COMMISSION .

##### I. CO-OPERATION WITH OTHER BODIES .

77. At its 656th meeting the Commission considered the item concerning co-operation with other bodies.

78. It noted the report of Mr. Radhabinod Pal (A/CN.4/146) on the Fifth Session of the Asian-African Legal Consultative Committee held at Rangoon from 17 to 30 January, which Mr. Pal had attended as an observer for the Commission.

79. The Secretary brought to the Commission's attention the two letters which had been received from the Secretary of the Asian-African Legal Consultative Committee. In the first of those letters, the Secretary of the Committee stated that the Committee had been unable to be represented by an observer at the Commission's session. By the second letter the Commission was invited to send an observer to the Sixth Session of the Committee in 1963, the agenda for which was to include the topic of state responsibility and possibly the law of treaties and the question of the legality of atomic tests.

80. The Inter-American Juridical Committee was represented at the session by Mr. Hugo Juan Gobbi, who addressed the Commission on the Committee's behalf. The Secretary informed the Commission that the next session of the Inter-American Council of Jurists was to be held in El Salvador on a date which had not yet been fixed.

81. The Commission decided to be represented by observers at the next sessions of the Asian-African Legal Consultative Committee and of the Inter-American Council of Jurists. It authorized the Chairman to appoint the observers as soon as the place and date of the sessions of these bodies were known.

## II. DATE AND PLACE OF THE NEXT SESSION

82. The Commission noted that, owing to the decision of the General Assembly to convene a conference of plenipotentiaries on consular intercourse at Vienna early in March 1963, difficulties of a practical nature might arise if the Commission's session was scheduled to open on a date close to the end of the Vienna conference. In the first place, several members of the Commission would have to attend the conference as representatives of their countries; in the second place, it was not possible that the conference might continue beyond the expected date of its closure. Consequently, in order to allow for a reasonable interval between the end of the Vienna conference and the beginning of the Commission's next session, it was decided, after consultation with the Secretary-General, that the Fifteenth Session of the Commission would be held at Geneva from 6 May to 12 July 1963.

83. Under the terms of the five-year "pattern of conferences" established by Resolution 1202 (XII) adopted by the General Assembly on 13 December 1957, the Commission may meet at Geneva only if there is no overlapping with the summer session of the Economic and Social Council. Since this pattern of conferences is to be discussed at the General Assembly's next session, the Commission held an exchange of views on the subject. During the discussion, many members drew attention to the difficulties to which the present arrangements give rise for those of them who are university professors. In the circumstances, the first Monday in May was decided on as the most convenient opening date for the session, since it would reduce to the minimum both the duration of overlapping with the session of the Council and the period during which several members of the Commission have difficulty in securing release from their professional duties and hence in taking part in the Commission's work.



### III. PRODUCTION OF DOCUMENTS, SUMMARY RECORDS AND TRANSLATION FACILITIES

84. In connexion with its future work the Commission is bound to draw the attention of the competent organs of the United Nations to the inadequate facilities relating to the production of documents, summary records and translations put at its disposal. The Commission wishes to emphasize that technical inadequacies and delays in the production of documents, summary records and draft texts in the working languages of the Commission created serious inconvenience and considerably delayed its work.

85. The Commission wishes to put on record its hope that proper arrangements will be made to avoid the repetition of these inadequacies and that in future it will have proper services at its disposal.

### IV. REPRESENTATION AT THE SEVENTEENTH SESSION OF THE GENERAL ASSEMBLY

86. The Commission decided that it should be represented at the Seventeenth Session of the General Assembly, for purposes of consultation, by its Chairman, Mr. Radhabinod Pal.

## ANNEX

### REGISTRATION AND PUBLICATION OF TREATIES AND INTERNATIONAL AGREEMENTS: REGULATIONS TO GIVE EFFECT TO ARTICLE 102 OF THE CHARTER OF THE UNITED NATIONS<sup>1</sup>

#### PART ONE

#### REGISTRATION

#### ARTICLE 1

1. Every treaty or international agreement, whatever its form and descriptive name, entered into by one or more Members of the United Nations after 24 October 1945, the date of the coming into force of the Charter, shall as soon as possible be registered with the Secretariat in accordance with these regulations.

2. Registration shall not take place until the treaty or international agreement has come into force between two or more of the parties thereto.

3. Such registration may be effected by any party or in accordance with Article 4 of these regulations.

4. The Secretariat shall record the treaties and international agreements so registered in a Register established for that purpose.

#### ARTICLE 2

1. When a treaty or international agreement has been registered with the Secretariat, a certified statement regarding any subsequent action which

<sup>1</sup> Adopted by General Assembly Resolution 97 (I) of 14 December 1946 and amended by General Assembly Resolution 482 (V) of 12 December 1950.

effects a change in the parties thereto, or the terms, scope or application thereof, shall also be registered with the Secretariat.

2. The Secretariat shall record the certified statement so registered in the Register established under Article 1 of these regulations.

#### ARTICLE 3

1. Registration by a party, in accordance with Article 1 of these regulations, relieves all other parties of the obligation to register.

2. Registration effected in accordance with Article 4 of these regulations relieves all parties of the obligation to register.

#### ARTICLE 4

1. Every treaty or international agreement subject to Article 1 of these regulations shall be registered *ex officio* by the United Nations in the following cases:

- (a) Where the United Nations is a party to the treaty or agreement;
- (b) Where the United Nations has been authorized by the treaty or agreement to effect registration.

2. A treaty or international agreement subject to Article 1 of these regulations may be registered with the Secretariat by a specialized agency in the following cases:

- (a) Where the constituent instrument of the specialized agency provides for such registration;
- (b) Where the treaty or agreement has been registered with the specialized agency pursuant to the terms of its constituent instrument;
- (c) Where the specialized agency has been authorized by the treaty or agreement to effect registration.

#### ARTICLE 5

1. A party or specialized agency, registering a treaty or international agreement under Article 1 or 4 of these regulations, shall certify that the text is a true and complete copy thereof and includes all reservations made by parties thereto.

2. The certified copy shall reproduce the text in all the languages in which the treaty or agreement was concluded and shall be accompanied by two additional copies and by a statement setting forth, in respect of each party:

- (a) The date on which the treaty or agreement has come into force;
- (b) The method whereby it has come into force (for example: by signature, by ratification or acceptance, by accession, et cetera).

#### ARTICLE 6

The date of receipt by the Secretariat of the United Nations of the treaty or international agreement registered shall be deemed to be the date of registration, provided that the date of registration of a treaty or agree-

ment registered *ex officio* by the United Nations shall be the date on which the treaty or agreement first came into force between two or more of the parties thereto.

#### ARTICLE 7

A certificate of registration signed by the Secretary-General or his representative shall be issued to the registering party or agency and also, upon request, to any party to the treaty or international agreement registered.

#### ARTICLE 8

1. The Register shall be kept in the English and French languages. The Register shall comprise, in respect of each treaty or international agreement, a record of:

- (a) The serial number given in the order of registration;
- (b) The title given to the instrument by the parties;
- (c) The names of the parties between whom it was concluded;
- (d) The dates of signature, ratification or acceptance, exchange of ratification, accession, and entry into force;
- (e) The duration;
- (f) The language or languages in which it was drawn up;
- (g) The name of the party or specialized agency which registers the instrument and the date of such registration;
- (h) Particulars of publication in the treaty series of the United Nations.

2. Such information shall also be included in the Register in regard to the statements registered under Article 2 of these regulations.

3. The texts registered shall be marked "*ne varietur*" by the Secretary-General or his representative, and shall remain in the custody of the Secretariat.

#### ARTICLE 9

The Secretary-General, or his representative, shall issue certified extracts from the Register at the request of any Member of the United Nations or any party to the treaty or international agreement concerned. In other cases he may issue such extracts at his discretion.

### PART TWO

#### FILING AND RECORDING

#### ARTICLE 10

The Secretariat shall file and record treaties and international agreements, other than those subject to registration under Article 1 of these regulations, if they fall in the following categories:

- (a) Treaties or international agreements entered into by the United Nations or by one or more of the specialized agencies;

(b) Treaties or international agreements transmitted by a Member of the United Nations which were entered into before the coming into force of the Charter, but which were not included in the treaty series of the League of Nations;

(c) Treaties or international agreements transmitted by a party not a member of the United Nations which were entered into before or after the coming into force of the Charter which were not included in the treaty series of the League of Nations, provided, however, that this paragraph shall be applied with full regard to the provisions of the resolution of the General Assembly of 10 February 1946 set forth in the Annex to these regulations.\*

#### ARTICLE 11

The provisions of Articles 2, 5, and 8 of these regulations shall apply, *mutatis mutandis*, to all treaties and international agreements filed and recorded under Article 10 of these regulations.

#### PART THREE

#### PUBLICATION

#### ARTICLE 12

1. The Secretariat shall publish as soon as possible in a single series every treaty or international agreement which is registered, or filed and recorded, in the original language or languages, followed by a translation in English and in French. The certified statements referred to in Article 2 of these regulations shall be published in the same manner.

2. The Secretariat shall, when publishing a treaty or agreement under paragraph 1 of this article, include the following information: the serial number in order of registration or recording; the date of registration or recording; the name of the party or specialized agency which registered it or transmitted it for filing; and in respect of each party the date on which it has come into force and the method whereby it has come into force.

#### ARTICLE 13

The Secretariat shall publish every month a statement of the treaties and international agreements registered, or filed and recorded, during the preceding month, giving the dates and numbers of registration and recording.

#### ARTICLE 14

The Secretariat shall send to all Members of the United Nations the series referred to in Article 12 and the monthly statement referred to in Article 13 of these regulations.

\* Not printed here.

## CONVENTION ON THE LIABILITY OF OPERATORS OF NUCLEAR SHIPS

*Signed at Brussels, May 25, 1962 \**

THE CONTRACTING PARTIES,

HAVING RECOGNIZED the desirability of determining by agreement certain uniform rules concerning the liability of operators of nuclear ships,

HAVE DECIDED to conclude a Convention for this purpose, and thereto have agreed as follows:

### ARTICLE I

For the purposes of this Convention:

1. "Nuclear ship" means any ship equipped with a nuclear power plant.
2. "Licensing State" means the Contracting State which operates or which has authorized the operation of a nuclear ship under its flag.
3. "Person" means any individual or partnership, or any public or private body whether corporate or not, including a State or any of its constituent subdivisions.
4. "Operator" means the person authorized by the licensing State to operate a nuclear ship, or where a Contracting State operates a nuclear ship, that State.
5. "Nuclear fuel" means any material which is capable of producing energy by a self-sustaining process of nuclear fission and which is used or intended for use in a nuclear ship.
6. "Radioactive products or waste" means any material, including nuclear fuel, made radioactive by neutron irradiation incidental to the utilization of nuclear fuel in a nuclear ship.
7. "Nuclear damage" means loss of life or personal injury and loss or damage to property which arises out of or results from the radioactive properties or a combination of radioactive properties with toxic, explosive or other hazardous properties of nuclear fuel or of radioactive products or waste; any other loss, damage or expense so arising or resulting shall be included only if and to the extent that the applicable national law so provides.
8. "Nuclear incident" means any occurrence or series of occurrences having the same origin which causes nuclear damage.
9. "Nuclear power plant" means any power plant in which a nuclear reactor is, or is to be used as, the source of power, whether for propulsion of the ship or for any other purpose.

\* Signed at the close of the Eleventh Session of the Diplomatic Conference on Maritime Law, Brussels, April 17-29, 1961/May 14-25, 1962, on behalf of the following states: Belgium, Republic of China, India, Indonesia, Ireland, Republic of Korea, Liberia, Federation of Malaya, Monaco, Panama, Republic of the Philippines, Portugal, United Arab Republic, Yugoslavia.

10. "Nuclear reactor" means any installation containing nuclear fuel in such an arrangement that a self-sustained chain process of nuclear fission can occur therein without an additional source of neutrons.

11. "Warship" means any ship belonging to the naval forces of a State and bearing the external marks distinguishing warships of its nationality, under the command of an officer duly commissioned by the Government of such State and whose name appears in the Navy List, and manned by a crew who are under regular naval discipline.

12. "Applicable national law" means the national law of the court having jurisdiction under the Convention including any rules of such national law relating to conflict of laws.

## ARTICLE II

1. The operator of a nuclear ship shall be absolutely liable for any nuclear damage upon proof that such damage has been caused by a nuclear incident involving the nuclear fuel of, or radioactive products or waste produced in, such ship.

2. Except as otherwise provided in this Convention no person other than the operator shall be liable for such nuclear damage.

3. Nuclear damage suffered by the nuclear ship itself, its equipment, fuel or stores shall not be covered by the operator's liability as defined in this Convention.

4. The operator shall not be liable with respect to nuclear incidents occurring before the nuclear fuel has been taken in charge by him or after the nuclear fuel or radioactive products or waste have been taken in charge by another person duly authorized by law and liable for any nuclear damage that may be caused by them.

5. If the operator proves that the nuclear damage resulted wholly or partially from an act or omission done with intent to cause damage by the individual who suffered the damage, the competent courts may exonerate the operator wholly or partially from his liability to such individual.

6. Notwithstanding the provisions of paragraph 1 of this Article, the operator shall have a right of recourse:

- (a) If the nuclear incident results from a personal act or omission done with intent to cause damage, in which event recourse shall lie against the individual who has acted, or omitted to act, with such intent;
- (b) If the nuclear incident occurred as a consequence of any wreck-raising operation, against the person or persons who carried out such operation without the authority of the operator or of the State having licensed the sunken ship or of the State in whose waters the wreck is situated;
- (c) If recourse is expressly provided for by contract.

## ARTICLE III

1. The liability of the operator as regards one nuclear ship shall be limited to 1500 million francs in respect of any one nuclear incident, notwithstanding that the nuclear incident may have resulted from any fault or privity of that operator; such limit shall include neither any interest nor costs awarded by a court in actions for compensation under this Convention.

2. The operator shall be required to maintain insurance, or other financial security covering his liability for nuclear damage, in such amount, of such type and in such terms as the licensing State shall specify. The licensing State shall ensure the payment of claims for compensation for nuclear damage established against the operator by providing the necessary funds up to the limit laid down in paragraph 1 of this Article to the extent that the yield of the insurance or the financial security is inadequate to satisfy such claims.

3. However, nothing in paragraph 2 of this Article shall require any Contracting State or any of its constituent subdivisions, such as States, Republics or Cantons, to maintain insurance or other financial security to cover their liability as operators of nuclear ships.

4. The franc mentioned in paragraph 1 of this Article is a unit of account constituted by sixty-five and one half milligrams of gold of millesimal fineness nine hundred. The amount awarded may be converted into each national currency in round figures. Conversion into national currencies other than gold shall be effected on the basis of their gold value at the date of payment.

## ARTICLE IV

Whenever both nuclear damage and damage other than nuclear damage have been caused by a nuclear incident or jointly by a nuclear incident and one or more other occurrences and the nuclear damage and such other damage are not reasonably separable, the entire damage shall, for the purposes of this Convention, be deemed to be nuclear damage exclusively caused by the nuclear incident. However, where damage is caused jointly by a nuclear incident covered by this Convention and by an emission of ionizing radiation or by an emission of ionizing radiation in combination with the toxic, explosive or other hazardous properties of the source of radiation not covered by it, nothing in this Convention shall limit or otherwise affect the liability, either as regards the victims or by way of recourse or contribution, of any person who may be held liable in connection with the emission of ionizing radiation or by the toxic, explosive or other hazardous properties of the source of radiation not covered by this Convention.

## ARTICLE V

1. Rights of compensation under this Convention shall be extinguished if an action is not brought within ten years from the date of the nuclear incident. If, however, under the law of the licensing State the liability

of the operator is covered by insurance or other financial security or State indemnification for a period longer than ten years, the applicable national law may provide that rights of compensation against the operator shall only be extinguished after a period which may be longer than ten years but shall not be longer than the period for which his liability is so covered under the law of the licensing State. However, such extension of the extinction period shall in no case affect the right of compensation under this Convention of any person who has brought an action for loss of life or personal injury against the operator before the expiry of the aforesaid period of ten years.

2. Where nuclear damage is caused by nuclear fuel, radioactive products or waste which were stolen, lost, jettisoned, or abandoned, the period established under paragraph 1 of this Article shall be computed from the date of the nuclear incident causing the nuclear damage, but the period shall in no case exceed a period of twenty years from the date of the theft, loss, jettison or abandonment.

3. The applicable national law may establish a period of extinction or prescription of not less than three years from the date on which the person who claims to have suffered nuclear damage had knowledge or ought reasonably to have had knowledge of the damage and of the person responsible for the damage, provided that the period established under paragraphs 1 and 2 of this Article shall not be exceeded.

4. Any person who claims to have suffered nuclear damage and who has brought an action for compensation within the period applicable under this Article may amend his claim to take into account any aggravation of the damage, even after the expiry of that period, provided that final judgment has not been entered.

#### ARTICLE VI

Where provisions of national health insurance, social insurance, social security, workmen's compensation or occupational disease compensation systems include compensation for nuclear damage, rights of beneficiaries under such systems and rights of subrogation, or of recourse against the operator, by virtue of such systems, shall be determined by the law of the Contracting State having established such systems. However, if the law of such Contracting State allows claims of beneficiaries of such systems and such rights of subrogation and recourse to be brought against the operator in conformity with the terms of this Convention, this shall not result in the liability of the operator exceeding the amount specified in paragraph 1 of Article III.

#### ARTICLE VII

1. Where nuclear damage engages the liability of more than one operator and the damage attributable to each operator is not reasonably separable, the operators involved shall be jointly and severally liable for such damage. However, the liability of any one operator shall not exceed the limit laid down in Article III.



2. In the case of a nuclear incident where the nuclear damage arises out of or results from nuclear fuel or radioactive products or waste of more than one nuclear ship of the same operator, that operator shall be liable in respect of each ship up to the limit laid down in Article III.

3. In case of joint and several liability, and subject to the provisions of paragraph 1 of this Article:

- (a) Each operator shall have a right of contribution against the others in proportion to the fault attaching to each of them;
- (b) Where circumstances are such that the degree of fault cannot be apportioned, the total liability shall be borne in equal parts.

#### ARTICLE VIII

No liability under this Convention shall attach to an operator in respect to nuclear damage caused by a nuclear incident directly due to an act of war, hostilities, civil war or insurrection.

#### ARTICLE IX

The sums provided by insurance, by other financial security or by State indemnification in conformity with paragraph 2 of Article III shall be exclusively available for compensation due under this Convention.

#### ARTICLE X

1. Any action for compensation shall be brought, at the option of the claimant, either before the courts of the licensing State or before the courts of the Contracting State or States in whose territory nuclear damage has been sustained.

2. If the licensing State has been or might be called upon to ensure the payment of claims for compensation in accordance with paragraph 2 of Article III of this Convention, it may intervene as party in any proceedings brought against the operator.

3. Any immunity from legal processes pursuant to rules of national or international law shall be waived with respect to duties or obligations arising under, or for the purpose of, this Convention. Nothing in this Convention shall make warships or other State-owned or State-operated ships on non-commercial service liable to arrest, attachment or seizure or confer jurisdiction in respect of warships on the courts of any foreign State.

#### ARTICLE XI

1. When, having regard to the likelihood of any claims arising out of a nuclear incident exceeding the amount specified in Article III of this Convention, a court of the licensing State, at the request of the operator, a claimant or the licensing State, so certifies, the operator or the licensing State shall make that amount available in that court to pay any such

claims; that amount shall be regarded as constituting the limitation fund in respect of that incident.

2. The amount may be made available for the purposes of the preceding paragraph by payment into court or by the provision of security or guarantees sufficient to satisfy the court that the money will be available when required to meet any established claim.

3. After the fund has been constituted in accordance with paragraph 1 of this Article the court of the licensing State shall be exclusively competent to determine all matters relating to the apportionment and distribution of the fund.

4. (a) A final judgment entered by a court having jurisdiction under Article X shall be recognized in the territory of any other Contracting State, except:

(i) where the judgment was obtained by fraud; or

(ii) the operator was not given a fair opportunity to present his case;

(b) A final judgment which is recognized shall, upon being presented for enforcement in accordance with the formalities required by the law of the Contracting State where enforcement is sought, be enforceable as if it were a judgment of a court of that State;

(c) The merits of a claim on which the judgment has been given shall not be subject to further proceedings.

5. (a) If a person who is a national of a Contracting State, other than the operator, has paid compensation for nuclear damage under an International Convention or under the law of a non-Contracting State, such person shall, up to the amount which he has paid, acquire by subrogation the rights which the person so compensated would have enjoyed under this Convention. However, no rights shall be so acquired by any person if and to the extent that the operator has a right of recourse or contribution against such person under this Convention;

(b) If a limitation fund has been set up and

(i) the operator has paid, prior to its being set up, compensation for nuclear damage; or

(ii) the operator has paid, after it has been set up, compensation for nuclear damage under an International Convention or the law of a non-Contracting State,

he shall be entitled to recover from the fund, up to the amount which he has paid, the amount which the person so compensated would have obtained in the distribution of the fund;

(c) If no limitation fund is set up, nothing in this Convention shall preclude an operator, who has paid compensation for nuclear damage out of funds other than those provided pursuant to paragraph 2 of Article III, from recovering from the person providing financial security under paragraph 2 of Article III or from the licensing State, up to the amount he has paid, the sum which the person so compensated would have obtained under this Convention;

(d) In this paragraph the expression "a national of a Contracting State" shall include a Contracting State or any of its constituent sub-divisions or a partnership or any public or private body whether corporate or not established in a Contracting State.

6. Where no fund has been constituted under the provisions of this Article, the licensing State shall adopt such measures as are necessary to ensure that adequate sums provided by it or by insurance or other financial security in accordance with paragraph 2 of Article III, shall be available for the satisfaction of any claim established by a judgment of a court of any other Contracting State which would be recognized under paragraph 4 of this Article; the sums shall be made available, at the option of the claimant, either in the licensing State or in the Contracting State in which the damage was sustained or in the Contracting State in which the claimant is habitually resident.

7. After the limitation fund has been constituted in accordance with paragraph 1 of this Article or, where no such fund has been constituted, if the sums provided by the licensing State, or by insurance, or other financial security are available in accordance with paragraph 6 of this Article to meet a claim for compensation, the claimant shall not be entitled to exercise any right against any other asset of the operator in respect of his claim for nuclear damage, and any bail or security (other than security for costs) given by or on behalf of that operator in any Contracting State shall be released.

## ARTICLE XII

1. The Contracting States undertake to adopt such measures as are necessary to ensure implementation of the provisions of this Convention, including any appropriate measures for the prompt and equitable distribution of the sums available for compensation for nuclear damage.

2. The Contracting States undertake to adopt such measures as are necessary to ensure that insurance and reinsurance premiums and sums provided by insurance, reinsurance or other financial security, or provided by them in accordance with paragraph 2 of Article III, shall be freely transferable into the currency of the Contracting State in which the damage was sustained, of the Contracting State in which the claimant is habitually resident or, as regards insurance and reinsurance premiums and payments, in the currencies specified in the insurance or reinsurance contract.

3. This Convention shall be applied without discrimination based upon nationality, domicile or residence.

## ARTICLE XIII

This Convention applies to nuclear damage caused by a nuclear incident occurring in any part of the world and involving the nuclear fuel of, or radioactive products or waste produced in, a nuclear ship flying the flag of a Contracting State.

## ARTICLE XIV

This Convention shall supersede any International Conventions in force or open for signature, ratification or accession at the date on which this Convention is opened for signature, but only to the extent that such Conventions would be in conflict with it; however, nothing in this Article shall affect the obligations of Contracting States to non-Contracting States arising under such International Conventions.

## ARTICLE XV

1. Each Contracting State undertakes to take all measures necessary to prevent a nuclear ship flying its flag from being operated without a licence or authority granted by it.

2. In the event of nuclear damage involving the nuclear fuel of, or radioactive products or waste produced in, a nuclear ship flying the flag of a Contracting State, the operation of which was not at the time of the nuclear incident licensed or authorized by such Contracting State, the owner of the nuclear ship at the time of the nuclear incident shall be deemed to be the operator of the nuclear ship for all the purposes of this Convention, except that his liability shall not be limited in amount.

3. In such an event, the Contracting State whose flag the nuclear ship flies shall be deemed to be the licensing State for all the purposes of this Convention and shall, in particular, be liable for compensation for victims in accordance with the obligations imposed on a licensing State by Article III and up to the limit laid down therein.

4. Each Contracting State undertakes not to grant a licence or other authority to operate a nuclear ship flying the flag of another State. However, nothing in this paragraph shall prevent a Contracting State from implementing the requirements of its national law concerning the operation of a nuclear ship within its internal waters and territorial sea.

## ARTICLE XVI

This Convention shall apply to a nuclear ship from the date of her launching. Between her launching and the time she is authorized to fly a flag, the nuclear ship shall be deemed to be operated by the owner and to be flying the flag of the State in which she was built.

## ARTICLE XVII

Nothing in this Convention shall affect any right which a Contracting State may have under international law to deny access to its waters and harbours to nuclear ships licensed by another Contracting State, even when it has formally complied with all the provisions of this Convention.

## ARTICLE XVIII

An action for compensation for nuclear damage shall be brought against the operator; it may also be brought against the insurer or any person

other than the licensing State who has provided financial security to the operator pursuant to paragraph 2 of Article III, if the right to bring an action against the insurer or such other person is provided under the applicable national law.

#### ARTICLE XIX

Notwithstanding the termination of this Convention or the termination of its application to any Contracting State pursuant to Article XXVII, the provisions of the Convention shall continue to apply with respect to any nuclear damage caused by a nuclear incident involving the nuclear fuel of, or radioactive products or waste produced in, a nuclear ship licensed or otherwise authorized for operation by any Contracting State prior to the date of such termination, provided the nuclear incident occurred prior to the date of such termination or, in the event of a nuclear incident occurring subsequent to the date of such termination, prior to the expiry of a period of twenty-five years after the date of such licensing or other authorization to operate such ship.

#### ARTICLE XX

Without prejudice to Article X, any dispute between two or more Contracting Parties concerning the interpretation or application of this Convention which cannot be settled through negotiation, shall, at the request of one of them, be submitted to arbitration. If within six months from the date of the request for arbitration the Parties are unable to agree on the organization of the arbitration, any one of those Parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court.

#### ARTICLE XXI

1. Each Contracting Party may at the time of signature or ratification of this Convention or accession thereto, declare that it does not consider itself bound by Article XX of the Convention. The other Contracting Parties shall not be bound by this Article with respect to any Contracting Party having made such a reservation.

2. Any Contracting Party having made a reservation in accordance with paragraph 1 may at any time withdraw this reservation by notification to the Belgian Government.

#### ARTICLE XXII

This Convention shall be open for signature by the States represented at the eleventh session (1961-1962) of the Diplomatic Conference on Maritime Law.

#### ARTICLE XXIII

This Convention shall be ratified and the instruments of ratification shall be deposited with the Belgian Government.

## ARTICLE XXIV

1. This Convention shall come into force three months after the deposit of an instrument of ratification by at least one licensing State and one other State.

2. This Convention shall come into force, in respect of each signatory State which ratifies it after its entry into force as provided in paragraph 1 of this Article, three months after the date of deposit of the instrument of ratification of that State.

## ARTICLE XXV

1. States Members of the United Nations, Members of the specialized agencies and of the International Atomic Energy Agency not represented at the eleventh session of the Diplomatic Conference on Maritime Law, may accede to this Convention.

2. The instruments of accession shall be deposited with the Belgian Government.

3. The Convention shall come into force in respect of the acceding State three months after the date of deposit of the instrument of accession of that State, but not before the date of entry into force of the Convention as established by Article XXIV.

## ARTICLE XXVI

1. A conference for the purpose of revising this Convention shall be convened by the Belgian Government and the International Atomic Energy Agency after the Convention has been in force five years.

2. Such a conference shall also be convened by the Belgian Government and the International Atomic Energy Agency before the expiry of this term or thereafter, if one third of the Contracting States express a desire to that effect.

## ARTICLE XXVII

1. Any Contracting State may denounce this Convention by notification to the Belgian Government at any time after the first revision Conference held in accordance with the provisions of Article XXVI.1.

2. This denunciation shall take effect one year after the date on which the notification has been received by the Belgian Government.

## ARTICLE XXVIII

The Belgian Government shall notify the States represented at the eleventh session of the Diplomatic Conference on Maritime Law, and the States acceding to this Convention, of the following:

1. Signatures, ratifications and accessions received in accordance with Articles XXII, XXIII and XXV.

2. The date on which the Convention will come into force in accordance with Article XXIV.
3. Denunciations received in accordance with Article XXVII.

IN WITNESS WHEREOF, the undersigned Plenipotentiaries, whose credentials have been found in order, have signed this Convention.

DONE at Brussels, this twenty-fifth day of May, one thousand nine hundred and sixty-two, in the English, French, Russian and Spanish languages in a single copy, which shall remain deposited in the archives of the Belgian Government, which shall issue certified copies.

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## THE USES OF "GENERAL PRINCIPLES" IN THE DEVELOPMENT OF INTERNATIONAL LAW

BY WOLFGANG FRIEDMANN

*Columbia University School of Law*

As public international law expands into new domains formerly excluded from its province,<sup>1</sup> it will, for its "formal" sources, have to depend more and more on treaties as the nearest substitute for international legislation. This article is concerned with the "material" sources of international law that have to be widened and diversified in order to give shape and content to the new fields.<sup>2</sup>

In a very limited number of cases (*e.g.*, in the partial international codification of the law of bills of exchange, or in the likely regulation of certain subjects, such as patent and trademark law, or anti-trust law, and possibly company law, within the European Economic Community) a codification of law may replace international law and become the substantive norm—which will usually be based on a comparative study of the systems thus merged or co-ordinated. But in the great majority of cases, the new branches will remain unmodified, "international" rather than "supra-national," and will depend for their development on the sources available to international law. These have been defined, with direct reference to the International Court of Justice (repeating the identical formulation for its predecessor, the Permanent Court of International Justice), in Article 38 of its Statute, although this enumeration must be taken as an authoritative formulation of the sources of international law in general, inside or outside the International Court of Justice. Three of the four sources enumerated in Article 38 are reasonably well defined: treaties, custom and judicial decisions are in fact the three principal sources of legal authority in the international community. It is to "the general principles of law recognized by civilized nations" (Article 38c) and to "the teachings of the most highly qualified publicists of the various nations" (Article 38d), insofar as they formulate and develop these principles, that we must turn increasingly for the building and evolution of the

<sup>1</sup> For a preliminary survey, see Friedmann, "The Changing Dimensions of International Law," 62 *Columbia Law Rev.* 1147 (1962).

<sup>2</sup> The distinction between "formal" and "material" sources of law adopted here corresponds to that originally made by Sir John Salmond in his *Treatise on Jurisprudence* (11th ed., Ch. V). This has been criticized by C. K. Allen, *Law in the Making* 260 (6th ed.), but it has rightly been defended by Hart, *The Concept of Law* 246 (1961). The term "formal" source of law indicates the repository of authority or, in Hart's words, "the criteria of legal validity accepted in the legal system in question." The "material" sources are the sum of the substantive rules, principles or other materials from which a particular legal norm is nourished.

new branches of international law, such as international administrative law, international criminal law, or international contract law. Except for the very isolated "codification" of new principles of international law in international conventions such as the Genocide Convention, practice and precedent will gradually build these systems by drawing, to a much greater extent than before, on the "general principles."<sup>3</sup>

Although the "general principles of law" were officially recognized as one of the sources of international law over forty years ago (in the Statute of the Permanent Court of International Justice), the practical use made of this source in the decisions of the International Court and of international tribunals has been rather limited. There are two major reasons for this: first, the traditional international law, being essentially concerned with the formal regulation of diplomatic relations between states, did not need this source very much. Second, international judicial institutions, such as the International Court of Justice, depend for their jurisdiction, as well as for the acceptability of their decisions and opinions, upon the consent of states. They therefore have to exercise great caution in the application of general principles of law, lest they be accused of unauthorized exercise of international legislation. As Sir Hersch Lauterpacht has pointed out,<sup>4</sup> this is not a theoretically compelling argument, since general principles of law may be a necessary and inevitable way of filling a *lacuna* in the interpretation of a specific question. Yet the suspicion which states, especially those on the losing side, may entertain of indirect expansion of the scope of international law by a tribunal which depends upon the maximum amount of consent by its constituent members, no doubt largely accounts for the failure of the Court until now to make any significant

<sup>3</sup> As the actual and potential importance of general principles for the development of the new international law is universally recognized, it is unnecessary, for the purposes of this article, to discuss the theoretical controversy, which in recent years has engaged the attention of some eminent international lawyers such as the late Sir Hersch Lauterpacht and Professor Julius Stone, whether or not the reference in Article 38 of the Statute of the International Court of Justice to the "general principles of law recognized by civilized nations" has virtually eliminated the problem of the *lacuna* in international law. See, on the one hand, Lauterpacht, "Non *Liquet* and the Completeness of Law," *Symbolae Verzijl* 196, at 205, and, on the other hand, Stone, "Non *Liquet* and the Function of Law in the International Community," 35 *Brit. Yr. Bk. of Int. Law* (1959) 145 *et seq.* As Judge Lauterpacht observed (*loc. cit.* 198) and as is confirmed by even more recent experience, *non liquet* has hardly, if ever, deterred an international court or tribunal from giving a substantive decision. The *Lotus* case (the *SS Lotus* (France v. Turkey), 1927, P.C.I.J., Ser. A, No. 10) is not, of course, a proposition for the application of *non liquet* in international law, but for the very different theory that international law grants to states the liberty to invoke national jurisdiction over foreigners where there is no positive international norm to the contrary. Judge Lauterpacht's observation that for this reason the whole discussion had "a measure of unreality" (p. 198) applies even more strongly to the contemporary developments in international law, which mainly occur outside the field of litigation. Even where no specific reference is made to the "general principles" or a similar formulation, their use is implicit in the making and purport of international agreements. See further, p. 282 *et seq.* below.

<sup>4</sup> The Development of International Law by the International Court 165 ff. (1958).

use of this potentially very fertile source of development in international law.

This inhibition does not, however, apply to the development of new branches of international law, which is proceeding overwhelmingly outside the jurisdiction of the International Court of Justice, and mostly in a non-litigious manner: through international loan contracts, concession agreements and other types of international transactions; through the practices of international administrative agencies, and of the tribunals constituted as part of these organizations; or through the administrative and judicial organs of more closely knit communities, such as the European Economic Community.

Because so many of the new domains of international law are no longer clearly allocable to either public or private law but constitute a blend of both, the statement made a generation ago by Lauterpacht<sup>5</sup> that "these general principles of law are, in the great majority of cases, in substance co-extensive with the general principles of private law" would no longer be correct today.<sup>6</sup> Many kinds of international activities, formerly taken as a matter of course to be in the sphere of private international relations, have become a matter of public international concern through the participation of public entities—either states or public international organizations—as well as through the transfer of the activity in question, *e.g.*, an international loan transaction, from that of private commerce to that of public international relations.

#### THE INTERMINGLING OF PUBLIC AND PRIVATE LAW

The neat distinction of the categories of public and private law has long ceased to be expressive of the realities of contemporary municipal, as well as international, law, even though the distinction still dominates the teaching curricula of law schools. There is today hardly any field of private law which could be adequately understood without a strong and often decisive admixture of public law. Thus, the law of contract is today deeply affected by the numerous statutory prohibitions or public law conditions controlling private contracts. Within the common law a new category of government contracts has developed, which, although in theory only a particular form of private contract, has produced specifically public law principles, closely akin to those of the French *contrat administratif*.<sup>7</sup> A comparable admixture of public and private law elements also characterizes the modern law of torts, which, especially in the field of industrial and motor car accidents, is a composite of private principles of liability and of public law principles of compensation and insurance. Again, the liability of government authorities, while in theory dominated by the common law of torts, is in effect largely modified by considerations of administrative

<sup>5</sup> The Function of Law in the International Community 115 (1933).

<sup>6</sup> In his last contribution (see note 3 above), Judge Lauterpacht modified this statement by characterizing the use of general principles as "the analogy of all the branches of municipal law, and in particular, of private law." (P. 205.)

<sup>7</sup> See further on this point p. 291 *et seq.* below.



law.<sup>8</sup> Modern family law is largely modified by the public law principles of administrative and judicial institutions controlling juveniles, guardianship, adoption and other aspects of family life. Commercial transactions are now increasingly, even outside the United States, to a large extent controlled by the administrative and judicial restraints imposed by anti-trust legislation.

The strict distinction between public and private law rests on a distinction of spheres of activities characteristic of the *laissez-faire* philosophy as it prospered particularly in the earlier part of the 19th century. It assumes that the sphere of government is confined to certain protective functions—defense, administration of justice and police—while the overwhelming bulk of social and economic activities is carried out between private subjects. Within the national legal systems, this assumption has long vanished. The state has assumed responsibilities, mainly in the interests of economic and social welfare, that have found increasing expression in the admixture of public and private law.

This process is now being repeated in the international sphere. To the bulk of traditional inter-state relations, which correspond roughly to the functions of government in municipal society, *i.e.*, the spheres of diplomatic relations, the formal limits of jurisdiction and the responsibilities of defense and war, have been added a growing number of "welfare" functions.<sup>9</sup> Health, food, transport, and conservation of vital resources, have created a new body of "social" international law, while concern for minimum standards of living on an international, rather than a national, scale, has created an entirely new field of international economic development aid. The administration of all these new international interests has produced a multitude of public international organizations, the internal administration of which requires a fast-developing body of international administrative law.<sup>10</sup>

In all these fields it is, expressly or implicitly, the "general principles of law recognized by civilized nations" from which a substantive body of legal rules has to be developed. This means in essence the application of a comparative study of legal principles to the developing international law. In no other field is the contact between comparative and international law as close or as necessary. Neither comparative law nor any self-contained system of "general principles of law recognized by civilized nations"<sup>11</sup> is, as such, the new system of international law. The general principles formed by a comparative study of the relevant principles of the different national systems provide the principal source from which the new bodies of international law are being developed. Not only in the formulation of Article 38 of the Statute of the International Court of Justice, but in the general theory of international law, it is a source of law which in

<sup>8</sup> Friedmann, *Law in a Changing Society* 388 ff. (1959).

<sup>9</sup> *Of.*, in particular, Röling, *International Law in an Expanded Society* (1960).

<sup>10</sup> See now Jenks, *The Proper Law of International Organizations*, Pt. II (1962).

<sup>11</sup> As seems to be suggested by McNair, in 33 *Brit. Yr. Bk. of Int. Law* (1957). 6, and Jenks, *op. cit.* 152.

our time is gaining immensely in importance. This does not mean that we are likely to see a flood of international arbitral or judicial decisions spelling out these principles. Many of these principles are and will remain implicit, insofar as they are assumed rather than spelled out in international transactions and agreements. Thus, the international loan agreements of the World Bank and of the affiliated institutions do not normally spell out the law to be applied, and, in the opinion of authoritative commentators,<sup>12</sup> this must normally be taken as implying the application of public international law and thus, by reference, of the "general principles" to the transaction in question. Again, modern international concession agreements, such as the Iranian Oil Agreement of 1954, which provide for the application of principles common "to Iran and the several nations . . . and in the absence of such principles . . . principles of law recognised by civilised nations in general," will not often lead to the articulation of such principles by the decision of the arbitration tribunal provided for in these agreements. A case where, without specific reference in the agreement to "general principles," the arbitrator did in fact apply such a process of reasoning, was the *Abu Dhabi* Arbitration.

A concession agreement made in 1939 between the Sheikh of Abu Dhabi and a petroleum development corporation contained a declaration by the parties "that they base their work in this agreement on good will and sincerity of belief and on the interpretation of this agreement in the fashion consistent with reason." The dispute concerned principally the question whether the concession extended (a) to the subsoil of the territorial waters of Abu Dhabi, and (b) to the Continental Shelf (considering the fact that the agreement was made in 1939, while the doctrine of the Continental Shelf was not recognized in the practice of states until after the end of the second World War).

In a now famous award,<sup>13</sup> the arbitrator, Lord Asquith of Bishopstone, arrived at the applicability of international law as the proper law of the agreement by the following reasoning:

What is the "Proper Law" applicable in construing this contract? This is a contract made in Abu Dhabi and wholly to be performed in that country. If any municipal system of law were applicable, it would *prima facie* be that of Abu Dhabi. But no such law can reasonably be said to exist. The Sheikh administers a purely discretionary justice with the assistance of the Koran; and it would be fanciful to suggest that in this very primitive region there is any settled body of legal principles applicable to the construction of modern commercial instruments. Nor can I see any basis on which the

<sup>12</sup> Such as Sommers, Broches and Delaume, in 21 *Law and Contemporary Problems* 463 *et seq.* (1956); Mann, "The Proper Law of Contracts Concluded by International Persons," in 35 *Brit. Yr. Bk. of Int. Law* (1959) 34 ff.; and see Broches, "International Legal Aspects of the Operations of the World Bank," 98 *Hague Academy Recueil des Cours* 297, at 316 (1959): "In analysing the legal nature of the Bank's loan and guarantee agreements with its members, I shall be concerned primarily to consider by what rules of law these agreements are governed. My conclusion will be that they are international agreements governed by international law."

<sup>13</sup> Reported in 1 *Int. and Comp. Law Q.* 247 ff. (1952); 47 *A.J.I.L.* 156 (1953).

municipal law of England would apply. On the contrary, Clause 17 of the agreement, cited above, repels the notion that the municipal law of any country, as such, would be appropriate. The terms of that clause invite, indeed prescribe, the application of principles rooted in the good sense and common practice of the generality of civilised nations—a sort of “modern law of nature.”

In applying this doctrine, the arbitrator accepted certain principles of English law as representing a “modern law of nature,” but rejected others, such as the English rules of evidence or the feudally inspired principle that grants by a sovereign are to be construed against the grantee, as being peculiarities of English legal history.

While, in many similar cases, the contribution to be made by the relevant national legal systems is likely to be less one-sided, the process of reasoning employed by Lord Asquith is of basic and general importance.<sup>14</sup> The first step is to free the interpretation from submission to any one of the possibly applicable national systems of law, because this would not be in the spirit of the transaction or would create an imbalance in the position of the parties. The next step is to look for applicable principles both in public international law and, to the extent that this does not yield an answer, in principles extracted from recognized national systems of law. As Lord Asquith indicated, this process might lead to the acceptance of some, and the rejection of other, principles of even a highly developed system of law, since almost any national system is a mixture of modern and antiquated principles, of those of general applicability and those of historic or national peculiarity. In many cases, however, such a comparison will show that different systems apply substantially the same principles, though in very different forms. In the sense in which Lord Asquith used the term, “modern law of nature,” he clearly had no more in mind than a shorthand description of the principles—to be taken either from international law or from one or several national systems of law—applicable to the circumstances of the agreement in question, and to the equities of the situation.

Since nations and individuals appear to be unable to agree on the substantive content of natural law, the clothing of any particular controversy in the terminology of natural law does not advance us towards a solution of the problem at hand. The “general principles of law recognized by civilized nations” have in fact a very different basis: an examination of these principles means a pragmatic attempt to find from the major legal systems of the world the maximum measure of agreement on the principles relevant to the case at hand. As an eminent comparative lawyer pointed out some years ago,<sup>15</sup> it is not necessary that the principles should be found to exist in identical form in every system of civilized law:

<sup>14</sup> It has been quoted, with emphatic approval and as representing a major advance, by—among others—Jessup, *Transnational Law* 80 ff. (1956); McNair, “The General Principles of Law Recognized by Civilized Nations,” 33 *Brit. Yr. Bk. of Int. Law* (1957) 12 ff.; and Mann, “The Proper Law of Contracts Concluded by International Persons,” 35 *ibid.* (1959) 52 ff.

<sup>15</sup> Gutteridge, *Comparative Law* 65 (2nd ed., 1949).

If any real meaning is to be given to the words "general" or "universal" and the like, the correct test would seem to be that an international judge before taking over a principle from private<sup>16</sup> law must satisfy himself that it is recognized in substance by all the main systems of law, and that in applying it he will not be doing violence to the fundamental concepts of any of those systems.

In a comparison between the relevant article of the Statute of the Permanent Court of International Justice (now the International Court of Justice) and the celebrated provision of Article 1 of the Swiss Civil Code, which directs the judge in case of need to fill a gap in the law according to the rules which he would lay down if he had himself to act as legislator (having due regard for legal doctrine and judicial decisions), Professor Gutteridge finds that a principal object of the invocation of the "general principles" is to provide

the judge, on the one hand, with a guide to the exercise of his "choice of a new principle" and, on the other hand, to prevent him from "blindly following the teaching" of the jurists with which he is most familiar "without first carefully weighing the merits and considering whether a principle of private law does in fact satisfy the demands of justice" if applied to the particular case before him. In other words . . . comparative law furnishes [him] with an objective test by which he can measure the justice of a principle which he believes to be the correct one and proposes to apply to the facts of a particular case when the existing rules of the law of nations do not furnish him with the materials for a decision.<sup>17</sup>

This approach is not far removed from that of Lord Asquith in the *Abu Dhabi* Arbitration: the aim is to use comparative law as a guide to the principles that, in the circumstances of the case, are most appropriate and equitable. This will, in most, though by no means in all, cases, involve a comparison of the relevant principles of the most representative systems of the common-law and the civil-law world. In certain cases it may be necessary to examine some of the non-Western legal systems, such as Muslim or Hindu law, now actively represented in the family of nations.<sup>18</sup> In the great majority of cases, however, the parts of the law most applicable to international issues, i.e., contract, tort and commercial transactions, have been deliberately incorporated by the non-Western systems in adaptations of one of the leading systems of the Western world.<sup>19</sup>

<sup>16</sup> As will be pointed out later, the limitation of the use of general principles to the private law sphere, which was also emphasized, although less absolutely, by Lauterpacht (p. 281 above), is no longer justified in the present context of international law, which must draw its strength from a combination of public and private law sources.

<sup>17</sup> Gutteridge, *op. cit.* 70-71.

<sup>18</sup> For an example, see the discussion of basic concepts of Muslim law in the field of property and contract, as applied in the *Aramco Award* of Aug. 23, 1958, discussed by Habachy in "Property, Right and Contract in Muslim Law," 62 *Columbia Law Rev.* 450 ff. (1962).

<sup>19</sup> Thus, an application of the principles "common to the laws of the parties" under the *Iranian Oil Agreement* of 1954 would essentially mean an application and comparison of the principles of contract of the common law, as interpreted in England and the United States (which would reveal many differences of detail, but very few of principle

THE USE AND ADAPTATION OF GENERAL PRINCIPLES OF LAW  
IN THE EVOLUTION OF PUBLIC INTERNATIONAL LAW

It remains to indicate briefly in what ways the "general principles of law recognized by civilized nations" can be used to direct and support the evolution of international law at a time when its social and moral foundations are changing, and when it is rapidly expanding both vertically and horizontally.<sup>20</sup> It is not intended here to give even a tentative summary of the legal principles that might be said to qualify, at the present time, as "general principles" in the international legal context. Not only have various preliminary surveys of this kind been made,<sup>21</sup> but above all, any enumeration of such principles at this time is apt to be a temporary one, since the scope of the applicability of such principles is constantly expanding with the extension of public international law to new fields formerly within the sphere of private international law.

What may, however, be usefully attempted and has on the whole been neglected in the various analyses of this problem up to date, is: (a) a differentiation between at least three different *types* of general legal principles as they might be applied to international law; (b) a tentative consideration of the transformation to which some of these principles might be subjected by being transferred from the sphere of private or public national law to the different realm of international relations.

THREE TYPES OF "GENERAL PRINCIPLES"

In the various enumerations of general principles of law applicable to international legal relations there has generally been a somewhat indis-

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between the two leading common-law jurisdictions), and, on the other hand, the French civil-law system, as developed in France itself, in the French-inspired Netherlands Civil Code, and in the equally French-inspired Iranian civil and commercial law. Thus, although the parties to this Agreement represent five different national legal systems, the comparison would most likely reduce itself to one between the two major legal systems of the Western world.

<sup>20</sup> *I.e.*, when the actively lawmaking members of international society are expanding from a small club of Western nations to entire mankind and a variety of civilizations (horizontal expansion), and the subject matter of international legal relations is extending from the regulation of diplomatic inter-state relations to a growing number of social and economic relations formerly outside its province (vertical expansion).

<sup>21</sup> *E.g.*, by Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (1958), an enterprise limited in scope and value by its restriction to the very occasional use which international courts and tribunals have so far made of the general principles. See also Wortley, "The Interaction of Public and Private Law Today," 85 *Hague Academy Recueil des Cours* (1954, I), Ch. IV, and Jenks, *The Common Law of Mankind* 106-172 (1958). For an earlier survey, see Verdross, 52 *Hague Academy Recueil des Cours* 191 (1935, II); for illuminating observations on the uses of "general principles" which do not attempt classification or enumeration, see McNair, "The General Principles of Law Recognized by Civilized Nations," 33 *Brit. Yr. Bk. of Int. Law* (1957) 1 ff., and 1 Dahm, *Völkerrecht* 35-42 (1958). The "World Peace through Law" Program of the American Bar Association has issued a provisional study on the subject (January, 1963). A comprehensive research project on the substantive meaning of "general principles" is being undertaken by the Cornell University Law School under the direction of Professor Rudolf Schlesinger.

criminate cataloguing of principles as different in both methodological and substantive importance as, for example, "equity," "estoppel," "*pacta sunt servanda*," "unjust enrichment," or "the protection of acquired rights," the principle of *nemo iudex in sua causa* or *audiatur et altera pars*. These various principles fall into at least three different categories: (1) principles of approach and interpretation to legal relationships of all kinds; (2) minimum standards of procedural fairness; (3) substantive principles of law sufficiently widely and firmly recognized in the leading legal systems of the world to be regarded as international legal principles.<sup>22</sup>

### 1. General Principles of Interpretation

Probably the most widely used and cited "principle" of international law is the principle of general equity in the interpretation of legal documents and relations. There has been considerable discussion on the question of whether equity is part of the law to be applied, or whether it is an antithesis to law, in the sense in which "*ex aequo et bono*" is used in Article 38, Paragraph 2, of the Statute of the International Court of Justice. A strict distinction must of course be made between, on the one hand, the Roman *aequitas* and the English equity—both separate systems of judicial administration designed to correct the insufficiencies and rigidities of the existing civil or common law—and, on the other hand, the function of equity as a principle of interpretation. In the latter sense, it is beyond doubt an essential and all-pervading principle of interpretation in all modern civil codifications, and it is equally important in the modern common-law systems, under a variety of terminologies such as "reasonable," "fair" or occasionally even in the guise of "natural justice."<sup>23</sup> There is thus overwhelming justification for the view developed by Lauterpacht,<sup>24</sup> Manley Hudson,<sup>25</sup> De Visscher,<sup>26</sup> and Dahm,<sup>27</sup> that equity is part

<sup>22</sup> In his *Droit International Public* (1953), Professor Rousseau (at p. 71) distinguishes between "règles de droit matériel (principe *pacta sunt servanda*, principe de l'abus du droit, respect des droits acquis, théories de loi prescription libératoire et des intérêts moratoires, règle *nemo plus juris transferre potest quam ipse habet*, etc.)" and "de procédure (principe du respect de la chose jugée, exception de litispendance, règles relatives au régime des preuves ou au paiement des dépens, etc.)." But surely the application of such principles as "abuse of rights" (or equity) does not give us a substantive solution, especially in the international context, since abuse or equity can only gain content in the context of a particular system of law. On the other hand, *pacta sunt servanda*, or doctrines restrictive of this principle, like frustration, *imprévision*, *clausula rebus sic stantibus*, etc., do give a substantive solution, however uncertain or controversial its application may be in specific cases. Hence the threefold division of the text.

<sup>23</sup> Cf., for an illustration of the application of equity in this latter sense, in the modern common law, Friedmann, *Legal Theory* 494 ff. (4th ed., 1960).

<sup>24</sup> *Private Law Sources and Analogies of International Law*, Par. 28 (1927).

<sup>25</sup> The Permanent Court of International Justice 616, where the task of equity is described as being "to liberalize and to temper the application of law, to prevent extreme injustice in particular cases, to lead into new directions to which received materials point the way."

<sup>26</sup> 60 *Revue de Droit International et Comparé* 414 ff. (1933).

<sup>27</sup> 1 *Völkerrecht* 40 ff. (1958).

and parcel of any modern system of administration of justice. It is in this sense, too, that it has been applied in some important international decisions, such as the arbitration award in the *Cayuga Indians* case,<sup>28</sup> where that part of the Cayuga Indians who, after the division of the Cayuga Nation between Great Britain and the United States in consequence of the War of 1812, had remained on the Canadian side, were, as a matter of "international law and of equity," held entitled to an appropriate share of the annuity payable by the United States under a treaty with Great Britain. General principles of equity also underlay the decision of the Permanent Court in the case of *Diversion of Waters from the River Meuse*,<sup>29</sup> and in particular the decision of Judge Hudson, who emphasized the importance of equity as part of international law. In that case, a claim on the part of The Netherlands against Belgium, arising from a Belgian diversion of the river waters for canal purposes, was rejected on the ground that The Netherlands itself had previously done exactly the same. The equitable principle applied here was one which also was formulated in one of the early maxims of English equity, that "he who seeks equity must do equity."

This is closely akin to the common-law principle of estoppel, which holds one who, by word or conduct willfully causes another to believe in the existence of a certain state of things, and induces him to act on the strength of that belief, as precluded from averring against that party a different state of things as existing at the same time.<sup>30</sup> This in turn has a civil-law analogy in the principle of *venire contra factum proprium*, derived from the Roman law and familiar to modern continental systems.<sup>31</sup> It is as a method of approach to legal rights and duties, as a principle of interpretation, that we must also view the much-discussed principle of abuse of rights (*abus de droit*). This does not say anything on the specific content and extent of certain rights, such as ownership of land or territory, the use of waters, fishing and the like; it merely says that whatever these rights are, they must not be used in such a manner that its anti-social effects outweigh the legitimate interests of the owner of the right.<sup>32</sup> It is evident that the precise adjustment between the claims of the individual and those of either the community at large, or of specific neighbors adversely affected by the exercise of his rights, must be largely a matter of changing social and economic philosophies on the sacrosanctity and extent of property rights. Clearly, the principle has a different reach and meaning in a socialist-oriented society from that in a strongly individual-

<sup>28</sup> *Cayuga Indians* (Great Britain v. U. S.), Nielsen, Rep. 203, 307 (1926).

<sup>29</sup> P.O.I.J., Ser. A/B, No. 70 (1937).

<sup>30</sup> On a discussion of the application of estoppel to international law, see Lauterpacht, *op. cit.*, para. 87, 88.

<sup>31</sup> See Gutteridge, *Comparative Law* 70 (2nd ed.); Friedmann, *Legal Theory* 506 (4th ed.). On the use of estoppel in international law, see now the detailed analysis of McGibbon in 7 *Int. and Comp. Law Q.* 458 ff. (1958).

<sup>32</sup> A leading comparative study of abuse of right is that of Gutteridge, 5 *Cambridge Law J.* 22 ff. (1934). On the significance of the principle in international law, see also the recent monographs of Siorat, *Lacunes en Droit International, Titre III* (1959), and Van Bogaert, *Het rechtsmisbruik in het volkenrecht* (1948).

istic one.<sup>33</sup> Quite apart from the question whether the principle of abuse of rights can be regarded as a general principle of international law, it is therefore, like equity in general, a yardstick, a way of measuring and interpreting legal rights and obligations.

The need to distinguish those principles of mature legal systems that can serve as general guideposts to the interpretation and evolution of international legal rights and duties from those that can form the raw material for developing substantive branches of international law, such as an international law of contract, crime, or corporations, is more than a matter of classification. To the present writer the differentiation appears to be an essential factor in the approach to the evolution of international law, in a world deeply divided by conflicting ideologies as well as conflicting interests. Such "jural postulates of civilized society"—to use Roscoe Pound's celebrated formula—as good faith and equity in the interpretation of legal obligations, or the prohibition of an abuse of rights, are standards; they are excellent tools in the hands of international courts and arbitration tribunals, which can apply them to a specific factual situation. This is particularly important in international disputes, which are disputes between states, and therefore far more individual and less typical in character than litigation under municipal law, which applies legal norms framed for millions of individuals without distinction of individuality or personality.<sup>34</sup> It is no less important to recognize that such general formulas or postulates present no short cut to a substantive solution of international legal disputes any more than the invocation of natural law. Basic conflicts are not eliminated by emotive incantations. In the present greatly diversified family of nations—which comprises states of starkly differing stages of economic development, as well as of conflicting political and social ideologies—the notions, for example, of "equity," "reasonableness" or "abuse of rights" with respect to the terms of nationalization of a foreign monopoly of a vital natural resource do, and are bound to, differ widely. What to the one party is an abuse is to the other the reassertion of a long withheld "natural" right.<sup>35</sup> It is therefore

<sup>33</sup> Thus, the principle has been incorporated in the Soviet Civil Code of 1922 as indicating the subordination of private rights to the welfare of the community. On the other hand, according to Habachy, *loc. cit.* 456, the classical Muslim jurisprudence regards respect for property rights so sacrosanct that during the second World War, the Ulamas objected to a law placing a ceiling on rents, which had soared as the result of spectacular developments in Arab oil production, and inflicted great hardship on salaried employees. They held that such a law would constitute an unlawful restriction of the right of owners to enjoy the income they could derive from their property.

<sup>34</sup> The cardinal difference between the essentially individual and unique character of international disputes and the essential generality of the typical municipal legal norm is often neglected. It has, however, been stressed by some eminent writers, among them Max Huber, 3 *Vermischte Schriften* 208, Brierly, *The Outlook for International Law* at 40-41 (1944), De Visscher, *Théories et Réalités en Droit International Public* 171 ff. (3d ed., 1960), and Dillard, "Some Aspects of Law and Diplomacy," 91 *Hague Academy Recueil des Cours* at 469-471 (1957, I).

<sup>35</sup> For some suggestions as to how the gap between the substantive legal conceptions of the capital-exporting and the capital-importing states in such matters as the termina-



in the individualizing application of such guideposts by impartial arbiters to concrete and unique situations that such principles as equity or abuse of rights can contribute to the evolution of a new balance of rights and duties in many fields of international law.

## 2. *Procedural Standards of Fairness*

There may, secondly, be said to exist a rudimentary code of principles of "due process," i.e., certain minimum standards in the administration of justice of such elementary fairness and general application in the legal systems of the world that they have become international legal standards. Such international standards of due process have long played an important rôle in the articulation of the principles of international state responsibility insofar as they concern interference with the persons rather than the economic interests of aliens. Among these basic principles of due process are the principles that no one shall be subjected to unlimited arrest or detention without judicial trial, that there shall be no identity between prosecutor and judge, and that no condemnation shall occur without the accused being given a fair opportunity to be heard. Since all these principles, and others, have been embodied not only in the codes of the Western family of nations, but also in the Constitution of the Soviet Union,<sup>36</sup> and in the Universal Declaration of Human Rights of the United Nations (1948),<sup>37</sup> these minimum standards of due process enjoy a degree of, at least, theoretical universal support among the nations which does not exist with regard to the integrity of economic interests.<sup>38</sup>

## 3. *Substantive General Principles*

It is with regard to the substantive principles of law, of sufficiently general and persuasive application in national legal systems to be applicable to international law, that the greatest degree of uncertainty persists and the greatest amount of work remains to be done. It is in this field that the science of comparative law can render invaluable and indispensable service to the many developing new fields of international law.

The use of established concepts and institutions of municipal law for public international law may be illustrated by two examples, both of growing importance in present-day international relations:

### INTERNATIONAL CONCESSION AGREEMENTS AND THE CONTRAT ADMINISTRATIF

In recent years there has been a voluminous and often bitter debate on the legal nature of international concession agreements. The bitterness

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tion of concession agreements or proper compensation for nationalization of foreign enterprises, can be narrowed, if not eliminated, see pp. 291 *et seq.* below.

<sup>36</sup> Cf. Arts. 112, 127, 128 of the Constitution of 1936.

<sup>37</sup> Arts. 9-11.

<sup>38</sup> For an enumeration of the principal international standards of due process, see Orfield, "What Constitutes Fair Criminal Procedure under Municipal and International Law," 12 U. Pittsburgh Law Rev. 35, 41-44 (1950).

has resulted from the clash of interests between the developing countries and the foreign investors (usually private, but sometimes governmental) of the industrially developed countries. The gist of the controversy is whether concession agreements made between the government controlling the resources to be exploited by the concession and the foreign party should be treated as genuine civil contracts, or whether, on the other hand, the right to terminate such agreements at any time should be regarded as a non-negotiable aspect of the power and duty of governments to serve the social and economic welfare of their peoples by the exercise of their sovereign legislative and administrative powers. Quite often a compromise has been reached by *ad hoc* agreements providing for arbitration in the case of disputes. But the clash of principles remains sharp.

It is submitted that the institution of the contract of public law, and notably of the French *contrat administratif*, can provide a solution that is theoretically proper and practically fair. The heart of the international controversy is the conflict between the state's predominant concern and responsibility for the country and people over which its sovereignty extends, and the interest of the foreign investor in the reasonable protection of his investment and economic expectations. It is precisely this problem that, in municipal legal systems, has led to the elaboration of the public law contract. Naturally, it is in the legal systems that have long recognized administrative law as a legitimate and necessary branch of any modern legal system, and notably in France, that this institution has been most carefully worked out in a long interplay of legal science and judicial practice.<sup>39</sup> This famous concept now governs numerous types of agreements between public authorities and private parties for various kinds of services and supplies, from radio performances to electricity systems, road construction, or food supplies for refugee centers. The *contrat administratif*—as developed by the Conseil d'État, and similarly by the Belgian and Italian courts—is characterized by the open recognition that typical contracts between public authorities and private citizens cannot be regarded as a species of ordinary contract, but have distinctive features springing from the very nature of the administrative function. The fundamental characteristic of a *contrat administratif* is the recognition of certain unilateral powers of control by the administration in the public interest. The public interest requires that the administrative authority be empowered to carry out continuous supervision over the execution of the contract. The administration is granted certain unilateral powers: to suspend, vary or rescind the contract, to transfer it to another party or to take it over itself. Indeed, the decisions have held the administrative authorities not only empowered, but under a duty to exercise such powers as part of their responsibility to the public. Thus, consumers or other interested parties may bring an action to compel the administration to exercise its powers

<sup>39</sup> For details, see Péquignot, *Théorie Générale du Contrat Administratif* (1945); Mitchell, *Contracts of Public Authorities* (1954); Langrod, "Administrative Contracts," 4 A. J. Comp. Law 347 ff. (1955); Friedmann, *Law in a Changing Society* 371 ff. (1959).

and may sue it for damages if it refuses to do so. The contracts are always subject to the changing needs of the public service. Thus, in a famous decision, it was held that a long-term concession for street lighting by gas could be converted into a demand for lighting by electricity, if this was required by modern technical developments and public needs. But the contractor, while subject to these various powers, is entitled to an indemnity for the consequences of the interference, unless it is caused by his own fault. He has even been held entitled to an equitable upward adjustment of the agreed remuneration where the equilibrium of the contract has been upset by economic causes beyond the control of the parties, and has thus inequitably increased his burden.<sup>40</sup>

Thus the *contrat administratif* is dominated by the principle of the predominance of the public interest, from which flow a number of unilateral powers of the administrative authority, balanced by the claim of the private contractor to equitable compensation or indemnification.

Although there is no corresponding full-fledged institution in the common-law systems, a government contract of very similar type has in fact developed within the common law, mainly through the standard forms and terms of government contracts,<sup>41</sup> which give to the government certain powers of termination or modification balanced by an obligation to indemnify the contractor against the prejudice suffered by reliance on the contract.

In a new country like the United States, where defense expenditure now accounts for more than half of the total national budget, and where the government is in contractual relations with a vast number and variety of enterprises, from the largest to the smallest, involving billions of dollars, the government contract is in fact a legal institution of towering importance. In some respects, the theory of the government or administrative contract, as gradually developed in the United States and Britain, expresses a more modern approach to the balance of governmental responsibilities and private rights than the French *contrat administratif*, the theory and practice of which have developed over many decades. Certainly it cannot be neglected in an application of comparative principles of public contract law to international agreements. This applies particularly to the question of indemnification in the cases where, as agreed in the French, English and American interpretations and practice, the governmental contractor has a unilateral power of variation or termination of contracts in the public interest.

At first sight the French theory of indemnification of the private contractor appears to be clear: it is that, in the case of a "*résiliation*" without default on his part, he is entitled not only to compensation for the loss

<sup>40</sup> This is the famous theory of *imprévision*, first established by the Conseil d'État in the *Gaz de Bordeaux* case in 1916. Sirey 1916, III, 19. •

<sup>41</sup> For details see, for example, Miller, "Government Contracts and Social Control,"

41 Va. Law Rev. 27 (1955); the chapter on "Government Contracts" in 9 Williston, Law of Contracts, Ch. XII; Pasley, "The Interpretation of Government Contracts," 25 Fordham Law Rev. 211 (1956); Friedmann, *op. cit.* note 8 above, 375 ff.; and for Great Britain, Mitchell, *op. cit.*, Ch. II.

suffered (*damnum emergens*) but also for the loss of anticipated profits (*lucrum cessans*).<sup>42</sup> There has, however, always been an element of discretion in the assessment of the indemnification, expressed by the formula that the court will take account not only of the stipulations of the contract but of "all the circumstances of the situation."<sup>43</sup> The tendency to enlarge the court's discretion in the assessment of proper compensation, especially in cases due to "external circumstances which have made (the termination of the contracts) practically inevitable, i.e., especially in cases of cancellation as a consequence of war circumstances (opening or termination of hostilities),"<sup>44</sup> has clearly increased in recent years.<sup>45</sup> It seems to be recognized in the newer case law of the Conseil d'État that, at least in the case of overwhelming necessity, compensation will be limited to the *damnum emergens*, to actual losses suffered by expenses and commitments incurred in execution of the contract, as distinct from the expectation of profits.

This brings French theory and practice somewhat closer to the modern practice and theory of government contracts in the common-law sphere. In one of the leading American cases<sup>46</sup> the Supreme Court drew a clear distinction between the measure of damages for breach of contract and the rule of just compensation for the lawful taking of property by the power of eminent domain. "In fixing just compensation the Court must consider the value of the contract at the time of its cancellation, not what it would have produced by way of profits for the car company had it been fully performed." Generally the practice of United States and British standard government contracts restricts the compensation payable in the event of an exercise of a special power of determination by the governmental contractor in accordance with these principles.

After a comprehensive comparative analysis of the contracts of public authorities, J. D. B. Mitchell, in the leading monograph on the subject,<sup>47</sup> demonstrates not only the prevalence of this practice but also its desirability. "What appears desirable is to find some measure of compensation provided for by a general rule of law to be operative where there is no appropriate contractual term, and which will neither impede the administration in imposing variations, nor leave the contractor unprotected." In support of this contention Mitchell emphasizes that the possibility of termination of contracts of this kind is often in the minds of the parties and is therefore reflected in the price paid to the contractor,<sup>48</sup> and, secondly,

<sup>42</sup> This was laid down by the Conseil d'État as long ago as 1874, in the Hotchkiss case, and it has been reconfirmed in a number of later decisions, as listed in the most comprehensive and recent French treatise on this subject: 3 de Laubadère, *Traité Théorique et Pratique des Contrats Administratifs* 165 ff. (1956).

<sup>43</sup> Judgments of the Conseil d'État of Jan. 14, 1938, *Recueil*, p. 21, and of Feb. 13, 1942, as quoted by Péquignot, *Théorie Générale du Contrat Administratif* at 501 (1945).

<sup>44</sup> de Laubadère, *op. cit.* at 165.

<sup>45</sup> See in particular the decision in the case of Chambouvet, Jan. 23, 1952, *Recueil*, p. 50, and the observations by de Laubadère, *op. cit.* at 165-166.

<sup>46</sup> *Russell Motor Car Company v. U. S.* (1923), 261 U. S. 514, 523.

<sup>47</sup> J. D. B. Mitchell, *The Contracts of Public Authorities* at 228 ff. (1954).

<sup>48</sup> A fact certainly borne out by the revelations of a number of Congressional inquiries on the prices paid by the U. S. Government to private contractors.

perhaps more importantly, that too large a measure of compensation might impair the principle of governmental effectiveness. The overriding reason for the termination of the contract must be public necessity, and this also justifies the limitation of compensation to actual loss suffered in the computation of such loss. However, all relevant factors must be taken into account, such as the fact that the contractor may have declined alternative work, or that he has converted his plant or borrowed money in order to fulfill the contract.

A much simpler situation arises, where the private contractor himself has been at fault by not executing his part of the contract properly. In such cases French, American and British theory and practice concur on the exclusion of the *lucrum cessans*.<sup>49</sup>

The applicability of the public law contract to international concession agreements has recently been suggested by Fatouros.<sup>50</sup> As the author points out, there is a growing volume of judicial authority for the proposition that concession contracts are of a mixed legal character, and that they contain public law elements. Thus, the Permanent Court of International Justice, in the *Lighthouse* case between France and Greece,<sup>51</sup> stated that "a contract granting a public utility concession does not fall within the category of ordinary instruments of private law." The *Aramco* Award of 1958 stressed the double character of the concession as involving both a state act and rights of ownership. The tribunal likened the agreement in question to the mining concession of French law, which it characterized as partaking of the nature of a unilateral act insofar as it depended on the authorization of the state, and that of a contract insofar as it required an agreement between the state and the concessionaire. A notable recent illustration is the arbitral award by the President of the Swiss Federal Tribunal in the *Alsing* case.<sup>52</sup> In that case, an affiliate of the Kreuger Match Trust had entered into a contract with the Greek Government for the exclusive supply of matches for a period of twenty years. The economic importance of the agreement was enhanced by the fact that the Greek Government had by law a monopoly on the manufacture, import and sale of matches in Greece. Simultaneously, a loan contract for one million pounds, payable in twenty-eight annual installments, was signed. The arbitrator rejected the claim of the Swedish suppliers that the right to continue supplies be extended "until repayment in full of the two loans linked to our contract, and in any case for six annual deliveries," in view of the suspension of the deliveries during the war and of other changes of circumstances justifying a prolongation of the contract. The arbitrator dealt extensively with the mixture of public and private law elements in the supply contract, which may be either a contract in private law or a supply agreement coming under administrative law. He characterized the administrative law aspects of the contract by extensive

<sup>49</sup> *Of. de Laubadère, op. cit.* at 166, and Mitchell, *op. cit.* at 229.

<sup>50</sup> Government Guarantees to Foreign Investors 196 ff. (1962).

<sup>51</sup> P.C.I.J., Ser. A/B, No. 62, p. 20 (March 17, 1934).

<sup>52</sup> The award, dated Dec. 22, 1954, is fully reported by Schwebel, "The Alsing Case," 8 Int. and Comp. Law Q. 320 ff. (1959).

reference to the French doctrine, although he regarded it as legitimate to interpret an administrative contract "according to the norms of private law and by the application of the principles of good faith."

Similar uses of a blend of public and private concepts and institutions may be expected in the growing number of international economic transactions, especially where either both parties are public authorities or where one is a public authority and the other a private subject. As Fatouros concludes,

it is possible that international law may apply in the case of such instruments certain rules which differ from rules applicable to interstate agreements, in the same manner in which municipal law applies public and not private law in the case of government contracts.<sup>53</sup>

Apart from the circumstances in which the termination of an international agreement may be justified by the analogous application of certain principles of administrative contracts as developed in municipal legal systems, the evolution of French, British, and American practice and theory in this field may also be helpful in the question of compensation. While the theoretical controversy on the measure of compensation to be paid in such circumstances remains as sharp as ever, a number of settlements reached in the postwar period seem to indicate that a compromise somewhere between full damages (including *lucrum cessans*) and compensation for actual loss suffered is gradually emerging, even though it is as yet almost impossible for the outsider to analyze the way in which particular global compensation settlements have been arrived at.<sup>54</sup>

The science of international law can no longer be content with the analogous application of private law categories. It must search the entire body of the "general principles of law recognized by civilized nations" for proper analogies. With the growing importance of international legal relations between public authorities and private legal subjects, public law will be an increasingly fertile source of international law.

#### UNJUST ENRICHMENT

The principle of unjust enrichment is specifically embodied in all modern civil law codifications, such as the German, Swiss, Greek and Soviet civil codes. In France, an analogous set of principles has been the result of judicial creation, which has based itself on Roman law maxims and general principles of equity. In the common-law systems, where there is no systematic or theoretic equivalent of this notion, corresponding principles have been developed from a number of actions in quasi-contract as well as from certain principles of constructive trust. In the United States this has led to the development of the concept of restitution, which, by and large, corresponds to the civil-law principle of unjust enrichment.<sup>55</sup>

<sup>53</sup> *Op. cit.* 208.

<sup>54</sup> See on this point, in particular, White, *Nationalisation of Foreign Property* 235 *et seq.* (1961), and see further on this question p. 297 *et seq.* below.

<sup>55</sup> For comparative studies see David, "Unjust Enrichment," 5 *Cambridge Law J.* 205 *et seq.* (1935); Friedmann, "The Principle of Unjust Enrichment," 16 *Canadian*

The common thread is the postulate that nobody should enrich himself, without legal cause, at the expense of another. The difficulty—which has on the whole been solved in the private-law sphere by specific enumeration—is to determine when there is an absence of legal cause for the transfer of assets from one party to another. Well-known examples are the payment of money under a mistake as to certain facts, such as the amount due or the identity of the payee, or the appropriation of work executed by another party, where there is no contractual obligation.

The principle that nobody should enrich himself at the expense of another is one that could be very fruitfully applied to international law. But the concept of "unjust" requires a rather different appraisal from that prevailing in the relations between private parties. The whole notion of unjust enrichment, which has become highly technical in the private-law field, has to be adapted to the relations between nations. Justice between nations is a far more complex and elusive concept than the technical private-law concepts of *cause* or consideration. A decision whether a state enriches itself at the expense of another state or of private foreign interests is often a highly complex question involving an examination not only of the formal legal titles but of the history of economic-political relations between the parties. It is a relatively simple matter to decide that a private party who has accepted payment of \$1000 made in error, instead of the due and intended payment of \$100, is unjustly enriched to the extent of \$900. It is equally simple to determine that a party who takes over an incomplete building which, because of a failure to meet certain contractual specifications, or for some other reason, does not fulfill contractual standards, but which forms a major portion of a building later completed by the appropriating party, enriches himself unjustly by using the labor and material invested by the builder without payment. For the latter situation there are certain analogies in international law, as illustrated by the famous *Lena Goldfields* Arbitration.<sup>56</sup> In that case the Soviet Union had invited a foreign firm to develop Soviet gold mines and had later appropriated these mines in the course of a series of nationalization measures. Here it was held by the arbitration tribunal that the Soviet Union had unjustly enriched itself by the appropriation, without compensation, of the capital assets, skill and work put into the development of the mines as a going concern and should make restitution for this enrichment. The case was a clear one, since the Soviet Union, as a sovereign and independent state, had invited the foreign company to develop the gold mines which it later appropriated.

But in most of the cases and situations that have given rise to the recent advocacy by a number of writers of the use of the principle of unjust enrichment in international law,<sup>57</sup> the situation is far more complex.

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Bar Rev. 243, 377 *et seq.* (1938); Dawson, Unjust Enrichment (1951); O'Connell, "Unjust Enrichment," 5 A. J. Comp. Law 2 *et seq.* (1956).

<sup>56</sup> *Lena Goldfields* Arbitration, 1929-30 Annual Digest, Case No. 1.

<sup>57</sup> See, among others, McNair, 6 *Netherlands Law Review* 239 ff. (1959); Wortley, *Expropriation in International Law* 95 ff.; Friedmann, *Law in a Changing Society* 456.

It is usually a question of the proper amount of compensation payable to foreign interests, which have acquired and held valuable natural resources or industries for a long period preceding the independence of a state, in utilization of the political and economic privileges of the colonial Power of which they were nationals, when, after independence, the newly formed state seeks to transfer these properties into national ownership. It has been claimed<sup>58</sup> that unjust enrichment in such a case means an obligation to pay full, adequate and prompt compensation. In other words, unjust enrichment seems to be equated with full damages—a proposition quite contrary to the civil systems, where unjust enrichment and damages are clearly distinguished.<sup>59</sup> The confusion of the two concepts may be due in part to the fact that the *Lena Goldfields* Award, almost the only, and certainly the best-known, international case in this field, was based on unjust enrichment as an equivalent alternative to damages. It seems that the tribunal preferred the emotive overtones of “unjust enrichment.” The distinction between the two concepts is, however, cardinal to the concept and use of unjust enrichment in all the relevant civil and common-law systems. As formulated in a modern German treatise,<sup>60</sup> the distinction extends both to the principles of liability and to the measure of restitution:

Not the unlawful action of the enriched is the decisive point but the utilization of the assets in contradiction to the rights allotted by the law to another person. . . . The enriched is not liable for the damage . . . done to the impoverished; nor is he liable for the latter's expenses but only for the enrichment—insofar as it still exists.

If understood as a semantic alternative to damages, the principle of unjust enrichment will in no way bridge the gap between the concepts of the economically developed and the underdeveloped nations, since it would merely be another name for the view—widely held in the West—that any expropriation of foreign assets, regardless of the manner in which they were acquired and exploited, must be fully compensated for.<sup>61</sup> It is evident, however, that long periods of colonization by Britain, France, The Netherlands or Belgium have enabled the interests of the colonizing nations to acquire economic privileges and profits which they could not possibly

<sup>58</sup> *E.g.*, by McNair and Wortley, *op. cit.*

<sup>59</sup> Unjust enrichment is, however, generally closer to *damnum emergens* than to *lucrum cessans* (see p. 293 above).

<sup>60</sup> Esser, *Schuldrecht* 767 (2nd ed., 1960).

<sup>61</sup> The distinction between damages and enrichment is made by Dr. O'Connell in his *Law of State Succession* (1956):

“It is upon the basis of unjustified enrichment that the principles of compensation can best be rationalized. The title-holder is not indemnified because the State has committed some tortious act, nor because it has broken a legal relationship existing between him and itself. On the contrary, compensation is paid, as Dr. Kaeckenbeeck points out, ‘simply as an equitable alleviation of the economic sacrifice demanded on behalf of the community.’ For this reason, the compensation which must be paid need not be the maximum. The injustice is relieved by a payment which is reasonable and approximates to the lowest market value of the interest.” (Pp. 103-104.)

It should be noted that Dr. O'Connell has also made a comparative study of unjust enrichment, in the article cited in note 55 above.



have acquired in a state of reasonable equality between the country of their nationality and the country of operation. If, for example, a concession for the growing and merchandising of tobacco or for the exploitation of mineral resources has been granted under conditions of political and military domination and under financial conditions starkly different from those prevailing in an open market, it would be neither realistic nor equitable not to take into account the "unjust" enrichment that has accrued to the foreign interests as a result of their privileged position. That this kind of situation existed, for example, in the economic and legal privileges enjoyed by United States companies in Central America earlier in this century, or by the Dutch tobacco and other interests in Indonesia, or by British interests in India before independence, cannot seriously be denied. On the other hand, the public or private interests of the colonizing countries have, by the development of natural resources which can be taken over as going concerns, often brought great and lasting benefits to the recipient nations. The balance sheet of benefits and disadvantages cannot be easily drawn up when these situations have prevailed over a long period. But it is by no means impossible to find reasonable yardsticks for measuring and balancing loss and gain. Thus, when a foreign company has acquired a long lease over agricultural territories or mines, at a rent that by comparison with prevailing commercial rates is purely nominal, and when it has over a number of years made profits considerably in excess of those that would have been possible under normal commercial arrangements, it is entirely proper to bring these factors into account against the benefits that will accrue to the recipient country as a result of nationalization of assets developed by the skill of the foreign enterprise and by the capital invested in it.

In short, the principle of unjust enrichment can be applied in international law only by going back to the basic equities of the situation, and by taking into account the nature of the mutual relationships. While judicial precedents are so far very few, there is at least one judicial authority in favor of this approach. In an award by the eminent Swiss international lawyer, Max Huber, in a dispute between Great Britain and Spain resulting from the seizure of British interests in Morocco, the arbitrator denied to the British interests a claim for the payment of a reasonable rent during the period when the Spanish authorities had occupied land belonging to a British subject. While pointing out that in principle the payment of rent would be justified on the ground of unjust enrichment, the arbitrator found that the value of the land, between the time of the seizure (1913) and the time of restoration (1921) had increased to a more than normal degree, partly as a consequence of measures taken by the Spanish Government. Hence, in application of general principles of equity, the arbitrator found that there was no case for compensation.<sup>62</sup>

This decision gives only a general indication of the way in which this "general principle" of unjust enrichment could and should be applied in

<sup>62</sup> Spanish Zone of Morocco Claims, *Great Britain v. Spain*, 1923-24 Annual Digest, No. 80.

international law. It remains for legal science and judicial practice to develop this principle further. This would contribute greatly to a peaceful and fair adjustment of the differences between the capital-exporting and the capital-importing countries, in this age of de-colonization and socialization of natural resources. Already the practice of many global settlements made in the postwar period<sup>63</sup> shows a practical compromise between the conflicting views by way of partial compensation. It remains to proceed from the *ad hoc* character of these settlements to a rational and fair application of the principle of unjust enrichment in the relations between nations, and most particularly in the adjustment of the equities between the interests of ex-colonial Powers and the interests of the colonized nations that transfer resources from foreign to national ownership.

<sup>63</sup> On these, see the detailed survey by White, *Nationalisation of Foreign Property* 193 *et seq.* (1961); Bindschedler, "La Protection de la Propriété Privée en Droit International Public," 90 *Hague Academy Recueil des Cours* 173 *et seq.* (1956, II).

THE INTERNATIONAL CONFERENCE ON THE SETTLEMENT  
OF THE LAOTIAN QUESTION AND THE GENEVA  
AGREEMENTS OF 1962

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On July 23, 1962, the International Conference on the Settlement of the Laotian Question in Geneva came to a close with the formal signature of a Declaration on the Neutrality of Laos and a Protocol to the Declaration.<sup>1</sup> The Conference had been in session for over a year; fourteen governments participated, and all of them became parties to the agreements reached.<sup>2</sup>

This article outlines briefly the background and history of the Conference and describes the most important provisions of the Declaration and Protocol which it produced.

\* Mr. Czyzak was legal adviser to the United States Delegation to the Laos Conference. The authors express their appreciation to Katherine F. Lincoln, member of the United States Delegation to the Laos Conference, whose research into the records of the Conference proved invaluable in the preparation of this article. The views expressed herein should not be attributed to the Department of State.

<sup>1</sup> For texts see 47 Dept. of State Bulletin 259 (1962); or LAOS/DOC/53 and LAOS/DOC/54. References to LAOS/DOC/— are to the official "documents" series issued by the Conference.

No official verbatim records were kept of the debates in the plenary or restricted meetings of the Conference. The Conference did issue an official "statement" series (LAOS/STA/—), consisting of prepared speeches delivered in the plenary sessions. It also kept official records of the decisions reached at each restricted meeting (LAOS/RECORD/— series), which included a record of items on which it was not possible to reach agreement. The Conference also issued an official "decisions" series (LAOS/DEC/—).

<sup>2</sup> Participants were Cambodia, the People's Republic of China, France, Laos, the U.S.S.R., the United Kingdom, the Democratic Republic of Viet-Nam and the Republic of Viet-Nam (all parties to the 1954 Geneva Accords), plus Canada, India and Poland (members of the International Commission for Supervision and Control in Laos established by the 1954 Accords), plus the United States, Burma and Thailand as interested parties. The presence of all of these parties, for political, military or geographic reasons, was considered desirable and even necessary if a completely satisfactory settlement of the Laotian question was to be achieved.

## BACKGROUND AND HISTORY OF THE CONFERENCE

*The Period from 1954 to 1961*

The Geneva Accords of 1954 brought to a close eight years of hostilities in Indochina.<sup>3</sup> While Laos was not a major theater during these hostilities, the country was invaded by Vietnamese Communist forces allied with a local dissident Lao group calling itself the Pathet Lao. Subsequent to the 1954 Accords, the Pathet Lao continued to occupy and administer the two provinces of Sam Neua and Phong Saly in northern Laos. For over three years the Government of Laos attempted, without success, to integrate the Pathet Lao and the two provinces under its control into the Lao national community.

In December, 1957, under the terms of the Vientiane Agreements concluded between the Government of Laos and the Pathet Lao,<sup>4</sup> the latter finally transferred the two provinces to the jurisdiction of the Government of Laos. At the same time the Pathet Lao were permitted to form a legitimate political party, the Neo Lao Hak Xat, and two of its leaders entered the Government of National Union. Integration of Pathet Lao military units into the Royal Army was likewise initiated at this time.

Political friction between successive Lao governments and the Neo Lao Hak Xat continued, however, and the Pathet Lao eventually resorted to military action. In May, 1959, a Pathet Lao battalion defected and started guerrilla activities against the Government forces. By July, 1959, the Pathet Lao were in rebellion and had begun receiving, as in the past, substantial clandestine support from the North Vietnamese. In August, 1960, a Lao paratroop captain, Kong Le, seized Vientiane, the capital of Laos, in a *coup d'état*. The Government resigned, and Prince Souvanna Phouma, who was striving for a neutral solution, formed a new cabinet. In southern Laos, General Phoumi Nosavan established an anti-Communist "Counter-coup d'état Committee." Supporters of this group proceeded to march on Vientiane and capture that city, with the result that Prime Minister Souvanna Phouma fled to Cambodia. Prince Boun Oum thereupon formed a pro-Western government at Vientiane. Prince Souvanna Phouma later re-established his government at Xieng Khouang in north central Laos.

By the close of the year 1960 a full-scale civil war was being waged in Laos. The Pathet Lao, who were co-operating with the Souvanna Phouma

<sup>3</sup> An international conference was held at Geneva from April 26 to July 21, 1954, to bring an end to the hostilities in Indochina. The Conference produced the 1954 Geneva Accords, consisting of a Final Declaration of the Conference, several unilateral declarations by participants in the Conference, and three armistice agreements relating respectively to Cambodia, Laos, and Viet-Nam. "Further Documents relating to the discussion of Indochina at the Geneva Conference," Cmd. No. 9239 (1954); or Senate Foreign Relations Committee, 83rd Cong., 2d Sess., "Report on Indochina" (Committee Print, 1954). The United States, while participating in the 1954 Geneva Conference, did not become a party to the Accords. See 1 American Foreign Policy 1950-1955, pp. 787-788.

<sup>4</sup> For texts of the Vientiane Agreements, see Fourth Interim Report of the International Commission for Supervision and Control in Laos, Cmd. No. 541 (1958).

government, had been heavily reinforced by North Vietnamese personnel, and were receiving military supplies from the Soviet Union as well as from North Viet-Nam. The Boun Oum government, endorsed by the King and National Assembly of Laos, was recognized and supported by most of the Western Powers as the legitimate Government of Laos. With the situation becoming daily more explosive, it was clear that the conflict could easily spread outside of Laos and that some sort of international action to restore peace was needed.

### *Convening of the Conference*

On April 24, 1961, after months of intergovernmental negotiation, the British and Soviet Co-Chairmen of the 1954 Geneva Conference took the first steps in the direction of a peaceful settlement of the Laotian question with the dispatch of three diplomatic messages.<sup>5</sup> One, addressed to the parties in Laos, appealed for a cessation of hostilities. The second, sent to the Government of India, requested that government to reconvene the International Commission for Supervision and Control in Laos (the I.C.C.), which had been set up by the 1954 Geneva Accords but which had adjourned *sine die* in July, 1958.<sup>6</sup> The third message invited 14 participants to an international conference for the settlement of the Laotian question, to be convened at Geneva on May 12.

The Conference failed to open on May 12 as scheduled, largely because of confusion over the question of who was to represent Laos. The Boun Oum government, the Souvanna Phouma government and the Pathet Lao all demanded to be seated. Eventually the Conference agreed to permit the seating of separate delegations representing or supporting the three factions, and the Conference opened on May 16. The opening weeks of the Conference were marked by repeated violations of the *de facto* cease-fire which had been established in Laos. This situation improved early in June, following the meeting at Vienna between President Kennedy and Chairman Khrushchev. The two heads of state stressed the importance of an effective cease-fire and agreed on the formula of an independent and neutral Laos.<sup>7</sup> This agreement laid the groundwork for the successful carrying out of the work of the Conference.

### *Conference Procedures*

The Conference accomplished its work in three successive phases. In the first, an effort was made to work primarily in plenary session. In the second, the device of restricted sessions was used almost exclusively. The third consisted largely of negotiations between the Co-Chairmen.<sup>8</sup>

<sup>5</sup> New York Times, April 25, 1961, p. 16, cols. 1-3.

<sup>6</sup> The Commission consisted of representatives of the governments of Canada, India and Poland, with the representative of India as Chairman. It was responsible for supervising the execution by the parties of the 1954 Geneva Agreement on the Cessation of Hostilities in Laos.

<sup>7</sup> 44 Dept. of State Bulletin 999 (1961).

<sup>8</sup> At its first meeting, the Conference decided that the representatives of the United Kingdom and the U.S.S.R. should act as Co-Chairmen of the Conference (LAOS/DEC/1).

1. *Plenary Sessions.* From May 16 through July 19, 1961, the Conference held thirty-six plenary meetings. Six additional plenary sessions were held at varying intervals thereafter. The first thirty-six meetings accomplished little. They were devoted largely to speeches of a general and propaganda nature, each of which seemed to generate another in rejoinder. The Conference appeared unable to move ahead, and the prospects of a break became more imminent from day to day. It was during this early phase of the Conference, however, that various delegations tabled their proposed draft agreements which became the bases for discussion and negotiation in the restricted sessions of the Conference.<sup>9</sup>

2. *Restricted Sessions.* When it became apparent that the Conference could make no progress in plenary meetings, on the initiative of the United States representative, W. Averell Harriman, the Co-Chairmen worked out procedures to advance the work of the Conference in restricted meetings (i.e., closed sessions with a single representative sitting for each party). Between July 20, 1961, and July 18, 1962, the Conference held 44 restricted meetings. These sessions were governed by "Proposals by the Co-Chairmen on the Procedures for the Further Work of the Conference" approved by the Conference.<sup>10</sup> Pursuant to these proposals the Conference members systematically discussed in the restricted meetings first the draft neutrality declarations and subsequently the draft protocols which had been tabled.<sup>11</sup> The Co-Chairmen prepared a schedule systematizing the items covered in the various drafts as a "List of Questions for Discussion at the Conference," which the Conference adopted on July 26, 1961.<sup>12</sup> The Conference debated the items on this list *seriatim*. When general substantive agreement was reached on a particular item, it was referred to the appropriate drafting committee<sup>13</sup> with instructions to prepare a text based on specified drafts submitted by various delegations, taking into account the views expressed and proposals made during the discussion of

<sup>9</sup> On May 17, 1961, the U.S.S.R. tabled a draft declaration on the neutrality of Laos (LAOS/DOC/4), and a draft protocol on the withdrawal of foreign troops and military personnel from Laos and on the terms of reference for the International Control Commission (LAOS/DOC/5). France, on May 23, 1961, submitted a draft declaration to be made by the Royal Laotian Government and a draft declaration of the 13 other Powers in reply thereto (LAOS/DOC/7), which, on July 27, 1961, was revised (LAOS/DOC/7/Rev. 1). On June 6, 1961, the French Delegation tabled a draft protocol on control (LAOS/DOC/11). The United States, on June 26, 1961, submitted ten draft articles as a supplement to the French draft protocol (LAOS/DOC/17). On July 13, 1961, India submitted a draft neutrality declaration (LAOS/DOC/23) and on the following day tabled a draft protocol (LAOS/DOC/24).

<sup>10</sup> LAOS/DEC/5.

<sup>11</sup> See note 9 above.

<sup>12</sup> LAOS/DOC/27/Add. 1.

<sup>13</sup> The Conference established two drafting committees. One, composed of representatives of the People's Republic of China, France, India, the Soviet Union and the United Kingdom, was appointed to draft texts for the Declaration on Neutrality. The other was to draft texts for the Protocol, and consisted of the same members as above, plus representatives of Canada, Poland and the United States. Other interested Conference participants were permitted to attend drafting committee meetings as observers and express their views. The British and Soviet members served alternately as chairmen of the committees.

the item in the restricted sessions. The two drafting committees submitted periodic reports embodying agreed texts to the Conference for approval. As a matter of fact, the restricted sessions referred to the drafting committees many items on which no fundamental agreement had really been reached, and the committees functioned largely as secondary negotiating bodies rather than as strictly drafting committees. On the other hand, many items on which basic differences emerged had to be set aside by the restricted meetings as "disagreed" and could not be referred to the drafting committees.

3. *Co-Chairmen's Negotiations.* After completion of the debates on the "List of Questions for Discussions at the Conference,"<sup>14</sup> the Conference on September 14, 1961, approved new proposals by the Co-Chairmen for continuing the work of the Conference.<sup>15</sup> Under these proposals, the items on which it had not been possible to agree during the restricted sessions of the Conference were made the subject of discussion and negotiation between the Co-Chairmen, and also between either Co-Chairman and the heads of other delegations outside the formal Conference sessions. As the Co-Chairmen reached agreement, they submitted the formulas embodying these agreements to restricted meetings of the Conference. After provisional approval in these sessions, the formulas were referred to the appropriate drafting committees for inclusion in the text of the Declaration or Protocol as the case might be.

As this somewhat detailed treatment of the Conference procedure indicates, the Conference was clearly at its best in its second and third phases. During those phases it was conducted in a businesslike manner. The performance of the parties was for the most part professional, by and large devoid of acrimony, and characterized by a good deal of give and take. In both phases most significant progress was made away from the actual conference table, with little publicity, through conventional methods of diplomacy. If the Conference had not moved away from the plenary phase of its work, it would undoubtedly have failed amidst hard feelings among the participants, stemming from the belief that neither of the power blocs was interested even in exploring the possibilities of a genuine solution.

#### *Formation of a Coalition Government*

An essential element of any settlement of the Laotian question was the formation of a single, unified national Government of Laos. Thus, while the Conference at Geneva concerned itself with the international aspects of the Laotian question, parallel efforts were being made to resolve the differences among the factions in Laos.

The three Laotian Princes, Boun Oum, Souvanna Phouma and Souphanouvong (Pathet Lao), met at Zurich from June 19 to 21, 1961, to discuss the future internal political organization and external status of Laos. This meeting resulted in a joint communiqué embodying an agreement among the three Princes on the formation of a provisional government of

<sup>14</sup> See note 12 above.

<sup>15</sup> LAOS/DEC/7.

national union comprising representatives of the three forces. The principal domestic and foreign goals of this government were defined as revolving around the building of a peaceful, neutral, independent, democratic, unified and prosperous Laos.<sup>16</sup>

Negotiations among the three Princes and their representatives to form the coalition government envisaged in the Zurich communiqué were long, sporadic and difficult. In October, 1961, at a meeting in the small village of Ban Hin Heup in Laos, the Princes agreed upon Souvanna Phouma as sole candidate for Prime Minister of the new government. Negotiations on the composition of the remainder of the cabinet continued in several later meetings, notably at Vientiane, Geneva, and the Plaine des Jarres in Laos.

In the meantime the 14-nation Conference had made substantial progress in its work. On December 18, 1961, at the 43rd Restricted Meeting, the Conference provisionally approved a draft Declaration on Neutrality, to be made by the 13 participants other than Laos,<sup>17</sup> and a draft Protocol.<sup>18</sup> Since there was no unified delegation which could speak on behalf of the Government of Laos, the Conference had to await agreement among the three Laotian Princes on the formation of a Lao Government of National Union which could approve the agreements already reached and issue its own statement of neutrality. Protracted negotiations among the Laotian factions followed, accompanied by repeated violations of the cease-fire in Laos and by a steady deterioration of the military situation which threatened to wreck the Conference. Finally, however, on June 12, 1962, after considerable pressure had been brought to bear by members of the Conference, the three Princes signed an agreement concerning the composition of a coalition government headed by Souvanna Phouma, and on June 23, 1962, the new Government of Laos assumed office.

#### *Signature of Declaration and Protocol*

The Conference held its 40th plenary meeting on July 2, 1962, to welcome to the Conference table for the first time a united delegation representing the newly formed Royal Government of Laos. One week later, on July 9, the Foreign Minister of Laos, on instructions of his government, submitted to the Conference the official text of a Statement of Neutrality by the Royal Government of Laos.<sup>19</sup> That Statement, together with the 13-Power Declaration, forms the Declaration on the Neutrality of Laos. The Declaration was signed only by the 13 participants other than Laos and not by Laos itself. However, the Statement of Neutrality of the Government of Laos, signed by the Lao Foreign Minister and formally submitted to the Conference, contains obligations undertaken by Laos and was, with the concurrence of that government, incorporated in the Declaration

<sup>16</sup> LAOS/DOC/18.

<sup>17</sup> The Conference had decided that the Neutrality Declaration should consist of two parts, a Statement of Neutrality by the Government of Laos, and a responsive 13-Power Declaration on Neutrality (LAOS/RECORD/39).

<sup>18</sup> The draft declaration was contained in LAOS/DOC/38 and the draft protocol in LAOS/DOC/34.

<sup>19</sup> LAOS/DOC/50.



as an integral part thereof.<sup>20</sup> The Lao Statement of Neutrality and the responsive Declaration by the 13 other Conference members together constitute an international agreement.<sup>21</sup> All 14 participants in the Conference signed the Protocol.

### *Problem of Recognition*

Participation in the Conference and signature of the agreements with the governments of the People's Republic of China and the Democratic Republic of Viet-Nam did not in any way imply recognition of those governments by parties that had not previously recognized them. The Conference considered that participation in a multilateral convention could not, unless there was some clear indication of an intention to the contrary, constitute recognition.<sup>22</sup> Recognition being a matter of intention, and the intention of the parties concerned *not* to recognize the governments of North Viet-Nam and Communist China being manifestly clear, no possibility of implying recognition was thought to arise. As a matter of precaution the British representative, Lord Home, in the first plenary session of the Conference, expressed the understanding that neither the invitations to the Conference nor participation in it could be "regarded as implying recognition in any case where it has not previously been accorded."<sup>23</sup> At the final meeting of the Conference, Lord Home, as the presiding officer, repeated this understanding and added that the same consideration applied to the signature of the agreements.<sup>24</sup> Secretary of State Rusk, in his statement at that meeting, made the same point for the record.<sup>25</sup>

## THE GENEVA AGREEMENTS

### *The Declaration*

The Declaration on the Neutrality of Laos consists of a statement of neutrality by the Royal Government of Laos and a responsive declaration by the 13 other Conference members. In its Statement, Laos resolves "to build a peaceful, neutral, independent, democratic, unified and prosperous Laos,"<sup>26</sup> and undertakes a number of specific steps to implement that policy. For example, it declares that it "will develop friendly relations and establish diplomatic relations with all countries, the neighboring countries first and foremost";<sup>27</sup> that "it will not resort to the use or threat of force in any way which might impair the peace of other countries, and will not

<sup>20</sup> See preamble to the Declaration on the Neutrality of Laos.

<sup>21</sup> Par. 5 of the Declaration provides: "The present Declaration . . . together with the statement of neutrality by the Royal Government of Laos of July 9, 1962 shall be regarded as constituting an international agreement."

<sup>22</sup> Support for this view may be found in 1 Oppenheim, *International Law* 146-147 (8th ed., Lauterpacht, 1955), and 1 Hackworth, *Digest of International Law* 346-354.

<sup>23</sup> LAOS/STA/2.

<sup>24</sup> LAOS/STA/113.

<sup>25</sup> LAOS/STA/125.

<sup>26</sup> See preamble to Statement of Neutrality by the Royal Lao Government contained in the Declaration on the Neutrality of Laos (hereinafter referred to as the "Statement").

<sup>27</sup> Par. (1) of the Statement.

interfere in the internal affairs of other countries";<sup>28</sup> and that "it will not allow any foreign interference in the internal affairs" of Laos.<sup>29</sup> The Government of Laos further pledges itself not to enter into any military alliance or any agreement inconsistent with its neutrality, not to permit any foreign military base to be established on Lao territory, not to allow any country to use Laotian territory for military purposes or for interference in the internal affairs of other countries, and not to recognize the protection of any alliance or military coalition, including SEATO.<sup>30</sup>

The other Conference participants in response declare that "they recognize and will respect and observe in every way the sovereignty, independence, neutrality, unity and territorial integrity" of Laos.<sup>31</sup> They also bind themselves to specific undertakings. Thus, they pledge not to "commit or participate in any way in any act which might directly or indirectly impair the sovereignty, independence, neutrality, unity or territorial integrity" of Laos;<sup>32</sup> not to "resort to the use or threat of force or any other measure which might impair the peace" of Laos;<sup>33</sup> not to "attach conditions of a political nature to any assistance" offered to or sought by Laos;<sup>34</sup> and not to invite, encourage or bring Laos into any military alliance or other agreement inconsistent with her neutrality.<sup>35</sup> In addition, the 13 Powers declare "they will refrain from all direct or indirect interference in the internal affairs of the Kingdom of Laos,"<sup>36</sup> and will respect the wish of Laos not to recognize the protection of any alliance or military coalition, including SEATO.<sup>37</sup> They further obligate themselves not to establish any foreign military base in Laos,<sup>38</sup> not to "use the territory of the Kingdom of Laos for interference in the internal affairs of other countries,"<sup>39</sup> and, conversely, not to "use the territory of any country including their own for interference in the internal affairs of the Kingdom of Laos."<sup>40</sup> In the event of a violation or threat of violation of the sovereignty, independence, neutrality, unity or territorial integrity of the Kingdom of Laos, they undertake "to consult jointly with the Royal Government of Laos and among themselves in order to consider measures which might prove to be necessary to ensure the observance of these principles and the other provisions of the present Declaration."<sup>41</sup>

Most of these undertakings are self-explanatory. There are at least two, however, on which it might be appropriate to comment. One is the so-called "corridor" provision. The other relates to SEATO.

<sup>28</sup> Par. (3) *ibid.*

<sup>29</sup> Par. (5) *ibid.*

<sup>30</sup> Par. (4) *ibid.* For a fuller discussion of these latter two undertakings, see below. See also note 45 below.

<sup>31</sup> Par. 1 of the 13-Power responsive declaration contained in the Declaration on the Neutrality of Laos (hereinafter referred to as the "responsive declaration").

<sup>32</sup> Par. 2(a) of the responsive declaration. <sup>33</sup> Par. 2(c) *ibid.*

<sup>34</sup> Par. 2(d) *ibid.*

<sup>35</sup> Par. 2(e) *ibid.*

<sup>36</sup> Par. 2(e) *ibid.*

<sup>37</sup> Par. 2(f) *ibid.*, and see discussion below.

<sup>38</sup> Par. 2(h) of the responsive declaration.

<sup>39</sup> Par. 2(i) *ibid.*, and see discussion below.

<sup>40</sup> Par. 2(j) of the responsive declaration. <sup>41</sup> Par. 4 *ibid.*

1. *The "Corridor" Provision.* In paragraph 2(i) of the Declaration, the 13 members of the Conference other than Laos undertake that "they will not use the territory of Laos for interference in the internal affairs of other countries." This provision was based on a proposal tabled by the Delegation of the Republic of Viet-Nam calling upon the members of the Conference to undertake not to use or permit the use of the territory or resources of Laos for the purpose of direct or indirect aggression against, or interference in the affairs of, other countries.<sup>42</sup> Viet-Nam had an obvious interest in the non-use of Laotian territory by third countries for interference in its affairs, since the North Viet-Nameese have used Laos as a "corridor" for infiltration of armed men and matériel into South Viet-Nam. In the course of the negotiations the Communist bloc eventually agreed to the inclusion in the Declaration of such an undertaking, but they insisted that there be a corresponding commitment by the 13 signatories not to use their territories for interference in the internal affairs of Laos. Paragraph 2(j) of the Declaration embodies this latter undertaking. The 13 signatories considered it important that a reciprocal undertaking by the Government of Laos be included in the Declaration. Accordingly, the Government of Laos, in its Statement of Neutrality which is part of the Declaration, declared that it will not allow any country "to use Laotian territory . . . for the purposes of interference in the internal affairs of other countries. . . ." <sup>43</sup>

2. *SEATO.* The Soviet draft declaration on neutrality <sup>44</sup> contained a provision that the Southeast Asia Collective Defense Treaty and the Protocol thereto <sup>45</sup> "cease hereby to have effect." This proposal amounted to an amendment of the SEATO Treaty and was unacceptable to the United States and other delegations, which pointed out that such an amendment could only be effected by the agreement of all SEATO members, whereas only four of them participated in the Conference. In the Zurich communiqué <sup>46</sup> the three Lao Princes agreed that it would be the policy of a Lao Government of National Union "not to recognize the protection of any alliance or military coalition." SEATO was not specifically mentioned.

In order to resolve the impasse between the Communist bloc and the United States position, the British Co-Chairman proposed to the Soviet Co-Chairman during the third phase of the Conference a compromise formula for handling the SEATO issue. This formula provided in essence that, if the statement of neutrality of the Government of Laos contained a

<sup>42</sup> Item A-13 on List of Questions for Discussion at the Conference (LAOS/DOC/27/Add.1, July 25, 1961).

<sup>43</sup> Par. (4) of the Statement of Neutrality.

<sup>44</sup> See note 9 above.

<sup>45</sup> 6 U. S. Treaties 81; T.I.A.S., No. 3170; 209 U. N. Treaty Series 28. While Laos was not a party to the treaty, the protection afforded by the treaty was in effect extended to Laos pursuant to Art. IV, par. 1, which permitted such extension to "any State or territory which the Parties by unanimous agreement may hereafter designate. . . ." In the accompanying protocol to the treaty, the parties unanimously designated Cambodia, Laos and South Viet-Nam.

<sup>46</sup> See note 16 and discussion above.

clause similar to that in the Zurich communiqué, then the response of the 13 Powers in the Declaration on the Neutrality of Laos would contain an undertaking to respect the wish of the Government of Laos not to recognize the protection of any alliance or military coalition. In addition, the four SEATO countries not represented at the Conference (Australia, New Zealand, Pakistan and the Philippines) would associate themselves in an appropriate and effective form with the undertaking in the Declaration.

This issue remained unresolved, however, until July, 1962, when the Government of Laos included in its Statement of Neutrality presented at Geneva,<sup>47</sup> a clause that Laos will not "recognize the protection of any alliance or military coalition (including SEATO)," with a note added, stating that the words in parenthesis would be included if the members of SEATO did not officially withdraw SEATO protection from Laos. It was finally agreed that the words "including SEATO" would appear in the Lao Statement and that the 13 Powers would declare in response that they "will respect the wish of the Kingdom of Laos not to recognize the protection of any alliance or military coalition, including SEATO."

Agreement thus having been reached along the foregoing lines, SEATO itself took no action, although all members were consulted on this formula. They did not view this formula as an amendment of the Southeast Asia Collective Defense Treaty. They considered it as being in conformity with Article IV(3) of that treaty, which provides in effect that the protection of SEATO would be extended to Laos only upon the invitation or with the consent of the Government of Laos.

### *The Protocol*

The Protocol to the Declaration on Neutrality creates specific obligations on the parties relating to the withdrawal from Laos of foreign military personnel and to the introduction into Laos of such personnel and of war material. In general, all foreign military personnel were to withdraw from Laos within a 75-day period after entry into force of the Protocol (July 23, 1962), along such routes and through such points as were to be determined by the Lao Government in consultation with the International Control Commission.<sup>48</sup> Introduction of foreign military personnel is prohibited,<sup>49</sup> except that provision is made for French military instructors to train the armed forces of Laos if the Lao Government considers it necessary.<sup>50</sup> Introduction of arms, munitions and war materials generally is prohibited "except such quantities of conventional armaments as the Royal Government of Laos may consider necessary for the national defense of Laos."<sup>51</sup>

The Protocol contains a provision for the release of foreign military or civilian personnel captured or interned during the hostilities in Laos. These are to be "handed over by the Royal Government of Laos to the representatives of the Governments of the countries of which they are

<sup>47</sup> LAOS/DOC/50.

<sup>48</sup> See Art. 4 *ibid.*

<sup>51</sup> Art. 6 *ibid.*

<sup>48</sup> See Arts. 2 and 3 of the Protocol.

<sup>50</sup> See Art. 5 *ibid.*

nationals in order that they may proceed to the destination of their choice."<sup>52</sup>

The Protocol also specifies the rôle of the Co-Chairmen of the Conference in the implementation of the agreements.<sup>53</sup> In addition, it establishes the terms of reference of the International Commission for Supervision and Control in Laos and defines its functions, powers and procedures.<sup>54</sup>

A number of the provisions of the Protocol call for comment in some detail. These are the provisions relating to (1) the rôle of the Co-Chairmen in the agreements; (2) the International Control Commission, its functions and investigatory powers; (3) the Commission and its internal administration; (4) voting in the Commission; (5) reports of the Commission; and (6) the rôle of the Government of Laos.

1. *Rôle of the Co-Chairmen.* Article 8 of the Protocol relates to the Co-Chairmen and is one of its most important articles. The Co-Chairmen were not mentioned in the Geneva Accords of 1954. Under Article 8 they play a significant rôle in the implementation of the Declaration and Protocol. Article 8 provides:

The Co-Chairmen shall periodically receive reports from the Commission. In addition the Commission shall immediately report to the Co-Chairmen any violations or threats of violations of this Protocol, all significant steps which it takes in pursuance of this Protocol, and also any other important information which may assist the Co-Chairmen in carrying out their functions. The Commission may at any time seek help from the Co-Chairmen in the performance of its duties, and the Co-Chairmen may at any time make recommendations to the Commission exercising general guidance.

The Co-Chairmen shall circulate the reports and any other important information from the Commission to the members of the Conference.

The Co-Chairmen shall exercise supervision over the observance of this Protocol and the Declaration on the Neutrality of Laos.

The Co-Chairmen will keep the members of the Conference constantly informed and when appropriate will consult with them.

Perhaps the most important function assigned to the Co-Chairmen is the requirement that they "exercise supervision over the observance of this Protocol and the Declaration on the Neutrality of Laos." This means that the governments of the United Kingdom and the Soviet Union have assumed the responsibility of seeing to it that all of the parties to the Declaration and Protocol live up to those agreements, and of exercising diplomatic pressures, if necessary, to that end.

It should perhaps be noted that the original Soviet proposal had been that the Commission should function "under the general guidance and supervision of the two Co-Chairmen."<sup>55</sup> This implied, of course, a veto by the Co-Chairmen over the Commission's activities, a position that was acceptable only to the Communist bloc. As a matter of fact, this concept

<sup>52</sup> See Art. 7 *ibid.*

<sup>53</sup> See Art. 8 *ibid.* and discussion below.

<sup>54</sup> See Afts. 9-17 of the Protocol and discussion below.

<sup>55</sup> LAOS/DOC/5.

of Co-Chairmen control over the Commission was dropped by the Soviets early in the negotiations.

The negotiation of Article 8 fell into two phases. At the end of the first phase the article had been drafted substantially as finally agreed upon, but it did not include the requirement ultimately expressed in the words "In addition the Commission shall immediately report to the Co-Chairmen . . . any other important information which may assist the Co-Chairmen in carrying out their functions." Thereafter the Western delegations reopened the draft in an attempt to find language which would establish a relationship between the Commission and the implementation of the Declaration on Neutrality. The principal stumbling block was the oft-proclaimed Communist charge that the Western Powers wished to "control" Lao neutrality, which they characterized as an infringement of Lao sovereignty. Agreement was finally reached on the phrase quoted in the second sentence of this paragraph. Its significance lies in the fact that one of the "functions" of the Co-Chairmen is to "exercise supervision over the observance of this Protocol and the Declaration on the Neutrality of Laos." Hence the Commission has a duty to report to the Co-Chairmen any important information which may assist them in their exercise of supervision over the observance of the Declaration.<sup>56</sup>

2. *The Commission, Its Functions and Investigatory Powers.* (a) The Commission has the following specific functions under the Protocol:

(1) Under Article 9 the Commission is directed to "supervise and control the cease-fire in Laos." This function is to be exercised in full co-operation with the Government of Laos and within the framework of the cease-fire agreement or cease-fire arrangements made by the three political forces in Laos, or the Government of Laos.

(2) In Article 10 the Commission is charged with the responsibility of supervising and controlling the withdrawal from Laos of foreign regular and irregular troops, foreign para-military formations and foreign military personnel.

(3) In Article 11 the Commission is directed to investigate when there are reasonable grounds to consider that a violation of the provisions of Article 4 (prohibiting the introduction of foreign regular and irregular troops, foreign para-military formations and foreign military personnel into Laos) has occurred. The Commission is required to inform the Co-Chairmen immediately of any violations or threats of violations of Article 4 and of all significant steps taken pursuant to this article.

(4) The Commission is required under Article 12 to assist the Government of Laos in cases where the latter considers that a violation of Article 6 concerning introduction of armaments, munitions and war material may have taken place.

(5) As noted earlier, under Article 8 the Commission is required as one of its functions to "immediately report to the Co-Chairmen any violations or threat of violations of this Protocol, all significant steps which it takes in pursuance of this Protocol, and also any other important in-

<sup>56</sup> For further ramifications of this provision see par. 2(b) below.

formation which may assist the Co-Chairmen in carrying out their functions."

(b) Article 15 of the Protocol provides, *inter alia*:

In the exercise of its specific functions which are laid down in the relevant articles of this Protocol the Commission shall conduct investigations (directly or by sending inspection teams), when there are reasonable grounds for considering that a violation has occurred. These investigations shall be carried out at the request of the Royal Government of Laos or on the initiative of the Commission, which is acting with the concurrence of the Royal Government of Laos.

In the exercise of the various specific functions outlined in the preceding section, the Commission is therefore empowered to conduct investigations under the provisions of Article 15. Of particular interest in this connection is the Commission's ability under Article 15 to conduct investigations in the exercise of its function under Article 8 to "immediately report to the Co-Chairmen . . . any other important information which may assist the Co-Chairmen in carrying out their functions." One of the Co-Chairmen's functions is, of course, to "exercise supervision and control over the observance of . . . the Declaration on the Neutrality of Laos." Thus, in the exercise of its responsibility of reporting to the Co-Chairmen information which will help them fulfill this latter function, the Commission has the power under Article 15 to investigate violations of the pertinent provisions of the Declaration on Neutrality. That a more direct statement of this power of the Commission could not be obtained in the Protocol was due to the opposition of the Communist delegations to any provision which made it appear that the Commission was to "control" the neutrality of Laos and thereby infringe its sovereignty.

3. *The Commission and Its Internal Administration.* Article 15 of the Protocol, as noted, stipulates that the Commission shall carry out investigations on its own initiative or at the request of the Government of Laos. The article also provides that when the Commission carries out investigations on its own initiative, decisions to undertake the investigations and decisions on the carrying out thereof are to be taken by majority vote. If, however, the Government of Laos requests an investigation, it must be made regardless of the views of the individual members of the Commission.

Article 16 of the Protocol states:

For the exercise of its functions the Commission shall, as necessary, set up inspection teams, on which the three member-States of the Commission shall be equally represented. Each member-State of the Commission shall ensure the presence of its own representatives both on the Commission and on the inspection teams, and shall promptly replace them in the event of their being unable to perform their duties.

It is understood that the dispatch of inspection teams to carry out various specific tasks takes place with the concurrence of the Royal Government of Laos. The points to which the Commission and its inspection teams go for the purposes of investigation and their length

of stay at those points shall be determined in relation to the requirements of the particular investigation.

The intent of this statement is to ensure that the Commission and its teams have access to any point in Laos where it is necessary for them to go in the course of an investigation, and that they may remain there as long as is necessary.

The final version of Article 16 represents a compromise between two extremely divergent positions. The Franco-American draft protocol had originally proposed that the Commission set up fixed and mobile inspection teams which would have a number of "operating centers" at various points throughout Laos to permit their efficient functioning.<sup>57</sup> The draft spelled out quite broadly that the Commission and its teams were to have "free and unrestricted access" to all parts of Laos; "full freedom to inspect, at any time, all aerodromes, installations or establishments and all units, organizations and activities which are or might be of a military nature"; "access to aircraft and shipping registers, to manifests and other relevant documents"; and "all authority for investigation, inspection and verification necessary for the performance of their duties."<sup>58</sup> In the Franco-American draft, the absence of the representative of one of the member states would not prevent the Commission or its teams from performing their functions. In contrast, the Soviet draft agreement merely stated that "the Commission shall, in agreement with the Government of Laos, set up suitable groups" for the sole purpose of supervising and controlling the withdrawal of foreign troops and military personnel.<sup>59</sup>

Article 17 deals with the means of communication and transport which the Commission needs for the performance of its duties. They are to be provided "as a rule" by the Government of Laos for payment on mutually acceptable terms. Those which that government cannot provide may be acquired by the Commission from other sources. The understanding is expressed that the means of communication and transport will be under the Commission's administrative control. In other words, the Commission will have full control of any equipment, whether purchased, leased or otherwise acquired, during the period the equipment is at the disposal of the Commission for the performance of its functions.

4. *Voting in the Commission.* Article 14 of the Protocol relates to the voting procedures of the Commission. It provides that

Decisions of the Commission on questions relating to violations of Articles 2, 3, 4 and 6 of this Protocol or of the cease-fire referred to in Article 9, conclusions on major questions sent to the Co-Chairmen and all recommendations by the Commission shall be adopted unanimously.

On "other questions, including procedural questions, and also questions relating to the initiation and carrying out of investigations," the Commission's decisions are to be adopted by majority vote.

<sup>57</sup> LAOS/DOC/17/Rev. 1, Art. 13.

<sup>58</sup> LAOS/DOC/11, Art. 3.

<sup>59</sup> LAOS/DOC/5, Art. 8.



Article 14 represents a compromise between the original Soviet position that decisions on all questions, except procedural questions, should be unanimous, and the Western position that all decisions should be taken by majority vote. In sum, while the article does require unanimity in respect of decisions on questions relating to violations of certain specified articles of the Protocol, conclusions on major questions sent to the Co-Chairmen, and all recommendations by the Commission, the general rule prescribed is that decisions of the Commission shall be made by majority vote. Probably the most important area in which Commission decisions will be taken, that is, decisions as to the initiation and carrying out of investigations, is explicitly made a matter for majority decision, both by Articles 14 and 15. In addition, it is clear from Article 15 that when the Commission cannot reach unanimous agreement on any particular decision, conclusion or recommendation, individual members of the Commission may express and report majority and/or minority points of view. Since the Commission is not a police body nor one that takes enforcement actions, its really significant function is that of reporting to the Conference through the Co-Chairmen, and this function remains unimpaired.

5. *Reports.* Article 15 of the Protocol provides, *inter alia*, that the Commission "shall submit agreed reports on investigations in which differences which may emerge between members of the Commission on particular questions may be expressed." The term "agreed reports" in Article 15 is anomalous because the language immediately following that term specifically permits the expression of differing views. This language was intended to permit individual majority and/or minority opinions or evaluations to be reported. The formulation embodied in Article 15 is another aspect of the compromise between the Western and Communist positions on voting in the International Control Commission discussed in the preceding section. Article 8 on the rôle of the Co-Chairmen also provides for reports from the Commission. These reports, however, are not denominated "agreed" reports. The possibility of minority and/or majority reports is thus clearly implicit in Article 8.

6. *Rôle of the Government of Laos.* Several articles of the Protocol provide that the Commission is acting "with the concurrence of the Royal Government of Laos." For example, Article 9 provides that the Commission "shall, with the concurrence of the Royal Government of Laos, supervise and control the cease-fire in Laos." Article 11 provides: "It is understood that in the exercise of this function [investigating violations of the prohibition on the introduction of foreign regular and irregular troops, etc.] the Commission is acting with the concurrence of the Royal Government of Laos." Article 15 provides:

These investigations [when there are reasonable grounds for considering that a violation has occurred] shall be carried out at the request of the Royal Government of Laos or on the initiative of the Commission, which is acting with the concurrence of the Royal Government of Laos.

Article 16 provides: "It is understood that the dispatch of inspection teams to carry out various specific tasks takes place with the concurrence of the

Royal Government of Laos." The phrase also appears in the preamble to the Declaration on Neutrality, which states that the neutrality statement of the Lao Government is "with the concurrence of the Royal Government of Laos, incorporated in the present Declaration as an integral part thereof."

These clauses are indicative of the scrupulous regard which the Conference had for the sovereignty and independence of Laos. It was for that government, acting in a sovereign capacity, to express its agreement to the machinery the Conference was prepared to establish to ensure the sovereign and independent status of Laos. It is in this sense that these clauses derive their meaning and it was understood when they were written that this concurrence of the Government of Laos would be considered to have been given by that government through its signature of the Protocol. They were not meant to require the consent of the Lao Government on every occasion the International Control Commission wished to act.

That these clauses must be interpreted in a general sense, as suggested above, appears sufficiently clear not only from the text but from the negotiating history as well. For example, on one occasion Malcolm MacDonald, the United Kingdom Co-Chairman, referred to an Indian draft article prohibiting the introduction of military personnel into Laos and providing that the International Control Commission, to assist Laos in ensuring observance of this provision, should establish machinery "in agreement with the Government of Laos." Mr. MacDonald, commenting on the words "in agreement with" the Laotian Government, said that these words must be interpreted in a general sense. He went on to say that, if the Protocol were to establish an International Control Commission with defined functions and powers, it would automatically have the agreement of the Laotian Government because that government, if it wished, would be a signatory to the agreement. It would stultify the Commission, he said, and cripple its capacity to give assistance to the Laotian Government, if it had to get the formal agreement of the Laotian Government to every act and every step which it took in carrying out its duties under an agreement to which the Laotian Government had already given its full consent.<sup>60</sup>

It is against this background that the clauses were included in the relevant articles. They made explicit the consent of the Government of Laos to the various functions of the Commission set forth in those articles. At the same time, the Government of Laos gave such consent when it signed the Protocol.

#### *Relationship to 1954 Geneva Accords*

There is no specific provision in the Protocol which indicates whether or to what extent it is intended to supersede the 1954 Geneva Accords relating to Laos. The draft protocol on control, which was submitted by the French Delegation on June 6, 1961,<sup>61</sup> envisaged the continuing validity of the 1954 Agreement on the Cessation of Hostilities in Laos, except insofar as it specifically replaced any provisions of the earlier agreement. Indeed, the preamble of the French draft made this clear in the words

<sup>60</sup> 26th Restricted Meeting, Aug. 24, 1961. <sup>61</sup> See note 9 above.

"Desiring to supplement the Agreement of 20 July 1954 . . . by provisions designed to ensure that Laotian neutrality will be effectively protected"; and Article 12 enumerated the articles of the 1954 Agreement which the French draft was replacing. The American submission of June 26, 1961, in the nature of draft articles supplementing the French proposal,<sup>62</sup> adopted the same theory.

This proposal to tie the new agreement to the 1954 Accords was opposed *en masse* by the Communist bloc. Chang Han-fu, of the Chinese Delegation, who obviously spoke for the bloc as a whole, argued that the 1954 Agreement on the Cessation of Hostilities in Laos was adapted to the situation of an international war and that the document was concluded solely between the commanders-in-chief of both parties to the hostilities, whereas the Protocol deals with questions which are radically different from those of 1954.<sup>63</sup>

The Indian Delegation, in its draft proposals, did not seek to establish any link with the 1954 Agreement. The Indian representative, Arthur Lall, agreed with the Chinese spokesman that it would be wiser not to call the protocol an amendment to the 1954 Agreement.<sup>64</sup> The Delegation of Thailand, for different reasons, opposed the reference as contemplated by the Franco-American proposals. It argued that it was inconceivable for 14 nations to be signing an agreement as a supplement to a document which was concluded solely between two commanders-in-chief.<sup>65</sup>

In view of this divergence of opinion, the attempt to settle the relationship of the new agreements with the 1954 Accords was abandoned. While the 1954 Agreement thus is not specifically terminated, all of its provisions can be said to be superseded in effect by the new agreements, because the terms of the 1954 Agreement either are irrelevant to the present situation or are replaced by new provisions on the same subject matter.

#### CONCLUSIONS

The agreement on Laos reached in Geneva by fourteen countries with differing attitudes and political persuasions represents a hopeful step in the effort to settle "cold war" disputes by peaceful means. It indicates that through patient negotiation, flexible procedures, and skillful diplomacy, difficult, highly-charged and seemingly insoluble problems can be solved. It would not be unreasonable to suppose that if the agreement works smoothly in Laos, the prospects which it offers in other fields may be truly promising. Indeed, in the final plenary meeting of the Conference the representatives of practically every participating country echoed the sentiment expressed by Lord Home in his statement that the solution of the Laos problem "perhaps will be an example to us all in more difficult but equally important fields."<sup>66</sup>

The Laos Conference had to deal with many issues common to other outstanding international disputes today. It was faced, in the spring of

<sup>62</sup> *Ibid.*

<sup>64</sup> *Ibid.*

<sup>66</sup> LAOS/STA/118.

<sup>63</sup> 14th Restricted Meeting, Aug. 8, 1961.

<sup>65</sup> LAOS/STA/59.

1961, with a dangerous military conflict in Laos which threatened to spread and involve the great Powers. Once the Conference got under way, it was concerned with the problem of establishing international peace-keeping machinery.<sup>67</sup> In connection with the establishment of the International Control Commission it was confronted with the problem of the veto and the so-called "troika": the Soviet concept that international organizations, including the United Nations, should be so composed that representatives of the Communist, neutral and non-Communist countries would each have a veto power over action of the organization. The veto problem also arose in the context of the rôle which the Co-Chairmen should play in implementation of the agreements. The Conference also was faced with the question of how to deal with unrecognized regimes. The fact that solutions to these and other problems were reached, the nature of these solutions and the manner in which they were arrived at are matters which deserve study with a view to determining their applicability and relevance to other areas of international concern.

At the same time it may be well to make a more cautious evaluation of the significance of the Laos Conference. Perhaps basic to the settlement were fundamental political decisions taken by the Soviet Union and the United States to settle this dispute by peaceful means. The genuine desire of these Powers to settle the Laos question at the conference table was manifest in Geneva. It was expressed formally at the highest level in the Kennedy-Khrushchev meetings in Vienna.<sup>68</sup> It thus seems fair to say as a minimum that, when a common purpose emerges, as it did regarding Laos, reconciliation of very divergent and conflicting views on how to achieve that end can be accomplished through negotiation and the conference technique.

<sup>67</sup> For a discussion of the peace-keeping problem in connection with the Geneva Disarmament Conference, see the article by Alan F. Neidle in 57 A.J.I.L. 46-72 (1963).

<sup>68</sup> See p. 302 above.

## THE EMPLOYMENT OF PRISONERS OF WAR

BY COLONEL HOWARD S. LEVIE, U. S. A. (Ret.) \*

From the days when the Romans first came to appreciate the economic value of prisoners of war as a source of labor, and began to use them as slaves instead of killing them on the field of battle,<sup>1</sup> until the drafting and adoption by a comparatively large number of members of the then family of sovereign states of the Second Hague Convention of 1899,<sup>2</sup> no attempt to regulate internationally the use made of prisoner-of-war labor by the Detaining Power<sup>3</sup> had been successful.<sup>4</sup> The Regulations attached to that Convention dealt with the subject in a single article,<sup>5</sup> as did those attached to the Fourth Hague Convention of 1907<sup>6</sup> which, with relatively minor changes, merely repeated the provisions of its illustrious predecessor. A somewhat more extensive elaboration of the subject was included in the

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<sup>1</sup> Davis, "The Prisoner of War," 7 A.J.I.L. 521, 523 (1913).

<sup>2</sup> 32 Stat. 1803; U. S. Treaty Series, No. 403; 1 A.J.I.L. Supp. 129 (1907).

<sup>3</sup> The Detaining Power is the state which holds captured members of the enemy armed forces in a prisoner-of-war status. The Power in whose armed forces they were serving at the time of capture is known as the "Power upon which they depend."

<sup>4</sup> Part of Art. 76 of Professor Francis Lieber's famous General Orders No. 100, April 24, 1863, "Instructions for the Government of the Armies of the United States in the Field," had dealt with this subject unilaterally; and provisions with respect thereto had likewise been included in Art. 25 of the Declaration drafted at the Brussels Conference of 1874 (2 U. S. Foreign Relations (1875) 1017; 1 A.J.I.L. Supp. 96 (1907)), and in Arts. 71 and 72 of the "Oxford Manual" drafted by the Institute of International Law in 1880 (*Annuaire de l'Institut de Droit International*, 1881-1882). While these efforts unquestionably influenced in material degree the decisions subsequently reached at the international level, none of them constituted actual international legislation.

<sup>5</sup> Art. 6 thereof (cited note 2 above) reads:

"The State may utilise the labour of prisoners of war according to their rank and aptitude. Their tasks shall not be excessive, and shall have nothing to do with military operations.

"Prisoners may be authorised to work for the public service, for private persons, or on their own account.

"Work done for the State shall be paid for according to the tariffs in force for soldiers of the national army employed on similar tasks.

"When the work is for other branches of the public service or for private persons, the conditions shall be settled in agreement with the military authorities.

"The wages of the prisoners shall go towards improving their position, and the balance shall be paid them at the time of their release, after deducting the cost of their maintenance."

<sup>6</sup> 36 Stat. 2277; U. S. Treaty Series, No. 539; 2 A.J.I.L. Supp. 90 (1908).

1929 Geneva Convention relative to the Treatment of Prisoners of War<sup>7</sup> (hereinafter referred to as the 1929 Convention). And, although still far from perfect, the provisions concerning prisoner-of-war labor contained in the 1949 Geneva Convention relative to the Treatment of Prisoners of War<sup>8</sup> (hereinafter referred to as the 1949 Convention) constitute an enlightened attempt to legislate a fairly comprehensive code governing the major problems involved in the employment of prisoners of war by the Detaining Power.<sup>9</sup> The purpose of this study is to analyze the provisions of that code and to suggest not only how the draftsmen intended them to be interpreted, but also how it can be expected that they will actually be implemented by Detaining Powers in any future war.<sup>10</sup>

While there are very obvious differences between the employment of workers available through a free labor market and the employment of prisoners of war, even a casual and cursory study will quickly disclose a remarkable number of similarities. The labor union which is engaged in negotiating a contract for its members is vitally interested in: (1) the conditions under which they will work, including safety provisions; (2) their working hours and the holidays and vacations to which they will be entitled; (3) the compensation and other monetary benefits which they will receive; and (4) the grievance procedures which will be available to them. (Of course, in each industry there will also be numerous items peculiar to that industry.) Because of the uniqueness of prisoner-of-war status, the 1949 Diplomatic Conference which drafted the latest prisoner-of-war convention felt it necessary, in negotiating for the benefit of future prisoners of war, to continue to cover certain items in addition to those listed above, such as the categories of prisoners of war who may be compelled to work (a problem which does not normally exist for labor unions in a free civilian society, although it may come into existence in a total war economy); and, collateral to that, the specific industries in which they may or may not be employed. Inasmuch as these latter problems lie at the threshold of the utilization of prisoner-of-war labor, they will be considered before those enumerated above.

Before proceeding to a detailed analysis of the labor provisions of the 1949 Convention, and how one may anticipate that they will operate in time

<sup>7</sup> 47 Stat. 2021; U. S. Treaty Series, No. 846; 27 A.J.I.L. Supp. 59 (1933).

<sup>8</sup> 6 U. S. Treaties 3316; T.I.A.S., No. 3364; 75 U. N. Treaty Series 135 (1972); 47 A.J.I.L. Supp. 119 (1953).

<sup>9</sup> Arts. 49 through 57 and Art. 62 are the basic articles of the 1949 Convention relating to the subject of prisoner-of-war labor. Mention will also be made of a number of other articles which touch on the subject.

<sup>10</sup> The author does not believe in the inevitability of major wars in the future, but he does believe, as did the 59 states which sent representatives to the Diplomatic Conference in Geneva in 1949 and the 87 states which have since either ratified or adhered to the four Conventions for the Protection of War Victims produced at that Conference, that, human nature being what it is, the outlawing of war and the existence of a state of peace are insufficient reasons for the apathy and attitude of complete disregard of the development of the law of war which has characterized many experts in the field of international law. Fortunately, there is evidence that a change in this attitude has occurred in recent years.

of war, it seems both pertinent and appropriate to survey briefly the history of, and the problems encountered in, the utilization of prisoner-of-war labor during the past century. That period is selected because its earliest date represents the point at which cartels for the exchange of prisoners of war had ceased to have any considerable importance and yet belligerents were apparently still unaware of the tremendous potentiality of the economic asset which was in their hands at a time of urgent need.

The American Civil War (1861-1865) was the first major conflict involving large masses of troops and large numbers of prisoners of war in which exchanges were the exception rather than the rule.<sup>11</sup> As a result, both sides found themselves encumbered with great masses of prisoners of war; but neither side made any substantial use of this potential pool of manpower, although both suffered from labor shortages.<sup>12</sup> This was so, despite the statement in Lieber's Code<sup>13</sup> that prisoners of war "may be required to work for the benefit of the captor's government, according to their rank and condition," and despite the valiant efforts of the Quartermaster General of the Union Army, who sought unsuccessfully, although fully supported by Professor Lieber, to overcome the official reluctance to use prisoner-of-war labor. The policy of the Federal Government was that prisoners of war would be compelled to work "only as an instrument of reprisal against some act of the enemy."<sup>14</sup>

In 1874 an international conference, which included eminent representatives from most of the leading European nations, met in Brussels at the invitation of the Tsar of Russia "in order to deliberate on the draft of an international agreement respecting the laws and customs of war."<sup>15</sup> This conference prepared a text which, while never ratified, constituted a major step forward in the effort to set down in definitive manner those rules of land warfare which could be considered to be a part of the law of nations. It included, in its Article 25, a provision concerning prisoner-of-war labor which adopted, but considerably amplified, Lieber's single sentence on the subject quoted above. This article was subsequently adopted almost verbatim by the Institute of International Law when it drafted Articles 71 and 72 of its "Oxford Manual" in 1880;<sup>16</sup> and it furnished much of the material for Article 6 of the Regulations attached to the Second Hague Convention of 1899 and the same article of the Regulations attached to the Fourth Hague Convention of 1907.

Despite all of these efforts, the actual utilization of prisoner-of-war labor

<sup>11</sup> A general cartel governing the exchange of prisoners of war was entered into in 1862 (the Dix-Hill Cartel, July 22, 1862, War of the Rebellion, Series II, Vol. IV, p. 266 (1899)), but it was not observed to any great degree by either side. Lewis and Mewha, *History of Prisoner of War Utilization by the United States Army, 1776-1945* (hereinafter referred to as Lewis, History), pp. 29-30 (1955).

<sup>12</sup> Lewis, History 27, 41. For a vivid fictional, but factually accurate, picture of this waste of manpower in the South, with its resulting evils to the prisoners of war themselves, see Kantor, *Andersonville* (1955).

<sup>13</sup> Note 4 above.

<sup>14</sup> Lewis, History 37, 38-39.

<sup>15</sup> Preamble, Declaration of Brussels, note 4 above.

<sup>16</sup> Note 4 above.

remained negligible during the numerous major conflicts which preceded World War I. This last was the first modern war in which there was total economic mobilization by the belligerents; and there were more men held as prisoners of war and for longer periods of time than during any previous conflict. Nevertheless, it was not until 1916 that the British War Office could overcome opposition in the United Kingdom to the use of prisoner-of-war labor;<sup>17</sup> and after the entry of the United States into the war, prisoners of war held in this country were not usefully employed until the investigation of an attempted mass escape resulted in a recommendation for a program of compulsory prisoner-of-war labor, primarily as a means of reducing disciplinary problems.<sup>18</sup> When the belligerents eventually did find it essential to make use of the tremendous prisoner-of-war manpower pools which were available to them, the provisions of the Regulations attached to the Fourth Hague Convention of 1907 proved inadequate to solve the numerous problems which arose, thereby necessitating the negotiation of a series of bilateral and multilateral agreements between the various belligerents during the course of the hostilities.<sup>19</sup> Even so, the Report of the "Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties," created by the Preliminary Peace Conference in January, 1919, listed the "employment of prisoners of war on unauthorized works" as one of the offenses which had been committed by the Central Powers during the war.<sup>20</sup>

The inadequacies in this and other areas of the Fourth Hague Convention of 1907, revealed by the events which had occurred during the course of World War I, led to the drafting and ratification of the 1929 Convention.<sup>21</sup> It was this Convention which governed many of the belligerents during the

<sup>17</sup> Belfield, "The Treatment of Prisoners of War," 9 Transactions of the Grotius Society 181 (1924).

<sup>18</sup> Lewis, History 57. This was not the case in France, where the American Expeditionary Force had started planning for prisoner-of-war utilization even before any were captured, the established policy there being that all except officers would be compelled to work. *Ibid.* 59-62.

<sup>19</sup> See, for example, the Final Act of the Conference of Copenhagen, executed by Austria-Hungary, Germany, Rumania, and Russia on Nov. 2, 1917 (photostatic copy on file in The Army Library, Washington, D. C.); the Agreement between the British and Turkish Governments respecting Prisoners of War and Civilians, executed at Bern on Dec. 28, 1917 (111 Brit. and For. State Papers 557); the Agreement between France and Germany concerning Prisoners of War, executed at Bern on April 26, 1918 (*ibid.* 713); and the Agreement between the United States of America and Germany Concerning Prisoners of War, Sanitary Personnel, and Civilians, executed at Bern on Nov. 11, 1918 (U. S. Foreign Relations, 1918, Supp. 2, p. 103; 13 A.J.I.L. Supp. 1 (1919)). This latter Agreement contained a section of eleven articles (41-51) relating to prisoner-of-war labor.

<sup>20</sup> 14 A.J.I.L. 95, 115 (1920); History of the United Nations War Crimes Commission 35 (1948).

<sup>21</sup> Note 7 above. The "Final Report of the Treatment of Prisoners of War Committee," published in 30 International Law Association Reports 236 (1921), had contained a set of "Proposed International Regulations for the Treatment of Prisoners of War."



course of World War II;<sup>22</sup> but once again international legislation based on the experience gained during a previous conflict proved inadequate to control the more serious and complicated situations which occurred during a subsequent period of hostilities.<sup>23</sup> Moreover, the proper implementation of the provisions of any agreement must obviously depend in large part upon the good faith of the parties thereto—and belligerents in war are, perhaps understandably, not motivated to be unduly generous to their adversaries, with the result that frequently decisions are made and policies are adopted which either skirt the bounds of legal propriety or actually exceed such bounds. The utilization of prisoner-of-war labor by the Detaining Powers proved no exception to the foregoing. Practically all prisoners of war were compelled to work.<sup>24</sup> To this there can be basically no objection. But during the course of their employment many of the protective provisions of the 1929 Convention (and of the Fourth Hague Convention of 1907 which it complemented) were either distorted or simply disregarded.

The leaders of Hitler's Nazi Germany were aware of its shortage of labor and appreciated the importance of the additional pool of manpower afforded by prisoners of war as a source of that precious wartime commodity. Nevertheless, for a considerable period of time they permitted their ideological differences with the Communists to overcome their common sense and urgent needs.<sup>25</sup> And in Japan, which, although not a party to the

<sup>22</sup> As the U.S.S.R. was not a party to this Convention, it considered that its relations with Germany and the latter's allies on prisoner-of-war matters were governed by the Fourth Hague Convention of 1907. Report of the International Committee of the Red Cross on its Activities during the Second World War (hereinafter referred to as ICRC Report), Vol. I, p. 412. (No mention was made by the U.S.S.R. of the situation created by the *si omnes* clause contained in that Convention.) Japan, which was likewise not a party to the 1929 Convention, nevertheless announced its intention to apply that Convention *mutatis mutandis* on a basis of reciprocity. *Ibid.* 443.

<sup>23</sup> "The international instruments regulating the treatment of prisoners of war were drawn up on the basis of the experience gained in the war of 1914-1918 and did not contemplate the wholesale and systematic use which many countries have since made of captive labor." Anon., "The Conditions of Employment of Prisoners of War: The Geneva Convention of 1929 and its Application," 47 International Labour Review 169 (Feb., 1943).

<sup>24</sup> In February, 1944, only 60% of the prisoners of war in the United States were being employed; by April, 1945, that figure had increased to more than 93%. Lewis, *History* 125. In Germany "the mobilisation of prisoner labour has been organised as part of the general mobilisation of man-power for the execution of the economic programme." Anon., "The Employment of Prisoners of War in Germany," 48 International Labour Review 316, 318 (Sept., 1943).

<sup>25</sup> Thus, it has been stated that the improved feeding of Russian prisoners of war by the Nazis in 1942 was instituted in order to obtain an adequate labor performance, and "must be assessed as a tactical sacrifice of dogma for the sake of short-range benefits to the warring Reich." Dallin, *German Rule in Russia* 423 (1957). In the *Milch Case* (U. S. v. Erhard Milch), 2 Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10 (hereinafter referred to as *Trials*) 782, the Military Tribunal quoted a 1943 statement of Himmler who, in speaking of the Russian prisoners of war captured early in the war, deplored the fact that at that time the Germans "did not value the mass of humanity as we value it today, as raw material, as labor."

1929 Convention, had committed itself to apply its provisions, those relating to prisoner-of-war labor were among the many which were assiduously violated.<sup>26</sup>

Like the other belligerents, the United States found an urgent need for prisoner-of-war labor, both within its home territory and in the rear areas of the embattled continents. One study even goes so far as to assert that the use of Italian prisoners of war in the Mediterranean theater was the only thing which made it possible for the United States to sustain simultaneously both the Italian campaign and the invasion of Southern France, thereby hastening the downfall of Germany.<sup>27</sup> Similarly, it was found that in the United States the use of prisoners of war for work at military installations, and in agriculture and other authorized industries, served to release both Army service troops and civilians for other types of work which were more directly related to the war effort.<sup>28</sup>

While the benefits of prisoner-of-war labor to the Detaining Power are patent, benefits flowing to the prisoners of war themselves as a result of their use in this manner are no less apparent. The reciprocal benefits resulting from the proper use of prisoner-of-war labor is well summarized in the following statement:

The work done by the PW has a high value for the Detaining Power, since it makes a substantial contribution to its economic resources. The PW's home country has to reckon that the work so done increases the war potential of its enemy, maybe indirectly; and yet at the same time it is to its own profit that its nationals should return home at the end of hostilities in the best possible state of health. Work under normal conditions is a valuable antidote to the trials of captivity, and helps PW to preserve their bodily health and morale.<sup>29</sup>

During the close reappraisal of the 1929 Convention which followed World War II, the provisions thereof dealing with the labor of prisoners of war were not overlooked; and the Diplomatic Conference which met in Geneva in 1949 redrafted many of those provisions of the 1929 Convention in an effort to plug the loopholes which the events of World War II had revealed. It is the 1949 Convention resulting from this work which will be used in the review and analysis of the rights and obligations of belligerents and prisoners of war in any future conflict insofar as prisoner-of-war labor is concerned.

<sup>26</sup> "The policy of the Japanese Government was to use prisoners of war and civilian internees to do work directly related to war operations." Judgment of the International Military Tribunal for the Far East 1082 (mimeo., 1948).

<sup>27</sup> Lewis, *History* 199.

<sup>28</sup> Fairchild and Grossman, *The Army and Industrial Manpower* 194 (1959).

<sup>29</sup> 1 ICRC Report 327. See also Pictet, *Commentary on the Geneva Convention relative to the Treatment of Prisoners of War* (hereinafter referred to as Pictet, *Commentary*) 260 (1960); Flory, *Prisoners of War* 71 (1942); Girard-Claudon, *Les prisonniers de guerre en face de l'évolution de la guerre* 151 (unpublished thesis, Université de Dijon, 1949); Feilchenfeld, *Prisoners of War* 47 (1948). Art. 49 of the 1949 Convention specifically states that the utilization of prisoner-of-war labor is "with a view particularly to maintaining them in a good state of physical and mental health."

## CATEGORIES OF PRISONERS OF WAR WHO MAY BE COMPELLED TO WORK

In general, Article 49 of the 1949 Convention provides that all prisoners of war, except commissioned officers, may be compelled to work. However, this statement requires considerable elaboration and is subject to a number of limitations.

a. The Detaining Power is specifically limited in that it may compel only those prisoners of war to work who are physically fit, and the work must be of a nature to maintain them "in a good state of physical and mental health." In determining physical fitness, it is prescribed that the Detaining Power must take into account the age, sex, and physical aptitude of each individual prisoner of war. It may be assumed that these qualities are to be considered not only in determining whether a prisoner of war should be compelled to work but also in determining the type of work to which the particular prisoner of war should be assigned. For example, women (and it must be accepted that in any future major war there will be many female prisoners of war) should not be given tasks requiring the lifting and moving of heavy loads; and, frequently, men who are physically fit to work may not have the physical aptitude for certain jobs by reason of their size, weight, strength, age, lack of experience, et cetera.<sup>30</sup> It would appear that the provisions of Article 49 of the 1949 Convention require the Detaining Power, within reasonable limits, to assure the assignment of the proper man to the job.

Moreover, under the provisions of Articles 31 and 55 of the 1949 Convention, the determination of physical fitness must not only be made by medically qualified personnel and at regular monthly intervals, but also whenever the prisoner of war considers himself physically incapable of working. It should be noted that the first of the cited articles is a general one which requires the Detaining Power to conduct thorough medical inspections, monthly at a minimum, primarily in order to supervise the general state of health of the prisoners of war and to detect contagious diseases; while the second, which calls for a medical examination at least monthly, is intended to verify the physical fitness of the prisoner of war for work, and particularly for the work to which he is assigned.<sup>31</sup> It is evi-

<sup>30</sup> During World War II the Nazi use as miners of prisoners of war who did not have the necessary physical aptitude for this type of work and who were inexperienced was a constant source of trouble. The I. G. Farben Case (U. S. v. Krauch), 8 Trials 1187. The ICRC Delegate in Berlin finally proposed to the German High Command that prisoners of war over 45 years of age be exempted from working as miners, but this proposal was rejected by the Germans on the ground that the 1929 Convention made no reference to age as a criterion of physical qualification for compulsory labor. 1 ICRC Report 329-331. This situation has now been rectified.

<sup>31</sup> The procedures followed in the United States during World War II were as follows: "Prisoners of war . . . are given a complete physical examination upon their first arrival at a prisoner of war camp. At least once a month thereafter, they are inspected by a medical officer. Prisoners are classified by the attending medical officer according to their ability to work, as follows: (a) heavy work; (b) light work; (c) sick, or otherwise incapacitated—no work. Employable prisoners perform work only when the job is commensurate with their physical condition." MacKnight, "The Employ-

dent that one medical examination directed simultaneously towards both objectives would meet the obligations thus imposed upon the Detaining Power.<sup>32</sup>

The provision of Article 55 which authorizes a prisoner of war to appear before a medical board whenever he considers himself incapable of working has grave potentialities. It can be expected that well-organized prisoners of war, intent upon creating as many difficulties as possible for the Detaining Power, will be directed by their anonymous leaders to report themselves *en masse* and at frequent intervals as being incapable of working and to request that they be permitted to appear before the medical authorities of the camp. Is the Detaining Power to be helpless, if thousands of prisoners of war, many more than can be examined by available medical personnel, all elect at the same time to claim sudden physical unfitness and to demand physical examinations? Where the Detaining Power has good grounds for believing that such is the situation, and this will normally be quite apparent, it would undoubtedly be justified in compelling every prisoner of war to work until his turn for examination is reached in regular order with the complement of medical personnel which had previously been adequate for the particular prisoner-of-war camp. Thus the act of the prisoners of war themselves in attempting to turn a provision intended for their protection into an offensive weapon, illegal in its inception, would actually result in their causing harm to the very people it was intended to protect—the truly physically unfit prisoners of war.

The suggestion has been made that the medical examinations to determine physical fitness for work should preferably be made by the retained medical personnel of the Power upon which the prisoners of war depend.<sup>33</sup> This suggestion is based upon the fact that Article 30, in providing for the medical care and treatment of prisoners of war, states that they “shall have the attention, preferably, of medical personnel of the Power on which they

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ment of Prisoners of War in the United States,” 50 International Labour Review 47 (July, 1944).

Major MacKnight's statement was based, at least in part, upon the U. S. War Department's Prisoner of War Circular No. 1, Regulations Governing Prisoners of War, sec. 87 (Sept., 1943), which was, in turn, taken from Art. 48 of the 1918 U. S.-German Agreement, note 19 above.

<sup>32</sup> Art. 31 speaks of “medical inspections,” while Art. 55 uses the term “medical examinations.” (A similar variation is found in the French version of the 1949 Convention.) It does not appear that any substantive difference was intended by the draftsmen, particularly inasmuch as Art. 31 considerably amplifies the term “inspection,” making it clear that much more than a mere visual inspection was intended.

<sup>33</sup> Pictet, Commentary 289. Captured medical service personnel are not prisoners of war and are entitled to be repatriated as soon as possible. Arts. 28 and 30, 1949 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. 6 U. S. Treaties 8114; T.I.A.S., No. 3362; 75 U. N. Treaty Series 31 (1970). However, the Detaining Power may temporarily retain some of these individuals to provide needed medical attention to prisoners of war, primarily those belonging to the armed forces of the Power to which the medical service personnel themselves belong (Art. 33). When so employed they are known as “retained medical personnel.”

depend and, if possible, of their nationality." However, there is considerable difference between permitting the medical personnel of the Power on which the prisoner of war depends to render medical assistance when he is ill or injured, and permitting such personnel to say whether or not he is physically qualified to work. It is not believed that any Detaining Power would, or that the Convention intended that it should, permit retained medical personnel to make final decisions in this regard.<sup>34</sup>

b. In his Instructions, Lieber gave no indication that the labor of *all* prisoners of war, regardless of rank, was not available to the Detaining Power in some capacity. However, Article 25 of the Declaration of Brussels and Article 71 of the "Oxford Manual" both provided that prisoners of war could only be employed on work which would not be "humiliating to their military rank." The Second Hague Convention of 1899 reverted to Lieber's rather vague phrase, "according to their rank"; and the Fourth Hague Convention of 1907 went a step further, adding to the foregoing phrase the words "officers excepted," thereby giving a legislative basis to a practice which had, in fact, already been followed.<sup>35</sup>

Both the 1929 Convention and the 1949 Convention are much more specific in this regard, the latter amplifying and clarifying the already more detailed provisions of its predecessor. While the first paragraph of Article 49 of the 1949 Convention authorizes the Detaining Power to utilize the labor of "prisoners of war," the second paragraph of that article specifies that non-commissioned officers (NCOs) may only be required to do supervisory work, and the third paragraph states that officers may not be compelled to work. It thus becomes clear that, as used in the first paragraph of this article, the term "prisoners of war" is intended to refer only to enlisted men below the non-commissioned officer grade.

During World War II several problems arose with respect to the identification of non-commissioned officers for labor purposes. In the first place, many NCOs had had their identification documents taken from them upon capture (probably for intelligence purposes) and were thereafter unable to establish their entitlement to recognition of their grade.<sup>36</sup> On the other hand, a number of individuals apparently claimed NCO grades to which they were not actually entitled, probably in order to avoid hard labor as well

<sup>34</sup> Similarly, the function of determining whether a prisoner of war should be repatriated for medical reasons is not allocated to the retained medical personnel, but is the responsibility of the medical personnel of the Detaining Power and of the Mixed Medical Commissions (Art. 112).

<sup>35</sup> During the Russo-Japanese War (1904-1905) the Japanese exempted officer prisoners of war from the requirement to work. Ariga, *La guerre russo-japonaise au point de vue de droit international* 114 (1907). But compare Takahashi, who stated that Japan did not impose labor on *any* Russian prisoners of war! *International Law Applied to the Russo-Japanese War* 125 (1908).

<sup>36</sup> The ICRC states that 26,000 German non-commissioned officer prisoners of war, whose identity papers had been taken from them in England, were compelled to work while interned in the United States because of their inability to prove their status. 1 ICRC Report 839. The German General Staff urged German non-commissioned officer prisoners of war to work, probably in order to avoid the deterioration, both physical and mental, which comes to the completely inactive prisoners of war. *Ibid.*

as to be entitled to the higher advances in pay.<sup>37</sup> In a number of respects the 1949 Convention attempts to obviate these problems. Thus, Article 21 of the 1929 Convention provided only that, upon the outbreak of hostilities, the belligerents would communicate to one another the titles and ranks in use in their armies in order to assure "equality of treatment between corresponding ranks of officers and persons of equivalent status." This was construed as limiting the requirements of this exchange of information to the ranks and titles of commissioned officers. Article 43 of the new Convention makes it clear that information is to be exchanged concerning the ranks and titles of *all* persons who fall within the various categories of potential prisoners of war enumerated in the Convention.<sup>38</sup> Further, during World War II the military personnel of each belligerent carried such identification documents, if any, as that belligerent elected to provide to its personnel. In addition, as just noted, it was not unusual for capturing personnel to seize these documents for whatever intelligence value they might have, leaving the prisoner of war with no official identification material. The 1949 Convention attempts to rectify both of these defects. In Article 17 it provides for an identification card containing, as a minimum, certain specified material concerning identity; prescribes the desirable type of card; provides that it be issued in duplicate; and states that while the prisoner of war must exhibit it upon the demand of his captors, under no circumstances may it be taken from him. This article, if complied with by the belligerents, should do much to eliminate the problem of identifying non-commissioned officers, which existed during World War II and which undoubtedly resulted in many incorrect decisions.

Two other problems connected with the labor of non-commissioned officers are worthy of comment. On occasions disputes may arise as to the types of work which can be construed as falling within the term "supervisory." The drafters of the 1949 Convention made no attempt to solve this problem. There is much merit in the solution offered by one authority, who says:

The term "supervisory work" is generally recognized as denoting administrative tasks which usually consist of directing the other ranks; it obviously excludes all manual labor.<sup>39</sup>

<sup>37</sup> Early in 1945 the U. S. military authorities discovered that many German prisoners of war had false documents purporting to prove non-commissioned status. They thereupon required all German prisoners of war who claimed to be non-commissioned officers to produce proof of such status in the form of a "*soldbuch*" or other official document. Thousands were unable to do so and were reclassified as privates. A Brief History of the Office of the Provost Marshal General, World War II, 516 (mimeo., 1946). To some extent these may have been the same prisoners of war referred to in the preceding note.

<sup>38</sup> It appears to the writer that the U. S. Army has created problems for itself in this respect by the establishment of a "specialist" classification of enlisted men who, although grouped in the same statutory grades as non-commissioned officers, are specifically stated not to be such. U. S. Army Regulations 600-201, June 20, 1956. The strict interpretation of the term "non-commissioned officers" contemplated by the U.S.S.R. is evidenced by its expressed desire to limit non-commissioned officer labor exemption privileges to regular army ("re-enlisted") personnel. Final Record of the Diplomatic Conference of Geneva of 1949 (hereinafter referred to as Final Record), Vol. IIA, pp. 348, 361, 566.

<sup>39</sup> Pictet, Commentary 262.

The other problem relates to the right of a non-commissioned officer, who has exercised the privilege given him under both conventions to request work other than supervisory, thereafter to withdraw his request. During World War II different practices were followed by the belligerents. Thus Germany gave British non-commissioned officers the right to withdraw their requests;<sup>40</sup> while the policy of the United States was not to grant such requests for non-supervisory work in the first place, unless they were for the duration of captivity in the United States.<sup>41</sup> It has been urged that, inasmuch as a non-commissioned officer is free to undertake non-supervisory work, he should be equally free to discontinue such work, subject to the right of the Detaining Power to provide him with such employment only if he agrees to work for a fixed term, which may be extended upon his request.<sup>42</sup> This appears to be a logical and practical solution to the problem, although it is probably one to which not every belligerent will subscribe.

Officers cannot be required to do even supervisory work unless they request it. Once they have done so, the problems relating to their labor are very similar to those relating to the voluntary labor of non-commissioned officers, except that they were apparently rather generally permitted to discontinue working whenever they decided to do so. In general, the labor of officers has not caused any material dissension between belligerents.<sup>43</sup>

c. Scattered throughout the 1949 Convention are a number of other provisions specifically limiting the work which may be required of certain categories of enemy personnel, prisoners of war or others, held by a Detaining Power. Thus, medically trained personnel who, when captured, were not assigned to the medical services in the enemy armed forces and who are, therefore, ordinary prisoners of war, may be required to perform medical functions for the benefit of their fellow prisoners of war; but if they are so required, they are entitled to the treatment accorded retained medical personnel<sup>44</sup> and are exempted from any other work (Article 32). The same rule applies to ministers of religion who were not serving as such when captured (Article 36). Prisoners of war assigned to provide essential services in the camps of officer prisoners of war may not be required to

<sup>40</sup> Sec. 59, German Regulations, Compilation of Orders No. 13, May 16, 1942. The apparent magnanimity of this provision is somewhat nullified by the last two sentences thereof, which indicate that "the employment of British non-commissioned officers has resulted in so many difficulties that the latter have by far outweighed the advantages. The danger of sabotage, too, has been considerably increased thereby."

<sup>41</sup> U. S. War Department Technical Manual 19-500, Enemy Prisoners of War, Oct. 5, 1944, Ch. 5, Sec. I, par. 4c. A draft revision of this Manual, which is currently under consideration in the Department of the Army, provides that "a non-commissioned officer may, at any time, revoke his voluntary request for work."

<sup>42</sup> Pictet, Commentary, *loc. cit.* The Commentary continues with the statement that "during the Second World War, however, prisoners of war were sometimes more or less compelled to sign a contract for an indefinite period which bound them throughout their captivity; that would be absolutely contrary to the present provision." The present writer confesses himself unable to identify the portion of Art. 49 of the 1949 Convention which so provides, or to determine wherein, in this respect, it differs from the provisions of the 1929 Convention.

<sup>43</sup> 1 ICRC Report 337-338.

<sup>44</sup> Note 33 above.

perform any other work (Article 44). And prisoners' representatives may likewise not be required to perform any other work, but this restriction applies only "if the accomplishment of their duties is thereby made more difficult" (Article 81). While these various provisions are not of very great magnitude in the over-all prisoner-of-war picture, they can, of course, be of major importance to the particular individuals involved.

#### TYPES OF WORK WHICH PRISONERS OF WAR MAY BE COMPELLED TO PERFORM

The types of work which prisoners of war may be compelled to perform and the industries to which they may be assigned have generated much controversy. Long before final agreement was reached thereon at the 1949 Geneva Diplomatic Conference, the article of the Convention concerned with the subject of authorized labor was termed "the most disputed article in the whole Convention, and the most difficult of interpretation."<sup>45</sup> Unfortunately, it appears fairly certain that the agreements ultimately reached in this area are destined to magnify, rather than to minimize or eliminate, this problem.<sup>46</sup>

The early attempts to draft rules concerning the categories of labor in which prisoners of war could be employed merely authorized their employment on "public works which have no direct connection with the operations in the theater of war,"<sup>47</sup> or stated that the tasks of prisoners of war "shall have nothing to do with the military operations."<sup>48</sup> The insufficiency of these provisions having been demonstrated by the events of World War I, an attempt at elaboration was made in drafting the comparable provisions (Article 31) of the 1929 Convention, in which were included not only prohibitions against the employment of prisoners of war on labor having a "direct relation with war operations," but also against their employment on several specified types of work ("manufacturing and transporting arms or munitions of any kind, or . . . transporting material intended for combatant units").

During World War II these latter provisions proved no more successful than their predecessors in regulating prisoner-of-war labor. The term "direct relation with war operations" once again demonstrated itself to be ex-

<sup>45</sup> Statement of Mr. William H. Gardner (U.K.), IIA Final Record 442. In a statement in a similar vein, Brig. Gen. Joseph V. Dillon, then the Provost Marshal General of the U. S. Air Force, and a member of the U. S. Delegation at Geneva, later wrote:

"Perhaps no section of the Convention gave rise to more debate and expressions of differences of view than that dealing with 'Labour of Prisoners of War.' At the outset, it appeared that all that could be agreed upon was the fact that the 1929 treatment of the subject was inadequate and ambiguous." "The Genesis of the 1949 Convention Relative to the Treatment of Prisoners of War," 5 *Miami Law Quarterly* 40, 51 (1950).

<sup>46</sup> Baxter, Book Review, 50 *A.J.I.L.* 979 (1956).

<sup>47</sup> Art. 25, Declaration of the Conference of Brussels (1874), note 4 above; Art. 71, "Oxford Manual" (1880), note 4 above.

<sup>48</sup> Art. 6, Second Hague Convention of 1899, notes 2 and 5 above. The only changes incorporated in Art. 6, Fourth Hague Convention of 1907, note 6 above, were periphrastic in nature.



ceedingly difficult to interpret<sup>49</sup> in a total war in which practically every economic resource of the belligerents is mobilized for military purposes.<sup>50</sup> So each belligerent attempting to comply with the labor provisions of the 1929 Convention found itself required to make a specific determination in all but the very few obvious cases as to whether a particular occupation fell within the ambit of the prohibitions.<sup>51</sup> As could be expected, there were many disputed decisions.

In drafting a proposed new convention aimed at obviating the many difficulties which had arisen during the two world wars, the International Committee of the Red Cross attempted a new approach to the prisoner-of-war labor problem. Instead of specifying prohibited areas in broad and general terms, as had been the previous practice, leaving to the belligerents, the Protecting Powers, and the humanitarian organizations the decision as to whether a specific task was or was not prohibited, it decided to list affirmatively and with particularity the categories of labor in which Detaining Powers would be permitted to employ prisoners of war, at least impliedly prohibiting their use in any type of work not specifically listed.<sup>52</sup> The International Red Cross Conference held at Stockholm in 1948, to which this new approach was proposed, accepted the idea of affirmatively specifying the areas in which prisoners of war could be required to work; but, instead of the enumeration of specifics which the Committee had prepared, the Conference substituted general terms.<sup>53</sup> The Committee was highly critical of this action.<sup>54</sup> At the 1949 Diplomatic Conference the United Kingdom proposed the substitution of the original proposal in place of

<sup>49</sup> "What constituted a direct relation with war operation was a matter of personal opinion or, indeed, guess." Dillon, *loc. cit.* note 45 above, at 52. Similarly, in the I. G. Farben Case (U. S. v. Carl Krauch), 7 Trials 1, the Military Tribunal said (8 *ibid.* 1189):

"To attempt a general statement in definition or clarification of the term 'direct relation to war operations' would be to enter a field that the writers and students of international law have found highly controversial. . . ."

<sup>50</sup> Flory, "Vers une nouvelle conception du prisonnier de guerre?" 58 *Revue générale de droit international public* 58 (1954); Janner, *La Puissance protectrice en droit international d'après les expériences faites par la Suisse pendant la seconde guerre mondiale* 54 (1948; original in German); Feilchenfeld, *op. cit.* note 29 above, at 13.

<sup>51</sup> The United States found it necessary to establish a Prisoner of War Employment Review Board, which was called upon to make a great number of decisions in this area. Mason, "German Prisoners of War in the United States," 39 *A.J.I.L.* 198 (1945). Postwar researchers have collated lists which include literally hundreds of occupations as to which specific decisions were made. Lewis, *History* 146-147, 166-167, 203; Tollefson, "Enemy Prisoners of War," 32 *Iowa Law Review* 51, note on 62 (1946).

<sup>52</sup> Draft Revised or New Conventions for the Protection of War Victims 82-83 (Art. 42) (XVIIth International Red Cross Conference, Stockholm, 1948).

<sup>53</sup> "... work which is normally required for the feeding, sheltering, clothing, transportation and health of human beings. . . ." 1 *Final Record* 83. It is of interest that this was substantially the policy which had been followed by the United States in interpreting the provisions of Art. 31 of the 1929 Convention. MacKnight, *loc. cit.* note 31 above, at 54.

<sup>54</sup> Remarks and Proposals submitted by the International Committee of the Red Cross (Diplomatic Conference, Geneva, 1949) 51-52.

that contained in the draft adopted at Stockholm, and it was this original text, with certain amendments which will be discussed later, which ultimately became Article 50 of the 1949 Convention.<sup>55</sup> While there is considerable merit to the new approach, the actual phraseology of the article leaves much to be desired.<sup>56</sup>

An analysis of the various provisions contained in Article 50 of the 1949 Convention and, to the extent possible, a delimitation of the areas covered, or probably intended to be covered, by each category of work which a prisoner of war may be "compelled" to do,<sup>57</sup> and the problems inherent in each, is in order.

(1) *Camp Administration, Installation or Maintenance.* This refers to the management and operation of the camps established for the prisoners of war themselves; in other words, broadly speaking, it constitutes their own "housekeeping." Early in World War II the United States divided all prisoner-of-war labor into two classes: class one, that related to their own camps; and class two, all other.<sup>58</sup> This distinction still appears to be

<sup>55</sup> Art. 50 reads:

"Besides work connected with camp administration, installation or maintenance, prisoners of war may be compelled to do only such work as is included in the following classes:

- (a) agriculture;
- (b) industries connected with the production or the extraction of raw materials, and manufacturing industries, with the exception of metallurgical, machinery and chemical industries; public works and building operations which have no military character or purpose;
- (c) transport and handling of stores which are not military in character or purpose;
- (d) commercial business, and arts and crafts;
- (e) domestic service;
- (f) public utility services having no military character or purpose.

"Should the above provisions be infringed, prisoners of war shall be allowed to exercise their right of complaint, in conformity with Article 78."

<sup>56</sup> In its Report to the Plenary Assembly of the Diplomatic Conference, Committee II (Prisoners of War) characterized this article as one which "clarifies [it] by a limitative enumeration of the categories of work which prisoners may be required to do." 2A Final Record 566. On the contrary, the expression "military character and purpose" used in subpars. b, c, and f, of Art. 50, is almost indefinable. As to these subparagraphs, the basic problem, which existed when the words "war operations" were used, remains unchanged. Pictet, Commentary 266.

<sup>57</sup> The difficulties experienced in selecting the appropriate verb to be used in the opening sentence of Art. 50 were typical of the over-all drafting problem. The following terms were contained in or suggested for the various texts, beginning with the original IORC draft, which was submitted to the 1948 Stockholm Conference, and continuing chronologically through the various drafts, amendments, and discussions, until final approval of the article by the Plenary Assembly: "obliged to" (note 52 above); "required to" (1 Final Record 83); "obliged to" (3 *ibid.* 70); "employed on" (2A *ibid.* 272); "engaged in" (*ibid.* at 470); "obliged to" (*ibid.* at 844); "compelled to" (2B *ibid.* 176); and "compelled to" (Art. 50, note 55 above).

<sup>58</sup> Par. 77, Prisoner of War Circular No. 1, note 31 above. Par. 78 of the same Circular contained the following informative enumeration:

"78. Labor in class one is primarily for the benefit of prisoners. It need not be confined to the prisoner of war camp or to the camp area. Class one labor includes:

a valid one. It has been estimated that the use of prisoners of war in the United States for the maintenance and operation of their own camps and of other military installations<sup>59</sup> constituted their major utilization.<sup>60</sup> While this is believed to be somewhat of an overstatement, it can be assumed that a very considerable portion of them will always be so engaged. However, it can also be assumed that in any future major conflict demands for prisoner-of-war labor will be so great that shortages will exist, requiring that the administration of prisoner-of-war camps be conducted on an extremely austere basis.

(2) *Agriculture*. This field of prisoner-of-war utilization, with its collateral field of food processing, combines with camp administration to account for the labor of the great majority of employed prisoners of war.<sup>61</sup> There are no restrictions imposed by the Convention on the employment of prisoners of war in agriculture,<sup>62</sup> the fact that the product of their labor may eventually be used in the manufacture of a military item or be supplied to and consumed by combat troops being too remote to permit of, or warrant, restrictions.

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"a. That which is necessary for the maintenance or repair of the prisoner of war camp compounds including barracks, roads, walks, sewers, sanitary facilities, water pipes, and fences.

"b. Labor incident to improving or providing for the comfort or health of prisoners, including work connected with the kitchens, canteens, fuel, garbage disposal, hospitals and camp dispensaries.

"c. Work within the respective prisoner companies as cooks, cook's helpers, tailors, cobblers, barbers, clerks and other persons connected with the interior economy of their companies. In apportioning work, consideration will be given by the company commander to the education, occupation, or profession of the prisoner."

<sup>59</sup> The utilization of prisoner-of-war labor for the operation and maintenance of military installations occupied by the armed forces of the Detaining Power does *not* fall within the classification of camp administration referred to in the Convention. While many such uses would probably come within the category of domestic services (cooks, cook's helpers, waiters, kitchen police, etc.), which are authorized, it would seem that many others are no longer permitted. (Employment in the Prisoner of War Information Bureau maintained by the Detaining Power is specifically authorized by Art. 122.)

<sup>60</sup> Fairchild, *op. cit.* note 28 above, at 190. See also MacKnight, *loc. cit.* note 31 above, at 57.

<sup>61</sup> In the spring of 1940 more than 90% of the Polish prisoners of war held by the Germans were employed in agriculture; and while this figure later dropped considerably, it always remained extremely high. Anon., "The Employment of Prisoners of War in Germany," note 24 above, at 317. In the United States, even though more than 50% of the man-months worked in industry by prisoners of war were performed in agricultural work, the demands for such labor could never be fully met. Lewis, *History* 125-126. An exception to the foregoing occurred in Canada, where the great majority of prisoners of war were used in the lumbering industry. Anon., "The Employment of Prisoners of War in Canada," 51 *International Labour Review* 335, 337 (March, 1945).

<sup>62</sup> Pictet, *Commentary* 266. It is interesting to note that the enumeration originally prepared by the ICRC (note 52 above), which was ultimately restored to the Convention at the behest of the U. K. Delegation to the Conference, did not include agriculture as a separate item. A member of the U. S. Delegation urged that it be specifically listed, and his proposal was adopted without discussion or opposition. 2A *Final Record* 470.

(3) *Production or Extraction of Raw Materials.* This category of authorized compulsory employment includes activities in such industries as mining, logging, quarrying, et cetera. It is one of the areas in which problems are constantly arising and in which there are frequent disagreements between belligerents as well as between Detaining Powers and Protecting Powers or humanitarian organizations. Thus, after the conclusion of World War II the International Committee of the Red Cross reported that it was called upon to intervene more frequently with respect to prisoners of war who worked in mines than with respect to any other problem.<sup>63</sup>

Inasmuch as the utilization of prisoners of war in this field has been, and continues to be, authorized, the problems which arise usually relate to the physical ability of the particular prisoner of war to participate in heavy and difficult labor of this nature, and to working conditions, including safety precautions and equipment, rather than to the fact of the utilization of prisoners of war in the specific industry. The first of these problems has already been reviewed and the latter will be discussed at length in the general analysis of that specific problem.

(4) *Manufacturing Industries (except Metallurgical, Machinery, and Chemical).*<sup>64</sup> In modern days of total warfare and the total mobilization of the economy of belligerent nations, it has become increasingly impossible to state with positiveness that any particular industry does not have *some* connection with the war effort. Where the degree of such connection is the criterion for determining the permissibility of the use of prisoners of war in a particular industry, as it was prior to the 1949 Convention, problems and disputes are inevitable. In this respect, by authorizing compulsory prisoner-of-war labor in most manufacturing industries and by specifically prohibiting it in the three categories of industries which will be engaged almost exclusively in war work, the new Convention represents

<sup>63</sup> 1 ICRC Report 329. For a specific example, see note 30 above. Unfortunately, little data is available concerning the activities of Protecting Powers in this regard, as they rarely publish any details of their wartime activities, even after the conclusion of peace (Levie, "Prisoners of War and the Protecting Power," 55 A.J.I.L. 374, 378 (1961)). An unofficial report of Swiss activities as a Protecting Power during World War II is contained in Janner, note 50 above.

<sup>64</sup> The source of some of the wording and punctuation of subpar. (b) of Art. 50 is somewhat obscure. As submitted by Committee II (Prisoners of War) to the Plenary Assembly of the Diplomatic Conference, it read:

"... manufacturing industries, with the exception of iron and steel, machinery and chemical industries and of public works, and building operations which have a military character or purpose" (2A Final Record 585-586). Although this portion of Art. 50 was approved by the Plenary Assembly without amendment, in the Final Act of the Conference (which is, of course, the official, signed version of the Convention), the same provision reads:

"... manufacturing industries, with the exception of metallurgical, machinery and chemical industries; public works and building operations which have no military character or purpose" (1 Final Record 254). These changes in wording and punctuation (made in the English version only) represent a considerable clarification and should eliminate many disputes which might otherwise have arisen. However, it would be interesting to know their origin!

a positive and progressive development in the law of war and has probably eliminated many potential disputes.

During World War II the nature of the item manufactured and, to some extent, its intended ultimate destination determined whether or not the use of prisoners of war in its manufacture was permissible. Thus, in the United States it was determined that prisoners of war could be used in the manufacture of truck parts, as these had a civilian, as well as a military, application; but that they could not be used in the manufacture of tank parts, as these had only a military application.<sup>65</sup> Under the 1949 Convention neither the nature nor the ultimate destination nor the intended use of the item being manufactured is material. *All* motor vehicles fall within the category of "machinery" and prisoners of war therefore may not be used in their manufacture. On the other hand, prisoners of war may be used in a food processing or clothing factory, even though some, or perhaps all, of the food processed or clothing manufactured may be destined for the armed forces of the Detaining Power.

Two sound bases have been advanced for the decision of the Diplomatic Conference to prohibit in its entirety the compelling of prisoners of war to work in the metallurgical, machinery, and chemical industries: first, that in any general war these three categories of industries will unquestionably be totally mobilized and will be used exclusively for the armaments industry; and second, that factories engaged in these industries will be key objectives of enemy air (and now of enemy rocket and missile) operations and would, therefore, subject the prisoners of war to military action from which they are entitled to be isolated.<sup>66</sup> The Diplomatic Conference apparently balanced this total, industry-wide prohibition of compulsory labor in the three specified industries against the general authorization to use prisoners of war in every other type of manufacturing without requiring the application of any test to determine its relationship to the war effort.

It should be borne in mind that the prohibition under discussion is directed only against *compelling* prisoners of war to work in the specified industries. (As we shall see, by inverted phraseology, subparagraphs *b*, *c*, and *f* of Article 50 also prohibit the Detaining Power from compelling them to do certain other types of work where such work has "military character or purpose.") The question then arises as to whether they may volunteer for employment in those industries. Based upon the discussions at the Diplomatic Conference,<sup>67</sup> it clearly appears that the prohibitions

<sup>65</sup> Lewis, History 77. After World War II one of the U. S. Military Tribunals at Nuernberg held:

"... as a matter of law that it is illegal to use prisoners of war in armament factories and factories engaged in the manufacture of airplanes for use in the war effort." The Milch Case (U. S. v. Erhard Milch), note 25 above, at 867. The decision would, in part, probably have been otherwise had the defense been able to show that the airplanes were intended exclusively for civilian use.

<sup>66</sup> Pictet, Commentary 268-269.

<sup>67</sup> As indicated in note 57 above, the decision to use the words "compelled to" in the first sentence of Art. 50 was reached only after the consideration and rejection of

contained in Article 50 are not absolute in character and that a prisoner of war may volunteer to engage in the prohibited employments, just as he is affirmatively authorized by Article 52 to volunteer for labor which is "of an unhealthy or dangerous nature." The problem will, of course, arise of assuring that the prisoner of war is a true volunteer and that neither mental coercion nor physical force has been used to "persuade" him to volunteer to work in the otherwise prohibited field of labor.<sup>68</sup> However, the fact that this particular problem is difficult of solution (and that the possibility undoubtedly exists that some prisoners of war will be coerced into "volunteering") cannot be permitted to justify an incorrect interpretation of these provisions of the Convention, as to which the indisputable intent of the Diplomatic Conference is clearly evidenced by the *travaux préparatoires*.

(5) *Public Works and Building Operations Which Have No Military Character or Purpose.* With respect to this portion of the subparagraph, it is first necessary to determine the meaning to be ascribed to the phrase "military character or purpose." This is no easy task.<sup>69</sup> Because the term defies definition in the ordinary sense, it will be necessary to define by example. Moreover, the discussions at the Diplomatic Conference, unfortunately, provide little that is helpful on this problem.

A structure such as a fortification clearly has, solely and exclusively, a "military character." Conversely, a structure such as a bowling alley clearly has, solely and exclusively, a civilian character. The fortification is intended for use in military operations; hence it has not only a "military character" but also a "military purpose." The bowling alley is intended for exercise and entertainment; hence it does not have a "mili-

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numerous alternatives. Words such as "prisoners of war may only be employed in" were strongly urged because they would preclude the Detaining Power from using pressure to induce prisoners of war to "volunteer" for work which they could not be compelled to do (2A Final Record 343); and words such as "prisoners of war may be obliged to do only" ("compelled to do only") were just as strongly urged on the very ground that the alternative proposal would preclude volunteering (*ibid.* at 342). The proponents of the latter position were successful in having their phraseology accepted by the Plenary Assembly.

<sup>68</sup> See Levie, "Penal Sanctions for Maltreatment of Prisoners of War," 56 A.J.I.L. 433, at 450, note 71 (1962). The ICRC appears to be inconsistent in asserting that the prohibition against prisoners of war working in these industries is absolute (Pictet, Commentary 268), but that prisoners of war may volunteer to handle stores which are military in character or purpose (*ibid.* at 278), work which the Detaining Power is likewise prohibited from compelling prisoners of war to do. The statement that the absolute prohibition of Art. 7 against the voluntary renunciation of rights by prisoners of war was necessary "because it is difficult, if not impossible, to prove the existence of duress or pressure" (*ibid.* at 89) is, of course, equally applicable to all of the prohibitions of Art. 50, but the Diplomatic Conference obviously elected to take a calculated risk in this regard insofar as prisoner-of-war labor is concerned.

<sup>69</sup> In his article (note 45 above, at p. 52), General Dillon showed considerable restraint when he said merely that many delegations believed that the phrase "will create some difficulty in future interpretations." He had been much more vehement at the Diplomatic Conference! (2A Final Record 342-343.)

tary purpose," even if some or all of the individuals using it will be members of the armed forces.<sup>70</sup>

These examples have been comparatively black and white. Unfortunately, as is not unusual, there is also a large gray area. This is especially true of the term "military purpose." A structure will usually be clearly military or clearly civilian in character; but whether its purpose is military or civilian will not always be so easy of determination. A sewer is obviously civilian in character, and the fact that it is to be constructed between a military installation and the sewage disposal plant does not give it a military purpose. On the other hand, a road is likewise civilian in character, but a road leading only from a military airfield to a bomb dump would certainly have a military purpose. And a theater is civilian in character, but if it is a part of a military school installation and is to be used exclusively or primarily for the showing of military training films, then it, too, would have a military purpose. However, a theater which is intended solely for entertainment purposes, like the bowling alley, retains its civilian purpose, even though the audience will be largely military.

To summarize, if the public works or building operations clearly have a military character, prisoners of war may not be compelled to work thereon; if they do not have a military character, but are being undertaken exclusively or primarily for a military use, then they will usually have a military purpose and again prisoners of war may not be compelled to work thereon; while if they do not have a military character and are not being built exclusively or primarily for a military use, then they have neither military character nor purpose, and prisoners of war may be compelled to work thereon, even though there may be incidental military use.<sup>71</sup>

Having determined, insofar as is possible, the meaning of the phrase "military character or purpose," let us apply it to some of the problems which have heretofore arisen. Although the use of compulsory prisoner-of-war labor in the construction of fortifications has long been considered improper,<sup>72</sup> after World War II a United States Military Tribunal at Nürnberg found "uncertainty" in the law, and held such labor not obviously illegal where it was ordered by superior authority and was not required to be performed in dangerous areas.<sup>73</sup> Under the 1949 Convention

<sup>70</sup> The test is whether it is intended for military use, and not whether it is intended for use by the military. A bowling alley or a tennis court or a clubhouse might be intended, perhaps exclusively, for use by the military, but such structures certainly have no military use *per se* and, therefore, they do not have a "military purpose."

<sup>71</sup> The foregoing position closely resembles the legal interpretation of the phrase in question proposed by the present author and approved by The Judge Advocate General of the United States Army in an unpublished opinion written in 1955 (JAGW 1955/88). It differs from the ICRC position, which is that "everything which is commanded and regulated by the military authority is of a military character, in contrast to what is commanded and regulated by the civil authorities." Pictet, Commentary 267.

<sup>72</sup> Flory, *op. cit.* note 29 above, at 74.

<sup>73</sup> The High Command Case (U. S. v. Wilhelm von Leeb), 11 Trials 534. No such uncertainty existed in the minds of the members of the Tribunal with respect to the use of prisoners of war in the construction of combat zone field fortifications. *Ibid.* 538.

such a decision would clearly be untenable. A fortification is military in character and the use of compulsory prisoner-of-war labor in its construction is prohibited, no matter what the circumstances or location may be. The same is, of course, true of other construction of a uniquely military character such as ammunition dumps, firing ranges, tank obstacles, et cetera. On the other hand, bush clearance and the construction of firebreaks in wooded areas far from the battle fronts, the digging of drainage ditches,<sup>74</sup> the building of local air-raid shelters,<sup>75</sup> and the clearing of bomb rubble from city streets<sup>76</sup> are typical of the categories of public works and building operations which have neither military character nor purpose.

If the foregoing discussion has added but little light to the problem, it is hoped that it has, at least, focused attention on an area which can be expected to produce considerable controversy; and here, too, the problem will be further complicated by the question of volunteering.

(6) *Transportation and Handling of Stores Which Are Not Military in Character or Purpose.* Article 31 of the 1929 Convention prohibited the use of prisoners of war for "transporting arms or munitions of any kind, or for transporting material intended for combatant units." The comparable provisions of the 1949 Convention clarify this in some respects and obscure it in others.

The former provision created problems in the determination of the point of time at which material became "intended" for a combatant unit and of the nature of a "combatant unit." These problems have now been eliminated, the ultimate destination of the material transported or handled no longer being decisive.

Creating new difficulties is the fact that the problem of the application of the amorphous term "military in character or purpose" is presented once again. Apparently a prisoner of war may now be compelled to work in a factory manufacturing military uniforms or gas masks or camouflage netting, as these items are neither made by the three prohibited manufacturing industries nor is their military character or purpose material; but once manufactured, a prisoner of war may not be compelled to load them on a truck or freight car, as they probably have a military character and they certainly have a military purpose. Conversely, prisoners of war may not be compelled to work in a factory making barbed wire, inasmuch as such a factory is in the metallurgical industry; but they may be compelled to handle and transport it where it is destined for use on farms or ranches, as it would have no military character or purpose. Surely, the Diplomatic Conference intended no such inconsistent results, but it is difficult to justify any other conclusions.

Just as was determined with respect to public works and building operations, it is extremely doubtful that the ultimate destination or intended

<sup>74</sup> Lewis, *History* 89.

<sup>75</sup> Sec. 738, German Regulations, Compilation of Orders No. 39, July 15, 1944.

<sup>76</sup> Pictet, *Commentary* 267-268, where a distinction is justifiably drawn between clearing debris from city streets and clearing it from an important defile used only for military purposes.



use of the stores is, alone, sufficient to give them a military character or purpose. Thus, agriculture and food processing are, as has been seen, authorized categories of compulsory labor for prisoners of war. The food grown and processed obviously has no military character; and the fact that it will ultimately be consumed by members of the armed forces, even in a battle area, does not give it a military purpose. Accordingly, prisoners of war may be compelled to handle and transport such stores. The same reasoning would apply to blankets and sleeping bags, to tents and tarpaulins, to socks and soap.

In this general category, again, the prohibition is only against compulsion, and the prisoner of war who volunteers may be assigned to the work of transporting and handling stores, even though they have a military character or purpose. And, once again, the problem will arise of assuring that the prisoner of war has actually volunteered for the work to which he is assigned.

(7) *Commercial Business, and Arts and Crafts.* It is doubtful whether very many prisoners of war will be given the opportunity to engage in commercial business. The prisoner-of-war barber, tailor, shoemaker, cabinetmaker, et cetera, will usually be assigned to ply his trade within the prisoner-of-war camp, for the benefit of his fellow prisoners of war as a part of the camp activities and administration. However, it is conceivable that in some locales they might be permitted to set up their own shops or to engage in their trades as employees of civilian shops owned by citizens of the Detaining Power.

That prisoners of war will be permitted to engage in the arts and crafts is much more likely. No prisoner-of-war camp has ever lacked artists, both professional and amateur, who produce paintings, wood carvings, metal objects, et cetera, which find a ready market, through the prisoner-of-war canteen, among the military and civilian population of the Detaining Power. However, normally this category of work will be done on spare time as a remunerative type of hobby, rather than as assigned labor.

(8) *Domestic Service.* The specific inclusion of this category of labor merely permits the continuation of a practice which was rather generally followed during World War II and which has rarely caused any difficulty, inasmuch as domestic services have, of course, never been construed as having a "direct relation with operations of war." As long as the domestic services are not required to be performed in an area where the prisoner of war will be exposed to the fire of the combat zone, which is specifically prohibited by Article 23 of the 1949 Convention, the type of establishment in which he is compelled to perform the domestic services, and whether military or civilian, is not material.

(9) *Public Utility Services Having No Military Character or Purpose.* This is the third and final usage in Article 50 of the term "military character or purpose." Its use here is particularly inept, inasmuch as it is difficult to see how public utility services such as gas, electricity, water, telephone, telegraph, et cetera, can, under any circumstances, be deemed

to have a military character.<sup>77</sup> With respect to military purpose, the conclusions previously reached are equally applicable here. If the utility services are intended exclusively or primarily for military use, they will have a military purpose and the Detaining Power is prohibited from compelling prisoners of war to work on them. Normally, however, the same public utility services will be used to support both military and civilian activities and personnel and will not have a military purpose.

(10) *Unhealthy, Dangerous, or Humiliating Labor.* Article 52 of the 1949 Convention contains special provisions with respect to labor which is unhealthy, dangerous, or humiliating. These terms are not defined and it may be anticipated that their application will cause some difficulties and controversies. Nevertheless, the importance of the provision cannot be gainsaid.

*Employing* a prisoner of war on unhealthy or dangerous work is prohibited "unless he be a volunteer." *Assigning* a prisoner of war to labor which would be considered humiliating for a member of the armed forces of the Detaining Power is prohibited. No differences can be perceived to have resulted from the use of the verb "employed on" in the first instance and "assigned to" in the second. Accordingly, it is believed that the omission of the clause "unless he be a volunteer" in the case of "humiliating" labor would preclude a prisoner of war from volunteering for labor which is considered to be humiliating. Perhaps the draftsmen believed that there would be no volunteers for work of a humiliating nature and that such a clause would be mere surplusage. However, this is probably not so.

Article 32 of the 1929 Convention forbade "unhealthful or dangerous work." In construing this provision the United States applied three separate criteria: first, the inherent nature of the job (mining, quarrying, logging, et cetera); second, the conditions under which it was to be performed (under a tropical sun, in a tropical rain, in a millpond in freezing weather, et cetera); and third, the individual capacity of the prisoner of war.<sup>78</sup>

<sup>77</sup> In Pietet, Commentary 268, the statement is made that these public utility services have a military character "in sectors where they are under military administration." The present writer finds it impossible to agree that the nature of the administration of these public services can determine their inherent character. If this were possible, then public utility services administered by the military authorities in an occupied area, as is normally the case, would be military in character, even though originally constructed for and then being used almost exclusively by the civilian population of the occupied territory.

<sup>78</sup> Lewis, History 112; MacKnight, *loc. cit.* note 31 above, at 55. The latter continues with the following statement:

"... The particular task is considered, not the industry as a whole. The specific conditions attending each job are decisive. For example, an otherwise dangerous task may be made safe by the use of a proper appliance, and an otherwise safe job rendered dangerous by the circumstances in which the work is required to be done. Work which is dangerous for the untrained may be safe for those whose training and experience have made them adept in it." The third criterion mentioned in the text has already been discussed at pp. 324-326 above.

These criteria would be equally relevant in applying the substantially similar provisions of Article 52 of the 1949 Convention.<sup>79</sup>

It is quite apparent that there are criteria available for determining whether a particular job is unhealthy or dangerous and is, therefore, one upon which prisoners of war may not be employed. Nevertheless, there will undoubtedly be some borderline cases in which disputes may well arise as to the utilization of non-volunteer prisoners of war. However, there unquestionably will be more jobs in clearly permissible categories than there will be prisoners of war available to fill them. Accordingly, the Detaining Power, which is attempting to handle prisoners of war strictly in accordance with the provisions of the Convention, can easily avoid disputes by not using prisoners of war on labor of a controversial character.

The third paragraph of Article 52 specifies that "the removal of mines or similar devices shall be considered as dangerous labor." By this simple statement the Diplomatic Conference, after one of its most heated and lengthy discussions,<sup>80</sup> made it completely clear that the employment of prisoners of war on mine removal is prohibited unless they are volunteers. The compulsory use of prisoners of war on this type of work was one of the most bothersome problems of prisoner-of-war utilization of World War II, particularly after the termination of hostilities.

The application of the prohibition against the assignment of prisoners of war to work considered humiliating for members of the armed forces of the Detaining Power should cause few difficulties.<sup>81</sup> Certainly the existence or non-existence of a custom or rule in this regard in the armed forces of the Detaining Power should rarely be a matter of controversy.<sup>82</sup> It is

<sup>79</sup> In determining whether an industry was of a nature to require special study, The Judge Advocate General of the United States Army rendered the following opinion in 1943:

"... If in particular industries the frequency of disabling injuries per million man-hours is:

"a. Below 28.0—prisoner-of-war labor is generally available therein;

"b. Between 28.0 and 35.0—the industry should be specifically studied, from the point of view of hazard, before assigning prisoner-of-war labor therein;

"c. Over 35.0—prisoner-of-war labor is unavailable, except for the particular work therein which is not dangerous. . . ."

<sup>80</sup> Those interested in the history and background of this problem and the debate at the Diplomatic Conference are referred to the following sources: 1 ICRO Report 334; 3 Final Record 70-71; 2A *ibid.* 272-273, 443-444, 345; 2B *ibid.* 290-295, 298-299; Pictet, Commentary 277-278.

<sup>81</sup> "This rule has the advantage of being clear and easy to apply. The reference is to objective rules enforced by that Power and not the personal feelings of any individual member of the armed forces. The essential thing is that the prisoner concerned may not be the laughing-stock of those around him." Pictet, Commentary 277.

<sup>82</sup> Although prohibitions against the use of prisoners of war on humiliating work were contained in Art. 25 of the Declaration of Brussels and Art. 71 of the Oxford Manual (note 4 above), there was no similar provision in the 1929 Convention. Nevertheless, during World War II the United States recognized the prohibition against the employment of prisoners of war on degrading or menial work as a "well settled rule of the customary law of nations" (MacKnight, *loc. cit.* note 31 above, at 54), and even prohibited their employment as orderlies for other than their own officers (Lewis, History 113). While this latter type of work is prohibited for personnel of the U. S. Army, it

probable that, in the main, problems in this area will arise because the standard adopted is that applied in the armed forces of the Detaining Power rather than that applied in the armed forces of the Power upon which the prisoners of war depend. While this decision was indubitably the only one which the Diplomatic Conference could logically have reached, it is not unlikely that prisoners of war will find this difficult to understand and that there will be tasks which they consider to be humiliating, even though the members of the armed forces of the Detaining Power do not, particularly where the prisoners of war come from a nation having a high standard of living and are held by a Detaining Power which has a considerably lower standard.

#### CONDITIONS OF EMPLOYMENT

We have so far considered the two aspects of prisoner-of-war labor which are peculiar to that status: who may be compelled to work; and the fields of work in which they may be employed. Our discussion now enters the area in which most nations have laws governing the general conditions of employment of their own civilian citizens—laws which, as we shall see, are often applicable to the employment of prisoners of war.

*General Working Conditions.* Article 51 of the Convention constitutes a fairly broad code covering working conditions. Its first paragraph provides that:

Prisoners of war must be granted suitable working conditions, especially as regards accommodation, food, clothing and equipment; such conditions shall not be inferior to those enjoyed by nationals of the Detaining Power employed in similar work; account shall also be taken of climatic conditions.

These provisions, several of which derive directly from adverse experiences of World War II, are, for the most part, so elementary as to require little exploratory discussion. However, one major change in basic philosophy is worthy of note. The 1929 Convention provided, in Articles 10 and 11, that the minimum standard for accommodations and food for prisoners of war should be that provided for "troops at base camps of the detaining Power." This standard was equally applicable to working prisoners of war. Article 25 of the 1949 Convention contains an analogous provision with respect to accommodations for prisoners of war generally—but the quotation from Article 51 given above makes it abundantly clear that, as to the lodging, food, clothing, and equipment of working prisoners of war, the minimum standard is no longer that of base troops of the Detaining Power, but is that of "nationals of the Detaining Power employed in similar work." While this represents a continuation of adherence to a national standard, it is probable that the new national standard will be higher

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is believed that the prohibition is based upon policy rather than upon the "humiliating" nature of an orderly's functions. Apparently this is settled policy for the United States, as the same rule is found in the draft of the new directive on the subject of prisoner-of-war labor which is being prepared by the U. S. Army.

than the one previously used, inasmuch as workers are frequently a favored class under wartime conditions.<sup>83</sup>

With regard to a somewhat similar provision contained in the second paragraph of the same article, less optimism appears to be warranted. This paragraph, making applicable to working prisoners of war "the national legislation concerning the protection of labor and, more particularly, the regulations for the safety of workers," was the result of a proposal made by the U.S.S.R. at the Diplomatic Conference, which received the immediate support of the United States and others.<sup>84</sup> This support was undoubtedly premised on the assumption that, if adopted, the proposal would increase the protection afforded to working prisoners of war. Second thoughts indicate that this provision may constitute a basis for reducing the protection which it was intended to afford prisoners of war engaged in dangerous employments. The International Committee of the Red Cross has found it necessary to point out that national standards may not here be applied in such a way as to reduce the minimum standards established by the Convention.<sup>85</sup> It now appears unfortunate that the Diplomatic Conference adopted the U.S.S.R. proposal rather than the suggestion of the representative of the International Labor Organization that it be guided by the internationally accepted standards of safety for workers contained in international labor conventions then already in being.<sup>86</sup> Moreover, the safety laws and regulations are not the only safety measures which are tied to national standards. The third paragraph of Article 51 requires that prisoners of war receive training and protective equipment appropriate to the work in which they are to be employed "and similar to those accorded to the nationals of the Detaining Power."<sup>87</sup> This same paragraph likewise provides that prisoners of war "may be submitted to the normal risks run by these civilian workers." Inasmuch as the test as to what are "normal risks" is based upon the national standards of the Detaining Power, this provision, too, would appear to be a potential breeding ground for disagree-

<sup>83</sup> In addition, Art. 25 prescribes specific minimum standards for accommodations; Art. 26 provides for such additional rations as may be necessary because of the nature of the labor on which the prisoners of war are employed; and Art. 27 provides that prisoners of war shall receive clothing appropriate to the work to which they are assigned. It has been asserted that not only must the living conditions of prisoner-of-war laborers not be inferior to those of local nationals, but also that this provision may not "prevent the application of the other provisions of the Convention if, for instance, the standard of living of citizens of the Detaining Power is lower than the minimum standard required for the maintenance of prisoners of war." Pictet, Commentary 271. While the draftsmen did intend to establish two separate standards (2A Final Record 401), at least as to clothing, it is difficult to believe that any belligerent will provide prisoners of war with a higher standard of living than that to which its own civilian citizens have been reduced as a result of a rigid war economy. <sup>84</sup> *Ibid.* 275.

<sup>85</sup> Pictet, Commentary 271-272.

<sup>86</sup> 2A Final Record 275.

<sup>87</sup> It could be argued that a proper grammatical construction of this provision of the Convention makes only the protective equipment and not the training subject to national standards. However, this is debatable, and, even if true, it would merely result in the application of an international standard in the very area where the national standard would probably be highest.

ment and dispute, particularly as the "normal risks" which civilian nationals of the Detaining Power may be called upon to undergo under the pressures of a wartime economy will probably bear little relationship to the risks permitted under normal conditions.

The reference to the climatic conditions under which the labor is performed, contained in the portion of Article 51 quoted above, is one of the provisions deriving from the experiences of World War II.<sup>88</sup> The 1929 Convention provided, in Article 9, that prisoners of war captured "where the climate is injurious for persons coming from temperate climates, shall be transported, as soon as possible, to a more favorable climate." It is well known that in a large number of cases this was not done. The 1949 Convention contains a somewhat similar general provision (in Article 22) concerning evacuation; but it was recognized that, despite the best of intentions, belligerents will not always be in a position to arrange the immediate evacuation of prisoners of war from the areas in which they are captured. Accordingly, the Diplomatic Conference wrote into the Convention the quoted additional admonition with respect to climatic conditions and prisoner-of-war labor. It follows that, where a Detaining Power cannot, at least for the time being, evacuate prisoners of war from an unhealthy climate, whether tropical or arctic, it must, if it desires to utilize the labor of the prisoners of war in that area even temporarily, make due allowances for the climate, giving them proper clothing,<sup>89</sup> the necessary protection from the elements, appropriate working periods, et cetera.

Article 51 of the 1949 Convention concludes with a prohibition against rendering working conditions more arduous as a disciplinary measure.<sup>90</sup> In other words, the standards for working conditions, be they international or national, established by the Convention may not be disregarded in the administration of disciplinary punishment to a prisoner of war, and it is immaterial whether the act for which he is being punished occurred in connection with, or completely apart from, his work. Thus, a Detaining Power may not lower safety standards, avoid requirements for protective equipment, lengthen working hours, withhold required extra rations, et cetera, as punishment for misbehavior. On the other hand, "fatigue details" of not more than two hours a day, or the withdrawal of extra privileges, both of which are authorized as dis-

<sup>88</sup> The Judgment of the International Military Tribunal for the Far East (note 26 above, at 1002) mentioned "forced labor in tropical heat without protection from the sun" as one of the atrocities committed against prisoners of war by the Japanese. The motion picture, "The Bridge on the River Kwai," graphically portrayed the problem.

<sup>89</sup> Art. 27 of the 1949 Convention specifically mentions that, in issuing clothing to prisoners of war (without regard to the work at which they are employed), the Detaining Power "shall make allowance for the climate of the region where the prisoners are detained."

<sup>90</sup> Art. 89 of the 1949 Convention contains an enumeration of the punishments which may be administered to a prisoner of war as a disciplinary measure for minor violations of applicable rules and regulations.

ciplinary punishment, undoubtedly could be imposed, as they obviously do not fall within the terms of the prohibition; and the extra rations to which prisoners of war are entitled under Article 26, when they are engaged in heavy manual labor, could undoubtedly be withheld from a prisoner of war who refuses to work, inasmuch as he would no longer meet the requirement for entitlement to such extra rations.

In the usual arrangement contemplated by the Convention for the utilization of the labor of prisoners of war, the prisoners, each working day, go from their camp to their place of employment, returning to the camp upon the completion of their working period. However, another arrangement is authorized by the Convention. Thus, where the place at which the work to be accomplished is too far from any prisoner-of-war camp to permit the daily round trip, a so-called "labor detachment" may be established.<sup>91</sup> These labor detachments, which were widely used during World War II, are merely miniature prisoner-of-war camps, established in order to meet more conveniently a specific labor requirement. Article 56 of the 1949 Convention requires that it be organized and administered in the same manner as, and as a part of, a prisoner-of-war camp. Prisoners of war making up a labor detachment are entitled to all the rights, privileges, and protections which are available under the Convention to prisoners of war assigned to, and living in, a regular prisoner-of-war camp.<sup>92</sup> However, the fact that local conditions render it impossible to make a labor detachment an exact replica of a prisoner-of-war camp does not necessarily indicate a violation of the Convention. As long as the provisions of the Convention are observed with respect to the particular labor detachment, it must be considered to be properly constituted and operated.<sup>93</sup>

One other point with respect to labor detachments is worthy of note. While Article 39 requires that prisoner-of-war camps be under the "immediate authority of a responsible commissioned officer belonging to the regular armed forces of the Detaining Power," there is no such requirement as to labor detachments. Although each labor detachment is under the authority of the military commander of the prisoner-of-war camp on which it depends, who will, of course, be a commissioned officer, there

<sup>91</sup> At the Diplomatic Conference Mr. R. J. Wilhelm, the representative of the International Committee of the Red Cross, stated that experience had indicated that the majority of all prisoners of war were maintained in labor detachments. 2A Final Record 276. This is confirmed by the series of articles which had appeared in the International Labour Review during the course of World War II. See 47 International Labour Review 169, note 23 above, at 187 (general); 48 *ibid.* 316, note 24 above, at 318 (Germany); Anon., "The Employment of Prisoners of War in Great Britain," 49 *ibid.* 191 (Feb., 1944); and MacKnight, *loc. cit.* note 31 above, at 49 (United States).

<sup>92</sup> In addition to the requirements of Art. 56 for the observance of the present Convention in labor detachments, specific provisions as to these detachments are contained in Arts. 33 (medical services), 35 (spiritual services), and 79 and 81 (prisoners' representatives), among others.

<sup>93</sup> For example, Art. 25 provides that the billets provided for prisoners of war must be adequately heated. The fact that the parent prisoner-of-war camp has central heating, while the billets occupied by the men of the labor detachment have separate, but adequate, heating facilities, does not constitute a violation of the Convention.

appears to be no prohibition against the assignment of a non-commissioned officer as the immediate commander. In view of the large number of labor detachments which will probably be established by each belligerent, it is safe to assume that the great majority of them will be under the supervision of non-commissioned officers.

A situation under which the utilization of prisoner-of-war labor will usually, although not necessarily, require the establishment of labor detachments is where they are employed by private individuals or business organizations. This is the method by which most of the many prisoners of war engaged in agriculture will probably be administered. During World War II, prisoners of war performing labor under these circumstances were frequently denied the basic living standards guaranteed to them by the 1929 Convention. Article 57 of the 1949 Convention specifically provides, not only that the treatment of prisoners of war working for private employers "shall not be inferior to that which is provided for by the present Convention," but also that the Detaining Power, its military authorities, and the commander of the prisoner-of-war camp to which the prisoners belong, all continue to be responsible for their maintenance, care, and treatment; and that these prisoners of war have the right to communicate with the prisoners' representative in the prisoner-of-war camp.<sup>94</sup> It remains to be seen whether the changes made in the provisions of the applicable international legislation will be successful in accomplishing their purpose.

One problem which may arise in the use of prisoner-of-war labor by private employers is that of guarding the prisoners of war. Frequently, the Detaining Power will provide military personnel to guard such prisoners of war. When it does so, the problems presented are no different from those which arise at the prisoner-of-war camp itself. If paroles have been given to and accepted by the prisoners of war concerned, there are likewise no problems peculiar to the situation.<sup>95</sup> But suppose that civilian guards are used. What authority do they have to compel a prisoner of war to work if he refuses to do so? Or to prevent a prisoner of war from escaping? And to what extent may they use force on prisoners of war?

If a prisoner of war assigned to work for a private employer refuses to do so, the proper action to take would unquestionably be to notify the

<sup>94</sup> This latter provision is included in order to enable them to register a complaint concerning their treatment, should they believe that it is below Convention standards. Of course, complaints may also be made to the representatives of the Protecting Power, who may visit these detachments whenever they so desire (Arts. 56 and 126), but these latter are not always immediately available, while the prisoners' representatives are. During World War II, both Great Britain and the United States provided for inspections by their own military authorities of the treatment of prisoners of war who were working for private employers. Anon., "The Employment of Prisoners of War in Great Britain," note 91 above, at 192; Mason, *loc. cit.* note 51 above, at 212.

<sup>95</sup> Members of the U. S. Armed Forces may not accept parole, except for very limited purposes. Code of Conduct, Exec. Order No. 10631, Aug. 17, 1955, 20 Fed. Reg. 6057; The Law of Land Warfare, FM 27-10, U. S. Army, July, 1956, sec. 187. The British rule is substantially similar. Manual of Military Law, Part III, The Law of War on Land, 1958, sec. 246, note 1.



military commander of the prisoner-of-war camp to which he belongs. The latter is in a position to have an independent investigation made and to impose disciplinary or judicial punishment, if and as appropriate.

If a prisoner of war assigned to work for a private employer who is not provided with military guards attempts to escape, the authority of the civilian guards is extremely limited. That they may use reasonable force, short of firearms, seems fairly clear. That the guards may use firearms to prevent the escape is highly questionable.<sup>96</sup> Detaining Powers would be well advised not to assign any prisoner of war to this type of labor, where he is to be completely unguarded or guarded only by civilians, unless the prisoner of war has accepted parole, or unless the Detaining Power has evaluated the likelihood of attempted escape by the particular prisoner of war and has determined to take a calculated risk in his case.

It would not be appropriate to leave the subject of conditions of employment without at least passing reference to the possibility of special agreements in this field between the opposing belligerents. Strangely enough, despite the fact that prisoner-of-war labor has been the subject of special agreements (or of attempts to negotiate special agreements) between opposing belligerents on a number of occasions during both World War I and World War II,<sup>97</sup> and despite numerous references elsewhere in the 1949 Convention to the possibility of special agreements, nowhere in the articles of the Convention concerned with prisoner-of-war labor is there any reference made to this subject. Nevertheless, such agreements, provided that they do not adversely affect the rights of prisoners of war, may be negotiated under the provisions of Article 6 of the Convention, as well as under the inherent sovereign rights of the belligerents.<sup>98</sup>

*Working Hours, Holidays, and Vacations.* Article 53 of the 1949 Convention covers all aspects of the time periods of prisoner-of-war labor. As to the duration of daily work, it provides that (1) this must not be excessive; (2) it must not exceed the work hours for civilians in the same district; (3) travel time to and from the job must be included; and (4) a rest of at least one hour (longer, if civilian nationals receive more) must be allowed in the middle of the day.

It thus appears that the new Convention contains the same prohibition as its predecessor against daily labor which is of "excessive" duration. Here, again, we have the application of the national standard, and in an

<sup>96</sup> In Pictet, Commentary 296, the argument is made, and with considerable merit, that escape is an act of war and that only military personnel of the Detaining Power are authorized to respond to this act of war with another act of war—the use of weapons against a prisoner of war. This theory finds support in the safeguards surrounding the use of weapons against prisoners of war, especially those involved in escapes, found in Art. 42 of the 1949 Convention.

<sup>97</sup> See, for example, the World War I agreements listed in note 19 above, and Lauterpacht, "The Problem of the Revision of the Laws of War," 29 Brit. Yr. Bk. of Int. Law 360, 373 (1952).

<sup>98</sup> By becoming parties to the Convention they have given up their sovereign right to enter into special agreements adversely affecting the rights guaranteed to prisoners of war by the Convention.

area in which such standard had proved to be disadvantageous to prisoners of war during World War II.<sup>99</sup> The Greek Delegation to the Diplomatic Conference attempted to obtain the establishment of an international standard—a maximum of eight hours a day for all work except agriculture, where a maximum of ten hours would have been authorized. This proposal was overwhelmingly rejected.<sup>100</sup> As has already been pointed out with regard to other problems, where a national rather than an international standard has been adopted, very few nations at war could afford to grant to prisoners of war more favorable working conditions than those accorded their own civilian citizens.<sup>101</sup> With respect to hours of daily work, it must be noted, too, that the limitations contained in the article cannot be circumvented by the adoption of piece work, or some other task system, in lieu of a specific number of working hours. The Convention specifically prohibits rendering the length of the working day excessive by the use of this method.<sup>102</sup>

The provision for a midday rest of a minimum of one hour is new and is only subject to the national standard if the latter is more favorable to the prisoner of war than the international standard established by the Convention. It may be necessary for the Detaining Power to increase the midday rest period given to prisoners of war, if its own civilian workers receive a rest period in excess of one hour, but it may not, under any circumstances, be shortened to less than one hour.

Article 53 further provides that prisoners of war shall be entitled to a 24-hour holiday every week, preferably on Sunday "or the day of rest in their country of origin." Except for the quoted material, which was adopted at the request of Israel but which should be of equal importance to the pious Moslem, a similar provision was contained in the 1929 Convention. This provision is not subject to national standards, whether or not the national standard is more liberal.<sup>103</sup> And finally, this same article grants to every prisoner of war who has worked for one year a vacation

<sup>99</sup> Statement of Mr. R. J. Wilhelm, the representative of the International Committee of the Red Cross, 2A Final Record 275. <sup>100</sup> 2B *ibid.* 300.

<sup>101</sup> The Conference of Government Experts called by the ICRC in 1947 had originally considered setting maximum working hours, but finally decided against it as being "discrimination in favour of PW, which would not be acceptable to the civilian population of the DP." Report on the Work of the Conference of Government Experts 176 (1947). As stated in Anon., "The Conditions of Employment of Prisoners of War," note 23 above, at 194:

"The prisoner cannot expect better treatment than the civilian workers of the detaining Power. . . . His fate depends upon the extent to which the standards of the country where he is imprisoned have been lowered through the exigencies of the war."

<sup>102</sup> During World War II, many countries used the piece or task-work method of controlling prisoner-of-war labor. Pictet, *Commentary* 282; Anon., "The Employment of Prisoners of War in Canada," note 61 above, at 337. In the United States the piece-work system was used, but to control pay rather than work hours. Lewis, *History* 120-121. As long as the pay does not drop below the minimum prescribed by the Convention, there would appear to be no objection to this procedure.

<sup>103</sup> Nor was it subject to national standards in the 1929 Convention, but the Germans refused to accord prisoners of war a weekly day of rest on the ground that the civilian population did not receive it. Janner, *op.cit.* note 50 above.

of eight consecutive days with pay. This provision is new and is of a nature to create minor problems, as, for example, whether normal days of rest are excluded from the computation of the eight days, what activity is permitted to the prisoner of war during his "vacation," and what he may be required to do during this period. However, despite these administrative problems, the provision should prove a boon to every person who undergoes a lengthy period of detention as a prisoner of war.

*Compensation and Other Monetary Benefits.* The 1929 Convention provided, in Article 34, that prisoners of war would be "entitled to wages to be fixed by agreements between the belligerents." No such agreements were, in fact, ever concluded.<sup>104</sup> The comparable provision of the 1949 Convention (Article 62) provides for "working pay"<sup>105</sup> in an amount to be fixed by the Detaining Power, which may not be less than one-fourth of one Swiss franc for a full working day.<sup>106</sup> The amount so fixed must be "fair" and the prisoners of war must be informed of it, as must the Protecting Power.

With regard to the establishment by the Detaining Power of a "fair working rate of pay," several matters should be noted. First, no basis can be seen for attempting to determine what is "fair" by endeavoring to compare the "working pay" of prisoners of war with the wages of civilian workers. There are too many diverse and unequal factors involved;<sup>107</sup> and the extremely nominal minimum set by the Convention is clearly indicative of the fact that there was no intention on the part of the Diplomatic Conference to establish any such relationship. Second, while there appears to be nothing to preclude a Detaining Power from establishing a fair basic "working rate of pay," and then providing for amounts in addition thereto for work requiring superior skill or heavier exertion or greater exposure

<sup>104</sup> Pictet, Commentary 313; ICRC Report 286.

<sup>105</sup> Actually, Art. 62 refers to "working rate of pay" twice and to "working pay" four times, while Arts. 54 and 64 refer only to "working pay." The term "indemnité de travail" is used in the French version of all of these articles and the difference in English appears to be an error in drafting. The report of the Financial Experts at the 1949 Diplomatic Conference (2A Final Record 557) states:

"It appeared that the expression 'wages' was inappropriate and might give the impression that prisoners of war while fed and housed at the cost of the Detaining Power were in addition being remunerated for their work at a rate corresponding to the remuneration of a civilian worker responsible for maintaining himself and his family out of his wages. For this reason, it was decided to substitute the terms 'working pay' wherever this was necessary."

<sup>106</sup> The inadequacy of the minimum set by the Convention, which amounts to approximately six cents a day in money of the United States (approximately 5 d. in British money), is illustrated by the fact that almost a century ago, in 1864, during the American Civil War, the Federal Government set the rate of prisoner-of-war pay at ten cents a day for the skilled and five cents a day for the "unskilled." Lewis, *History* 39. During World War II the United States paid prisoners of war 80 cents a day. *Ibid.* at 77. Under the incentive of the piece-work system it was possible to increase this to \$1.20 a day. *Ibid.* at 120.

<sup>107</sup> For some of these differences, see the quotation in note 105 above, and Mojonny, *The Labor of Prisoners of War* 24 (unpublished thesis, Indiana University, 1954). For a contrary view, see Pictet, Commentary 115.

to danger, or as a production incentive, no authority exists for establishing different working rates of pay for prisoners of war of different nationalities who have the same competence and are engaged in the same types of work.<sup>108</sup> And finally, the rate established as "fair" may not thereafter be administratively reduced by having a part of it "retained" by the camp administration. The authority for this procedure, which was contained in Article 34 of the 1929 Convention, has been specifically and intentionally deleted from the 1949 Convention.

There is one provision of the new Convention which could render this entire subject moot. An individual account must be kept for each prisoner of war. All of the funds to which he becomes entitled during the period of his captivity, including his working pay, are credited to this account and all of the payments made on his behalf or at his request are deducted therefrom (Article 64). Under Article 34 of the 1929 Convention it then became the obligation of the Detaining Power to deliver to the prisoner of war "the pay remaining to his credit" at the end of his captivity. Under Article 66 of the 1949 Convention, upon the termination of the captivity of a prisoner of war, it will be the responsibility of the Power in whose armed forces he was serving at the time of his capture, and *not* of the Detaining Power, to settle any balance due him. Under these circumstances, there appears to be little reason why a Detaining Power should not be extremely generous in establishing its "fair working rate of pay." In effect, it will, for the most part, merely be creating a future liability on the part of its enemy! This factor may result in the negotiation of agreements between belligerents fixing mutually acceptable "working rates of pay," despite the lack of a specific provision for such agreements in the 1949 Convention—agreements which, as has been noted, were not reached under the 1929 Convention where there was specific provision for them.

A number of changes have been embodied in the 1949 Convention with regard to the types of work which entitle a prisoner of war to working pay. Of major importance is the fact that, while Article 34 of the 1929 Convention specifically provided that "prisoners of war shall not receive wages for work connected with the administration, management and maintenance of the [prisoner-of-war] camps," Article 62 of the present Convention is equally specific that prisoners of war "permanently detailed to duties or to a skilled or semi-skilled occupation in connection with the administration, installation or maintenance of camps" *will be* entitled to working pay. This article also contains a specific provision under which non-medical service medical personnel (Article 32), and retained medical personnel and chaplains (Article 33) are entitled to working pay. And while the prisoners' representative and his advisers are, primarily, paid out of canteen funds, if there are no such funds, these individuals, too, are entitled to

<sup>108</sup> During World War II the Germans habitually paid Soviet prisoners of war as little as one-half of the amount paid to prisoners of war of other nationalities. Dallin, note 25 above, at 425. Art. 16 of the 1949 Convention specifically prohibits "adverse distinction based on race, nationality, religious belief or political opinions, or any other distinction founded on similar criteria."

working pay from the Detaining Power. Finally, because enlisted men assigned as orderlies in officers' camps are specifically exempted from performing any other work (Article 44), it appears that they should be entitled to working pay from the Detaining Power.<sup>109</sup>

What of the prisoner of war who is the victim of an industrial accident or contracts an industrial disease and is thereby incapacitated, either temporarily or permanently? Does he receive any type of compensation, and, if so, what, when, from whom, and how?

The Regulations attached to the Second Hague Convention of 1899 and to the Fourth Hague Convention of 1907 were silent on this problem. The multilateral prisoner-of-war agreement negotiated at Copenhagen in 1917 adopted a Russian proposal which placed upon the Detaining Power the same responsibility in this regard that it had towards its own citizens; but the British-German agreement, which was negotiated at The Hague in 1918, provided merely that the Detaining Power should provide the injured prisoner of war with a certificate as to his occupational injury.<sup>110</sup> The procedure adopted at Copenhagen was subsequently incorporated in Article 27 of the 1929 Convention, and in 1940, after some abortive negotiations with the British, Germany enacted a law implementing this procedure.<sup>111</sup> The United States subsequently established this same policy,<sup>112</sup> but the United Kingdom considered that it was only required to furnish the injured prisoner of war all required medical and other care.<sup>113</sup>

Inasmuch as no payments were ever, in fact, made to injured prisoners of war by the Detaining Powers after their repatriation,<sup>114</sup> it is not surprising that in drafting the pertinent provisions of the 1949 Convention the Diplomatic Conference replaced the 1929 procedure with one more nearly resembling that which had been adopted by the British and Germans at The Hague in 1918.<sup>115</sup> It may actually be asserted that there is little difference between the previous practice and the present policy.

The procedure established by the 1949 Convention is contained in the somewhat overlapping provisions of Articles 54 and 68. When a prisoner

<sup>109</sup> This was the policy followed by the United States during World War II. Prisoner of War Circular No. 1, note 81 above, sec. 85.

<sup>110</sup> Flory, *op. cit.*, note 29 above, at 79-80. The prisoner-of-war agreement concluded between France and Germany in 1915 had still a different approach: it provided that, upon repatriation, prisoners of war who had suffered industrial accidents would be treated as wounded combatants. Rosenberg, "International Law Concerning Accidents to War Prisoners Employed in Private Enterprises," 36 A.J.I.L. 294, 297 (1942).

<sup>111</sup> Lauterpacht, *loc. cit.* note 97 above. Lauterpacht labels the negotiations as "elaborate" and as "concerning the relatively trivial question of the interpretation of Article 27."

<sup>112</sup> Prisoner of War Circular No. 1, note 31 above, secs. 91 and 92; MacKnight, *loc. cit.* note 81 above, at 63.

<sup>113</sup> Lauterpacht, *loc. cit.*

<sup>114</sup> *E.g.*, Lewis, History 156.

<sup>115</sup> In the British Manual of Military Law, *op. cit.* note 95 above, sec. 185, note 1, the statement is made that during the World War II negotiations the United Kingdom "considered that its domestic workmen's compensation legislation was too complex and so bound up with the conditions of free civilian workmen as to make it impracticable to apply it to prisoners of war." That position has become no less valid with the passing of the years since the end of that war.

of war sustains an injury as a result of an industrial accident (or incurs an industrial disease), the Detaining Power has the obligation of providing him with all required care, medical, hospital, and general maintenance during the period of his disability and continuation in the status of a prisoner of war.<sup>116</sup> The only other obligation of the Detaining Power is to provide the prisoner of war with a statement, properly certified, "showing the nature of the injury or disability, the circumstances in which it arose and particulars of medical or hospital treatment." Also, a copy of this statement must be sent to the Central Prisoners of War Agency. This latter action insures its permanent availability.

If the prisoner of war desires to make a claim for compensation while still in that status, he may do so, but his claim will be addressed, not to the Detaining Power, but to the Power on which he depends and will be transmitted to it through the medium of the Protecting Power.<sup>117</sup> The Convention makes no provision for the procedure to be followed beyond this point, probably for the reason that the problem is a domestic one which would be inappropriate for inclusion in an international convention. Nevertheless, it may well be that, in the long run, the present policy, by transferring responsibility to the Power upon which he depends, upon the repatriation of the prisoner of war, will prove of more value to the disabled prisoner of war than the apparently more generous policy expressed in the 1929 Convention.<sup>118</sup>

*Grievance Procedures.* In general, any prisoner of war who believes that the rights guaranteed to him by the 1949 Convention are, in any manner whatsoever, being violated in connection with his utilization as a source of labor, would have the right to avail himself of any of the channels of complaint established by the Convention: to the representatives of the Protecting Power (Articles 78 and 126); to the prisoners' representative (Articles 78, 79, and 81); and, perhaps, to representatives of the International Committee of the Red Cross (Articles 9, 79, 81, and 126).<sup>119</sup>

<sup>116</sup> Arts. 40 and 95 of the 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War (6 U. S. Treaties 3516; 75 U.N. Treaty Series 287 (I:973); 50 A.J.I.L. Supp. 724 (1956)) place upon the Detaining Power the additional burden of providing compensation for occupational accidents and diseases. The variation between the two conventions was noted by the Co-ordination Committee of the Diplomatic Conference (2B Final Record 149), but Committee II, to which had been assigned the responsibility for preparing the text of the prisoner-of-war convention, determined that such a provision was not necessary for prisoners of war (2A Final Record 402).

<sup>117</sup> The suggestion has been made that, "since under Article 51, paragraph 2, he [the prisoner of war] is covered by the national legislation [of the Detaining Power] concerning the protection of labour," a prisoner of war disabled in an industrial accident or by an industrial disease would, while still a prisoner of war, be entitled to benefit from local workmen's compensation laws. Pictet, Commentary 286-287. It is believed that the application of this general provision of the Convention has been restricted in this area by the specific provision on this subject.

<sup>118</sup> Anon., "The Conditions of Employment of Prisoners of War," note 23 above, at 182; Pictet, *loc. cit.*

<sup>119</sup> The availability of the latter as a channel of complaint is not clearly defined. Levie, "Prisoners of War and the Protecting Power," *loc. cit.* note 63 above, at 396.

Nevertheless, the Diplomatic Conference felt it advisable to include in Article 50 (which lists the classes of authorized labor) a specific provision permitting prisoners of war to exercise their right of complaint, should they consider that a particular work assignment is in a prohibited industry. It is somewhat difficult to perceive the necessity for this provision or that it adds anything to the general protection otherwise accorded to the prisoner of war by the appropriate provisions of the Convention. In fact, the danger always exists that by this specific provision the draftsmen may have unwittingly diluted the effect of the general protective provisions in areas where no specific provision has been included.

#### CONCLUSION

Utilization of prisoner-of-war labor means increased availability of manpower and a reduction in disciplinary problems for the Detaining Power, and an active occupation, better health and morale, and, perhaps, additional purchasing power for the prisoners of war. It is obvious that both sides will have much to gain if all of the belligerents comply with the labor provisions of the 1949 Convention.

On the whole, it is believed that these labor provisions represent an improvement in the protection to be accorded prisoners of war in any future conflict. True, they contain ambiguities and compromises which can serve any belligerent which is so minded as a basis for justifying the establishment of policies which are contrary to the best interests of the prisoners of war detained by it and which are probably contrary to the intent of the drafters. However, it must be assumed that nations which have ratified or adhered to the 1949 Geneva Convention Relative to the Treatment of Prisoners of War, many of which were likewise involved in its drafting, will, to the maximum extent within their capabilities, implement it as the humanitarian charter which it was intended to be. And, in any event, two factors are always present which tend to call forth this type of implementation: the presence of the Protecting Power and the doctrine of reciprocity.<sup>120</sup> Information as to the interpretation and implementation of the Convention by a belligerent is made known to the other side through the Protecting Powers and thus becomes public knowledge with the resulting effect, good or bad, on world public opinion. Policies which, while perhaps complying with a strict interpretation of the Convention, are obviously overly restrictive in an area where a more humanitarian attitude appears justified and could easily be employed, will undoubtedly result in the adoption of an equally or even more restrictive policy by the opposing belligerent. Such retorsion can easily lead to charges of reprisals, which are outlawed, and thus create a situation which, whether or not justified, can only result in harm to all of the prisoners of war held by both sides. While there were nations which, during World War II,

<sup>120</sup> The activities of the International Committee of the Red Cross are likewise a major deterrent to the improper application of the Convention.

appeared to be disinterested in the effect that their treatment of prisoners of war was having on the treatment received by their own personnel detained by the enemy, it is to be hoped that in any future war, even one which represents the "destruction of an ideology,"<sup>121</sup> at the very least, concern for the fate of its own personnel will cause each belligerent to apply the doctrine *pacta sunt servanda* scrupulously in establishing policies which implement, among others, the labor provisions of the Geneva Prisoner of War Convention of 1949.

<sup>121</sup> Statement of German General Keitel, quoted in the "Opinion and Judgment of the International Military Tribunal," 41 A.J.I.L. 172, 228-229 (1947).



## THE WAR CLAIMS ACT OF 1962

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The War Claims Act of October 22, 1962,<sup>1</sup> is the culmination of legislative efforts of twenty years to provide for the adjudication and payment of claims to American individuals and companies for certain losses arising from World War II. The Act further incorporates amendments to the Trading with the Enemy Act, as amended.<sup>2</sup>

### LEGISLATIVE HISTORY

As early as 1943<sup>3</sup> and subsequently during the war,<sup>4</sup> bills were introduced in Congress to use the property of former enemy owners, which the United States had taken over by vesting orders under the Trading with the Enemy Act, to indemnify Americans for war damages. Secretary of State James F. Byrnes stated on November 20, 1945, that "assets of Germany and Japan in this country should be used by the United States for its purposes in connection with claims arising from the war."<sup>5</sup> The Paris Reparation Agreement of January 15, 1946,<sup>6</sup> limited the claims of the United States (and seventeen Allied Powers other than the U.S.S.R. and Poland) against Germany to vested property, and provided further for the disposition of those assets in each country in such a way as to preclude their return to German ownership and control. In 1946 and 1947, several bills were introduced in Congress, providing for the use of vested assets to compensate for war damage claims.<sup>7</sup> After extensive hearings<sup>8</sup> the War Claims Act of 1948<sup>9</sup> was enacted to provide for the satisfaction of certain

<sup>1</sup> An Act to amend the War Claims Act of 1948, as amended, to provide compensation for certain World War II losses, Pub. Law 87-846, 87th Cong., H.R. 7283, 76 Stat. 1107.

<sup>2</sup> 40 Stat. 411 (1917); 50 U.S.C. App. §§ 1-39 (1958).

<sup>3</sup> H.R. 3672, 78th Cong. (1943). See Report of Special Committee on Custody and Management of Alien Property, American Bar Association, of March 29, 1943, 68 American Bar Association Report 450 (1943).

<sup>4</sup> S. 2038, 78th Cong. (1944), H.R. 3371 and H.R. 5118, 79th Cong. (1945). See Report on War Claims by the Committee on Adjudication of War Claims, Section of International and Comparative Law, American Bar Association, adopted by the House of Delegates on Dec. 20, 1945, 1945 Proceedings 52.

<sup>5</sup> 91 Cong. Rec. App. 5031 (1945).

<sup>6</sup> 40 A.J.I.L. Supp. 117 (1946).

<sup>7</sup> See Foreign War Damage Claims, Hearings before a Senate Subcommittee of the Committee on the Judiciary (67 pp., 1946); Enemy Property Commission, Hearings before the House Committee on Interstate and Foreign Commerce (493 pp. 1947).

<sup>8</sup> War Claims Commission, Hearings before a Senate Subcommittee of the Committee on the Judiciary (256 pp., 1948).

<sup>9</sup> 62 Stat. 1240 (1948), 50 U.S.C. App. §§ 2001-2013 (1958). The Act, as amended by Public Law 744, 83d Cong., 68 Stat. 1033, is fully reprinted in 14 Foreign Claims Settlement Commission Semiannual Report 66 (1961).

war claims of Americans who had suffered injury to person and property at the hands of the enemy, particularly of military and civilian personnel, who suffered great hardships and deprivations in prisoner-of-war and concentration camps.<sup>10</sup> Section 12 of the War Claims Act of 1948 added a Section 39 to the Trading with the Enemy Act to prohibit the return of vested German and Japanese property and interests to the former owners, without further compensation to be paid to them by the United States. This legislative enactment corresponded to, and complied with, Section 12 of the Trading with the Enemy Act, which provided for the disposition of vested enemy property "as Congress shall direct." The War Claims Act of 1948 further provided that the net proceeds from vested enemy assets be transferred to the Treasury Department for deposit into the War Claims Fund. The Act of 1948 also required the War Claims Commission<sup>11</sup> to examine all types and categories of claims arising out of World War II and to make appropriate recommendations for future legislation.<sup>12</sup> Two detailed reports,<sup>13</sup> as President Truman stated in his letter of transmittal of January 16, 1953, revealed major differences between the conclusions and recommendations of the Commission and the views of various executive departments and agencies, so that no executive branch position on the problem of war claims legislation was determined.

Meanwhile, in the Bonn Convention on the Settlement of Matters Arising Out of the War and the Occupation, of May 26, 1952, as amended by the Paris Protocol on the Termination of the Occupation Regime in the Federal Republic of Germany, of October 23, 1954,<sup>14</sup> it was agreed that Germany would compensate its own nationals for the loss of property through the vesting measures of the Allied Powers.<sup>15</sup> On the other hand, the latter declared they would forego any claims for reparation against Germany's current production.<sup>16</sup> Similarly, the Japanese Government agreed, in the

<sup>10</sup> For a description of the awards rendered by the Foreign Claims Settlement Commission of the United States, see H. Rep. No. 1279, of Feb. 18, 1960, p. 8.

<sup>11</sup> Established by Sec. 2(a) of the Act, note 9 above, and abolished by Reorganization Plan No. 1 of 1954, 68 Stat. 1279. Its functions were transferred to the Foreign Claims Settlement Commission of the United States, which was established in Sec. 1 of the Plan.

<sup>12</sup> Sec. 8 of the Act, note 9 above, at 81.

<sup>13</sup> H. Doc. No. 580, 81st Cong., 2d Sess., of May 3, 1950 (95 pp.), Supplementary Report, H. Doc. No. 67, 83rd Cong., 1st Sess., of Jan. 16, 1953 (247 pp.).

<sup>14</sup> 49 A.J.I.L. Supp. 69, 98 (1955), Ch. VI (Reparation), Art. 5: "The Federal Republic shall ensure that the former owners of property seized . . . shall be compensated." On the constitutionality of the German ratifying legislation, see decision of the Federal Constitutional Court, Feb. 6, 1962, 57 A.J.I.L. 142 (1963).

<sup>15</sup> Such an indemnification by a Reparationsschädengesetz (Damage for Reparations Act) is now being contemplated by the Federal Republic of Germany in a draft bill submitted to the Länder for comment, and to be presented to the German legislature. For a previous bill, of July 12, 1961, see Drucksache 2964, Deutscher Bundestag, 3. Wahlperiode. On the obligation of the German Government to compensate its nationals, see Mann, *Zum Privatrecht der deutschen Reparationsleistung* (1962); Seidl-Hohenveldern and Ipsen, *Entschädigungspflicht der Bundesrepublik für Reparationsentzogenes Auslandsvermögen* (1962); and Kaufmann, *Rechtsgutachten über die Reparations-schäden* (1962).

<sup>16</sup> Howard, "The Paris Agreement on Reparation from Germany," 14 Dept. of State Bulletin 1023 (1946); Report, note 10 above, p. 36.

Treaty of Peace of September 8, 1951,<sup>17</sup> that the property of its nationals vested in the United States could be used for the satisfaction of war claims of American individuals and corporations against Japan. Here also the United States gave up its reparation claims against Japan, without imposing upon the Japanese Government the obligation to indemnify its own nationals for loss through vesting measures of the United States.<sup>18</sup>

At the request of the new Administration, legislation was introduced in 1954,<sup>19</sup> providing for a partial return of vested property of German and Japanese individuals (not companies) up to a maximum of \$10,000 per person "as a matter of grace for the purpose of alleviating the cases of hardships caused by vesting."<sup>20</sup> The bill further provided for the payment of certain categories of war claims from a fund of 100 million dollars out of sums payable by Germany "in settlement of its indebtedness to the United States for post-war economic assistance."<sup>21</sup> Bills which were introduced in the following Congress<sup>22</sup> provided that war claims were to be paid out of a Claims Fund newly to be created. After extensive hearings,<sup>23</sup> the Executive withdrew support of the proposals on July 3, 1957, in order to submit a supplemental plan providing "for the payment in full of all legitimate war claims of Americans against Germany."<sup>24</sup> Subsequent agreement could not be reached with the Government of the Federal Republic of Germany regarding legislation on the return of vested assets which would be satisfactory to both governments.<sup>25</sup> The Administration therefore proposed legislation which would only provide for the payment of war claims of Americans and not deal with the problem of return of vested property.<sup>26</sup> However, no bill introduced in the 86th Congress in

<sup>17</sup> Ch. V (Claims and Property), Art. 14(2). 46 A.J.I.L. Supp. 71, 77 (1952).

<sup>18</sup> Metzger, "The Liberal Japanese Peace Treaty," 37 Cornell Law Q. 382, 387 (1952). No internal compensation appears to be planned in Japan.

<sup>19</sup> H.R. 6730, 84th Cong. (1954).

<sup>20</sup> Letter of transmittal of June 6, 1955, reprinted in H. Rep. No. 1279, of Feb. 18, 1960, p. 84. See also Debt Claims and World War I Assets, Hearings before a Subcommittee of the Senate Committee on the Judiciary (71 pp., 1955).

<sup>21</sup> Agreement of Feb. 27, 1953, Report, note 10 above, p. 38. This Agreement regarding the Settlement of the United States Claim for Post-War Economic Assistance to Germany, T.I.A.S., No. 2795, was implemented by the Agreements of March 20, 1959, and April 5, 1961, T.I.A.S., Nos. 4200 and 4737, 44 Dept. of State Bulletin 720 (1961).

<sup>22</sup> 85th Cong., 2nd Sess., S. 2227 and H.R. 10549.

<sup>23</sup> Return of Confiscated Property, Hearings before a Senate Subcommittee of the Committee on the Judiciary (688 pp., 1956); and War Claims and Return of Enemy Assets, Hearings before a House Subcommittee of the Committee on Interstate and Foreign Commerce (489 pp., 1956).

<sup>24</sup> Department of State Press Release, reprinted in H. Rep. No. 1279, of Feb. 18, 1960, p. 14. A similar solution with regard to Japan was also expected by the Administration. See Return of Confiscated Property, Hearings before a Senate Subcommittee of the Committee on the Judiciary (702 pp., 1957); and Amendments to Trading with the Enemy Act, Hearings before a House Subcommittee of the Committee on Interstate and Foreign Commerce (70 pp., 1958).

<sup>25</sup> Letter from the Department of State, July 3, 1958, reprinted in Report, note 10 above, p. 39.

<sup>26</sup> Cf. Jessup, "Enemy Property," 49 A.J.I.L. 57 (1955); deVries, "The International Responsibility of the United States for Vested German Assets," 51 A.J.I.L. 18 (1957);

1959 and 1960 was enacted.<sup>27</sup> In 1961, similar bills were introduced again,<sup>28</sup> and adopted by the House on August 8, 1962,<sup>29</sup> and by the Senate on September 12, 1962.<sup>30</sup> The final text of the War Claims Act of 1962, after a conference committee considered not less than 18 amendments,<sup>31</sup> was passed on October 5, 1962.<sup>32</sup>

Meanwhile, Americans had been compensated, though only to a limited extent, by domestic legislation of some countries concerned,<sup>33</sup> *e.g.*, Germany, where, under Article 13 of the Equalization of Burden Law,<sup>34</sup> foreign nationals may be compensated for damage or losses suffered from the war. The Bonn Convention of 1952, as amended by the Paris Protocol of 1954<sup>35</sup> provided that nationals of the United States

shall enjoy, on the same basis as German nationals residing in the Federal territory, such compensation for war damage relating to property located in the Federal territory as may be provided by the Federal Republic or any of its Länder. . . .<sup>36</sup>

Other compensation of American war claims occurred under the provisions of the Peace Treaties concluded with the Axis-satellite countries (Italy, Rumania, Bulgaria and Hungary), on February 17, 1947.<sup>37</sup> The Peace Treaties provided that each Allied Power should have the right to seize all property within its territory belonging to nationals of the Axis-

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and Hearings, Senate Subcommittee of the Committee on the Judiciary, p. 352 (1957), also quoted in H. Rep. No. 1279, of Feb. 18, 1960, p. 5, and in 108 Cong. Rec. 18088 (Sept. 12, 1962).

See also *Chemical Bank New York Trust Company v. Kennedy*, 199 F. Supp. 256 (D. C., 1961), dealing with creditor rights of wartime seized Hungarian property in the United States, at p. 261: "It may be observed that the purpose of seizing enemy property is not confiscation. Even in an era of total war, confiscation of enemy property is not sanctioned either by international law or practice. The principal purpose of such seizures is to sequester the property in order to make it impossible for the enemy to use it against this country in time of war. A secondary objective is to secure payment of claims of the United States and its nationals arising against the foreign Government or against the original owners of seized property."

<sup>27</sup> War Claims and Enemy Property Legislation, Hearings before a House Subcommittee of the Committee on Interstate and Foreign Commerce (742 pp., 1959); H. Rep. No. 1279, of Feb. 18, 1960; S. Rep. No. 1390, of May 18, 1960.

<sup>28</sup> War Claims and Enemy Property Legislation, Hearings before a House Subcommittee of the Committee on Interstate and Foreign Commerce on H.R. 7283 and H.R. 7479 (269 pp., 1961); S. 2618, S. Rep. No. 1112, of Sept. 11, 1961; H. Rep. No. 2035, of July 25, 1962. For an analysis of the bills, see also S. Rep. No. 1363, of April 27, 1962, p. 2.

<sup>29</sup> 108 Cong. Rec. 15230 (Aug. 13, 1962).

<sup>30</sup> *Ibid.* 18056 (Sept. 12, 1962). The Subcommittee on Trading with the Enemy Act of the Senate Committee on the Judiciary has held no hearings since June and July, 1959. Letter of Chairman Olin D. Johnston to this writer, March 9, 1962.

<sup>31</sup> H. Rep. No. 2513, of Oct. 2, 1962; 108 Cong. Rec. 20596 (Oct. 2, 1962).

<sup>32</sup> 108 Cong. Rec. 21342 (Oct. 5, 1962).

<sup>33</sup> For a survey, see Hearings, note 28 above, pp. 83-88 (1961).

<sup>34</sup> Lastenausgleichsgesetz, Aug. 14, 1952, BGBl. 1952, I, 446.

<sup>35</sup> Note 14 above.

<sup>36</sup> Ch. X (Foreign Interests in Germany), Art. 3 (49 A.J.I.L. Supp. 102): "without prejudice to the terms of the final peace settlement with Germany."

<sup>37</sup> 61 Stat. 1247, 1757, 1915, 2065; 42 A.J.I.L. Supp. 47, 179, 225, 252 (1948).

satellite countries, and to apply the proceeds "to such purpose as it may desire," especially for the satisfaction of claims against the former enemy governments and their nationals.<sup>38</sup> Those claims against Italy not fully satisfied under other articles of the Peace Treaty were administered by the American-Italian Conciliation Commission.<sup>39</sup> Claims not provided for in the Italian Peace Treaty—primarily the claims of Americans for damages attributable to Italy which occurred in Greece, Yugoslavia, Albania, France, North Africa, or at sea—were administered by the Foreign Claims Settlement Commission of the United States.<sup>40</sup> That Commission combined the functions of the War Claims Commission, which administered claims under the War Claims Act of 1948, as amended,<sup>41</sup> and of the International Claims Settlement Commission, administering claims under the International Claims Settlement Act of 1949,<sup>42</sup> as amended.<sup>43</sup> The work of the Commission has been completed on war claims against Italy and Hungary<sup>44</sup> and will soon be completed with regard to Rumania, under a Claims Settlement Agreement of March 30, 1960.<sup>45</sup> Potential American war claims against Germany and Japan, to be administered by the Commission under the War Claims Act of 1962, are estimated to number 35,000 to 75,000, the awards amounting to possibly more than 300 million dollars.<sup>46</sup>

#### COVERAGE OF CLAIMS

The War Claims Act of 1962 authorizes the Foreign Claims Settlement Commission to receive and determine the validity and amount of claims, the payment of which had not been authorized by previous legislation. Indeed, Congress had authorized payment to persons who had suffered losses from World War II, under programs for which special appropriations were provided.<sup>47</sup> There may be mentioned the Philippine Rehabilita-

<sup>38</sup> Treaty of Peace with Italy, Art. 79, pars. 1 and 3, 61 Stat. 1247 (1948); the same provisions are contained in Arts. 27, 25 and 29 of the Peace Treaties with Rumania, Bulgaria and Hungary, cited above.

<sup>39</sup> Domke, "Settlement-of-Disputes Provisions in Axis Satellite Peace Treaties," 41 A.J.I.L. 911 (1947); Kane, "Some Unsolved Problems Regarding War Damage Claims under Article 78 of the Treaty of Peace with Italy," 45 *ibid.* 357 (1951).

<sup>40</sup> Under Sec. 304 of the International Claims Settlement Act of 1949, as amended, 69 Stat. 560 (1955); *cf.* also the so-called Lombardo Agreement of Aug. 14, 1947, 42 A.J.I.L. Supp. 18, 146 (1948), and the Ninth Semiannual Report of the Foreign Claims Settlement Commission, p. 5 (1958).

<sup>41</sup> Note 9 above.

<sup>42</sup> Pub. Law 455, 81st Cong., 2d Sess. (1950), 64 Stat. 12; 45 A.J.I.L. Supp. 58 (1951).

<sup>43</sup> Note 89 below. By Reorganization Plan No. 1 of 1954, note 11 above, both Commissions were abolished and their functions transferred to the Foreign Claims Settlement Commission of the United States.

<sup>44</sup> Foreign Claims Settlement Commission of the United States, Tenth Semiannual Report 2 (1959).

<sup>45</sup> 54 A.J.I.L. 742 (1960); Christenson, "The United States-Rumanian Claims Settlement Agreement of March 30, 1960," 55 *ibid.* 617 (1961).

<sup>46</sup> Letter of the Commission, Aug. 7, 1962, to which a list of large potential claims was attached. 108 Cong. Rec. 14888 (Aug. 8, 1962).

<sup>47</sup> For a survey, see Hearings, note 28 above, p. 80.

tion Act of 1946, which provided over 40 million dollars for damages in the Philippines, including losses suffered by American nationals.<sup>48</sup> This program had been administered by the Philippine War Damage Commission. Recently, in August, 1962, the Philippine War Damage Bill was enacted,<sup>49</sup> which authorized the payment of the balance of awards for war damage compensation made by the Philippine War Damage Commission, with an appropriation of 73 million dollars.<sup>50</sup> There may further be mentioned the Japanese-American Evacuation Claims Act of 1948, as amended,<sup>51</sup> which authorized the Attorney General of the United States to adjudicate claims for unreimbursed losses from damage as a reasonable and natural consequence of the evacuation of persons of Japanese ancestry, including American citizens and certain entities owned by such persons.<sup>52</sup> The number of Americans paid has been estimated at 13,000, with payments of about 18 million dollars.<sup>53</sup>

The War Claims Act of 1962 authorizes in Section 202 the payment of war claims falling within four general categories. The first deals with losses or damage to property located in certain European countries<sup>54</sup> within their territorial limits as they existed on December 1, 1937,<sup>55</sup> and in areas which were occupied or attacked by the Japanese military forces.<sup>56</sup> These losses had to result from military operations of war<sup>57</sup> or from special measures directed against property in such territories because of the enemy or alleged enemy character of the owner, "which property was owned, directly or indirectly, by a national of the United States."<sup>58</sup> Thus, the claims based on wartime seizures of property of Americans which had not been effectively restored to the use of such nationals and for which compensation had not previously been provided,<sup>59</sup> will be compensable. These "special measures" arose under wartime Trading with the Enemy legisla-

<sup>48</sup> 60 Stat. 128; on the legislative history, see S. Rep. No. 1882, of Aug. 16, 1962, p. 2.

<sup>49</sup> H.R. 11721; Pub. Law 616, 87th Cong., 2d Sess. (1962).

<sup>50</sup> Philippine War Damage Claims, Hearings before the Senate Committee on Foreign Relations on S. 2380 and S. 3329, of June 12 and 21, 1962 (63 pp.).

<sup>51</sup> 62 Stat. 1231 (1948), 50 U.S.C. App. §§ 1981-1987.

<sup>52</sup> See Adjudications of the Attorney General of the United States, Volume I, Precedent Decisions under the Japanese-American Evacuation Claims Act 1950-1956 (400 pp., 1956).

<sup>53</sup> H. Rep. No. 1279, of Feb. 18, 1960, p. 10; H. Rep. No. 2254, of Aug. 20, 1962.

<sup>54</sup> Albania, Austria, Czechoslovakia, the Free Territory of Danzig, Estonia, Germany, Greece, Latvia, Lithuania, Poland and Yugoslavia.

<sup>55</sup> Between that date (Dec. 1, 1937) and Sept. 15, 1947, when the Peace Treaties of Feb. 12, 1947, entered into force (note 37 above), Rumania and Hungary had lost territories to the Soviet Union and Czechoslovakia. War damage claims emanating from sectors which were lost to those other countries are now allowable. 106 Cong. Rec. 4052 (March 1, 1960).

<sup>56</sup> "Including territory to which Japan has renounced all rights, title, and claim under article 2 of the Treaty of Peace between the Allied Powers and Japan" (46 A.J.I.L. Supp. 72 (1952)), especially Korea and Formosa, but excluding the Island of Guam.

<sup>57</sup> During the European war beginning Sept. 1, 1939, and ending May 8, 1945, as to Germany; and from July 1, 1937, to Sept. 2, 1945, as to Japan.

<sup>58</sup> Sec. 202(a).

<sup>59</sup> Note 33 above.

tion of Germany<sup>60</sup> and Japan<sup>61</sup> which had also been introduced in the many countries occupied by the (then) enemy forces.<sup>62</sup> As an example, it was stated:

if a property located in an area of Germany, now subject to Communist control and owned, directly or indirectly, at the outbreak of World War II by a national of the United States was taken or confiscated by the Germans during the war, and, if because of treaty provisions made with reference to or political conditions existing in an area of Germany now subject to Communist control at the end of hostilities, such plant was never effectively restored to the U. S. national and said national has not been paid since the original taking by Germany for the amount of the loss sustained, a claim for the total amount of such uncompensated loss shall be allowable.<sup>63</sup>

Further categories concern the damage to, or destruction of, ships and cargoes as a result of military action by Germany or Japan.<sup>64</sup> Claims of insurers or reinsurers as assignees are not allowable under this subsection 202(b); all amounts received on account of the loss must, of course, be deducted from any award. Another category of claims concerns the losses of insurers and reinsurers under war-risk insurance policies incurred in the settlement of claims for insured losses of ships (but not of cargoes), involving approximately 13,000 ships damaged or sunk during a period of the war when it was doubtful whether, under the Neutrality Act of June 29, 1940, the United States Maritime Commission could insure American vessels carrying military supplies to Allied ports during the first critical months of 1942. The American Hull Syndicate, which had insured vessels used chiefly in transporting basic commodities to and from the United States, estimates the net losses to be \$16,500,000.<sup>65</sup> Finally, there are also covered claims for death, disability and property losses suffered by civilian passengers on vessels engaged in commerce on the high seas and there attacked by Germany or Japan.

<sup>60</sup> Decree concerning the Administration of Enemy Property, Jan. 15, 1940, and Executive Decrees mentioned in Domke, *Trading with the Enemy in World War II*, p. 1, note 8 (1948). On the application of that German legislation to the property of American nationals, see Court of Appeals of Coblenz (Germany), June 17, 1952, *Rechtsprechung zum Wiedergutmachungsrecht* 1952, p. 249; Court of Appeals of Bremen, of Feb. 4, 1955, *ibid.* 1956, p. 8; and *Sonnenberg v. U. S.*, 174 F. Supp. 674, *aff'd.*, 268 F. 2d 537 (2d Cir., 1959).

<sup>61</sup> Law No. 99 of Dec. 22, 1941, regarding the control of enemy assets and the appointment of administrators of enemy property, and implementing decrees, mentioned in Domke, *The Control of Alien Property* 6 (1947). On decisions of the United States-Japanese Property Commission, established under Art. 15a of the Peace Treaty with Japan, 46 A.J.I.L. Supp. 79 (1952), see 5 Japanese Annual of International Law 45-110 (1961), and Summers and Fraleigh, "The United States-Japanese Property Commission," 56 A.J.I.L. 407 (1962).

<sup>62</sup> Domke, note 60 above, p. 5, notes 26-31.

<sup>63</sup> H. Rep. No. 2035, of July 25, 1962, p. 10.

<sup>64</sup> During the period beginning Sept. 1, 1939, and ending Sept. 2, 1945. Sec. 202(b).

<sup>65</sup> Note<sup>63</sup> above, p. 11.

## NATIONALITY OF CLAIMANTS

The War Claims Act of 1962, Section 204, prohibits allowance of any claims unless the property upon which it is based was owned, directly or indirectly, by a national of the United States on the date of the loss or destruction. Nationals are defined<sup>66</sup> as not only natural persons who are citizens of the United States or owe permanent allegiance to the United States,<sup>67</sup> but also any entity under the laws of the "United States, or of any State, the Commonwealth of Puerto Rico, the District of Columbia, or any possession of the United States and in which more than 50 per centum of the outstanding capital stock or other proprietary or similar interest is owned, directly or indirectly," by natural persons who are citizens of the United States or owe permanent allegiance to the United States.<sup>68</sup>

The statutory provision follows the prevailing practice that the claimant has to be a national at the date of loss,<sup>69</sup> in spite of strong presentation that the principle does not necessarily apply to the field of domestic war-damage legislation, where Congress has full discretion as to the eligibility of claimants.<sup>70</sup> Efforts were therefore made to extend the benefits to any person who was a national of the United States on the date of enactment of the War Claims Act, or to any individual who was lawfully admitted to the United States for permanent residence during or after World War II, and who is a lawful resident on the date of enactment.<sup>71</sup> The Managers on the part of the House stated<sup>72</sup> that the Senate, which had included such provision in its amendment to the House-approved Bill, H.R. 7283,<sup>73</sup> receded "with the understanding that in the event there remains a balance in the war claims fund after the payment in full of claims provided for under

<sup>66</sup> Sec. 201(c).

<sup>67</sup> Sec. 101(a)(22) of the Immigration and Nationality Act of 1952, 66 Stat. 163 (1952).

<sup>68</sup> Persons who lost their American citizenship solely by reason of marriage to foreigners and reacquired citizenship before the date of enactment of the War Claims Act of 1962, will qualify as claimants if the sole bar to their rights arises out of their loss of citizenship due to their marriage. Sec. 204.

<sup>69</sup> See memorandum of the State Department, dated Feb. 6, 1959, entitled "The Matter of Nationality with respect to International Claims," in *The International Claims Settlement Act, Hearings before a Subcommittee of the Senate Committee on Foreign Relations of May 29, 1959*, p. 58, 53 A.J.I.L. 909 (1959); and van Panhuys, *The Role of Nationality in International Law* 86 (1959). Lillich, *International Claims: Their Adjudication by National Commissions* 76 (1962), and Lillich and Christenson, *International Claims: Their Preparation and Presentation* 8 (1962), offer abundant source material on the rule of continuity of nationality.

<sup>70</sup> See memorandum of this writer in *The International Claims Settlement Act*, note 69 above, p. 31; *War Claims and Enemy Property Legislation, Hearings* (note 28 above) of Aug. 2 and 3, 1961, pp. 67, 136, 182; and 108 Cong. Rec. 14894 (Aug. 8, 1962): "The disposition of these assets is a matter of U. S. domestic policy, not an international question."

<sup>71</sup> H.R. 3178, 87th Cong., 1st Sess., introduced Jan. 21, 1961; 108 Cong. Rec. App. 6184 (Aug. 14, 1962).

<sup>72</sup> Note 31 above, p. 4.

<sup>73</sup> 108 Cong. Rec. 18124 (Sept. 12, 1962).



this bill, consideration would be given to legislation providing for payment" to these persons.<sup>74</sup>

In addition to the requirement of nationality of the claimant at the date of loss, the claim must be continuously owned thereafter by a national of the United States until the date of filing with the Foreign Claims Settlement Commission.<sup>75</sup> The transfer of property after the damage had been suffered will not in itself extinguish the claim of the transferor. If the claim has been assigned for value, the assignee, subject to the nationality requirement of the Act, will be entitled to file a claim for recovery.<sup>76</sup>

#### STOCKHOLDERS' CLAIMS

Any claim "based upon an ownership interest in any corporation, association, or other entity which is a national of the United States" will not be allowed.<sup>77</sup> That means that, if a corporation is incorporated in any State of the Union and is owned 51 percent by Americans and 49 percent by aliens at all relevant times,<sup>78</sup> the claim of the corporation will be paid, but none of the stockholders. Thus, double compensation to the corporation and the individual stockholders is being excluded. However, if such a corporation is not a national of the United States because less than 51 percent is owned by Americans, or the corporation is a foreign and not an American corporation for lack of incorporation in any State of the Union, then a claim based on a *direct* ownership interest of Americans will be allowed "without regard to the per centum of ownership vested in the claimant in any such claim."<sup>79</sup> Even a very small ownership in such a corporation will not exclude compensation for any claim of an American shareholder. Where such a claim is based on an *indirect* ownership interest in a corporation which is not a national of the United States, a claim will be allowed "only if at least 25 per centum of the entire ownership interest thereof at the time of such loss was vested in nationals of the United States."<sup>80</sup> For example: An individual or an American corporation, qualifying as an American national under the Act, has a proprietary interest in a foreign corporation which in turn is a stockholder in another foreign corporation. The latter foreign corporation suffered war damages. In order to obtain compensation for the loss under the Act, the American (individual or corporation) must show that at least 25 percent of the entire ownership in that foreign corporation (suffering the loss) was vested in American nationals at the time of the loss. The obvious purpose of this provision is to avoid multiplication of small claims based on such indirect American ownership in foreign corporations. All claims of stockholders based directly or indirectly on ownership of Americans (individuals or corpora-

<sup>74</sup> Senator Javits declared that legislation will be introduced in 1963 "to give these claimants at least a measure of justice." 108 Cong. Rec. 21342 (Oct. 5, 1962). Representative Ryan introduced such a bill, H.R. 2687, 109 Cong. Rec. 898 (Jan. 24, 1963), and Senator Javits a similar bill, S. 987, 109 Cong. Rec. 8260 (March 4, 1963).

<sup>75</sup> Sec. 204.

<sup>76</sup> Sec. 203.

<sup>77</sup> Sec. 205(a).

<sup>78</sup> For such participation of nationals, see note 66 above, and Domke, "On the Nationalization of Foreign Shareholders' Interests," 4 New York Law Forum 46 (1958).

<sup>79</sup> Sec. 205(b).

<sup>80</sup> Sec. 205(c).

tions) shall be calculated on the basis of the total loss suffered by such corporation and "shall bear the same proportion to such loss as the ownership interest of the claimant bears to the entire ownership interest thereof." <sup>81</sup>

Corporations with claims in excess of \$10,000 must include a statement under oath disclosing the total Federal tax benefits derived by the corporation from the loss in any previous year.<sup>82</sup> Any such award will be reduced by the aggregate amount of tax benefits. It was stated in the House Report of July 25, 1962:

This provision is necessary in order to prevent windfalls to a few claimants. Section 123 of the Internal Revenue Code of 1939 permitted the deduction for Federal income and excess profits purposes, of certain war losses. In view of the high wartime tax rates (as much as 95 percent in some cases), corporate claimants may have already received as tax benefits most of the loss suffered. Where such benefits have been received, and subsequent recovery is made, the recovery is taxable at present rates. Therefore, but for the offset provisions of this section, it would be possible for claimant to receive more than 100 cents on the dollar for loss.<sup>83</sup>

Any payments made on awards reduced by reason of the aforementioned provision are exempt from Federal income tax.<sup>84</sup>

#### ADMINISTRATION OF THE WAR CLAIMS ACT

Claims under the Act will be certified by the Foreign Claims Settlement Commission to the Secretary of the Treasury for payment out of the War Claims Fund.<sup>85</sup> The Attorney General of the United States is authorized to cover into the Treasury for deposit in the War Claims Fund, from time to time, sums derived from the liquidated proceeds of property vested in him or transferred to him under the Trading with the Enemy Act. As of June 30, 1962, there were available for transfer to the Fund 132 million dollars in cash, and unliquidated assets of 142 million dollars, against which reserves for other claims litigations<sup>86</sup> and taxes of about 175 million dollars had to be off-set; it leaves an estimated free balance, after final liquidation by the Office of Alien Property, for transfer to the War Claims Fund of 100 million dollars.<sup>87</sup> Awards to persons convicted of treason, sedition, subversive activities or of any other crime involving disloyalty to the United States are prohibited,<sup>88</sup> as are also awards on account of certain claims

<sup>81</sup> Sec. 205(d).

<sup>82</sup> Sec. 206(b).

<sup>83</sup> No. 2035, p. 13. The limitation to awards in excess of \$10,000 eliminates the administrative burden that would otherwise be involved in numerous smaller claims.

<sup>84</sup> Sec. 206(b). Such provision was necessary in view of the fact that the Internal Revenue Service endeavored to collect taxes on awards paid under the Japanese Evacuation Claims Act of 1948, note 51 above; see 108 Cong. Rec. 14835 (Aug. 8, 1962).

<sup>85</sup> Sec. 209.

<sup>86</sup> Among them a reserve of the book value of 100 million dollars of the vested shares of General Aniline & Film Corporation, the sale of which has meanwhile been authorized, note 113 below.

<sup>87</sup> H. Rep. No. 2035, of July 25, 1962, p. 8; 108 Cong. Rec. 18089 (Sept. 12, 1962).

<sup>88</sup> Sec. 208.

against Italy, Rumania, Bulgaria, and Hungary, which had previously been authorized under Secs. 303 and 304 of Title III of the International Claims Settlement Act of 1949, as amended,<sup>89</sup> namely, for war damages, nationalization, compulsory liquidation or other taking of property.<sup>90</sup>

Payments will be made in the full amount of awards on death and disability suffered by civilian nationals on vessels attacked on the high seas, and to any claimant certified to the Commission by the Small Business Administration as having been, at the date the damage occurred, a small business concern within the meaning of the Small Business Act, as amended.<sup>91</sup> Thereafter, depending on the amount of money available, payments on other awards will be made in uniform installments not to exceed \$10,000 on any one award. On awards of more than \$10,000, payments will be made on a pro rata basis, to keep within the limits of available funds.<sup>92</sup> The awards of the Commission will be a final and conclusive determination. This follows from the incorporation, by reference, in the War Claims Act of certain procedural provisions of other laws,<sup>93</sup> especially the International Claims Settlement Act of 1949,<sup>94</sup> which provides in Section 4(h):

The action of the Commission in allowing or denying any claim under this title shall be final and conclusive on all questions of law and fact and not subject to review by the Secretary of State or any other official, department, agency, or establishment of the United States, or by any court by mandamus or otherwise.

Indeed, the finality of the Commission's decisions<sup>95</sup> has been repeatedly upheld by the courts,<sup>96</sup> and its rôle in the adjudication of international claims has rightly been termed as that of a "court of last resort."<sup>97</sup>

It is interesting to note that the War Claims Act of 1962 further provides that payment of an award will not "extinguish any rights against

<sup>89</sup> 69 Stat. 562, Pub. Law 285, 84th Cong., 1st Sess. (1955).

<sup>90</sup> With the exception of claims against the Hungarian Government, against which no claims may be filed but, if previously awarded, may be re-certified by the Secretary of the Treasury, Sec. 209(b). Such payment will be confined to 40 percent of the awards, Sec. 213(a)(3). This compares somewhat with payments of 40 percent on awards against Rumania and 53 percent against Bulgaria. See H. Rep. No. 1279, of Feb. 18, 1960, p. 9.

<sup>91</sup> Sec. 213(a)(1). There will be less than five million dollars involved in the small business claims. 108 Cong. Rec. 18115 (Sept. 12, 1962).

<sup>92</sup> Sec. 213(a)(2 and 3), 213(b and c).

<sup>93</sup> Sec. 215.

<sup>94</sup> 64 Stat. 12.

<sup>95</sup> See Coerper, "The Foreign Claims Settlement Commission and Judicial Review," 50 A.J.I.L. 868 (1956).

<sup>96</sup> *DeVegvar v. Gilliland*, 228 F.2d 640 (D.C. Cir., 1955), cert. den., 350 U. S. 994 (1956); *Dayton v. Gilliland*, 242 F.2d 227 (D.C. Cir., 1957), cert. den., 355 U. S. 813 (1957); *Haas v. Humphrey*, 246 F.2d 682 (D.C. Cir., 1957), cert. den., 355 U. S. 854 (1957); *American and European Agencies, Inc. v. Gilliland*, 247 F.2d 95 (D.C. Cir., 1957), cert. den., 355 U. S. 884 (1957); *Zutich v. Gilliland*, 254 F.2d 464 (8th Cir., 1958); *First National City Bank of New York v. Gilliland*, 257 F.2d 223 (D.C. Cir., 1958), cert. den., 358 U. S. 837 (1958).

<sup>97</sup> Re, "The Foreign Claims Settlement Commission: Its Function and Jurisdiction," 60 Michigan Law Rev. 1079, 1093 (1962).

any foreign government for the unpaid balance of the award."<sup>98</sup> This is a most welcome deviation from the practice in some lump-sum settlement agreements for compensation of losses suffered by Americans through nationalization measures, such as the agreements of the United States with Rumania, of March 30, 1960,<sup>99</sup> and with Poland, of July 16, 1960.<sup>100</sup> Articles IV of these agreements provide that the United States "will not pursue or present to the Government of the Rumanian People's Republic claims," or more explicitly:

the Government of the United States will neither present to the Government of Poland nor espouse claims of nationals of the United States against the Government of Poland. . . . In the event such claims are presented directly by nationals of the United States to the Government of Poland, the Government of Poland will refer them to the Government of the United States.

Under the War Claims Act of 1962, the question will therefore not arise, solely by reason of the aforementioned Section 213(e), whether the refusal of any espousal amounts to a deprivation of property rights protected by the Fifth Amendment to the Constitution.<sup>101</sup> Such a refusal would indeed make any assertion of an international claim unavailable through the usual diplomatic protection, as efficient as the latter may be under the circumstances. Here, under the War Claims Act of 1962, the claim for the unpaid part of an award is expressly reserved to the claimant, without any restriction as to its possible later espousal.

Mention may further be made of a provision of the War Claims Act of 1962 that

No remuneration on account of services . . . on behalf of any claimant in connection with any claim filed with the Commission . . . shall exceed 10 per centum<sup>102</sup> of the total amount paid pursuant to any award. . . . Any agreement to the contrary shall be unlawful and void. . . .

The provision contrasts with the corresponding provision of Section 20 of the Trading with the Enemy Act, as amended,<sup>103</sup> whereby the court

shall approve an aggregate of fees in excess of 10 per centum . . . only upon a finding that there exist special circumstances of unusual hardship which require the payment of such excess.

The program for adjudicating war claims to American nationals will, however, only be inaugurated within sixty days after the enactment of legislation making appropriations to the Commission for administrative ex-

<sup>98</sup> Sec. 213(e).

<sup>99</sup> Note 45 above.

<sup>100</sup> 55 A.J.I.L. 540 (1961); Rode, "The American-Polish Claims Agreement of 1960," *ibid.* 452.

<sup>101</sup> See editorial, "Executive Agreements and Emanations from the Fifth Amendment," 49 A.J.I.L. 362 (1955), and § 218 of the Restatement of the Foreign Relations Law of the United States, American Law Institute, Proposed Official Draft (May 3, 1962), p. 729 (1962).

<sup>102</sup> "(or such lesser per centum as may be fixed by the Commission with respect to any class of claims)". Sec. 214.

<sup>103</sup> By Sec. 2 of Pub. Law 322, of March 8, 1946, 60 Stat. 54.

penses in carrying out its functions under the Act.<sup>104</sup> The Commission must give notice through publication in the *Federal Register* of the time within which claims may be filed with the Commission, the limit not being more than eighteen months after such publication.<sup>105</sup> Completion of the program is required within four years after the enactment of the appropriation legislation, which the 87th Congress did not pass before its adjournment.<sup>106</sup>

#### AMENDMENTS TO THE TRADING WITH THE ENEMY ACT

The War Claims Act of 1962 contains in its Title II, Sections 201-206, several amendments to the Trading with the Enemy Act, as amended. They deal with heirless property, sale of vested property in litigation, certain interests in estates and trusts, and the return of vested German and Japanese copyrights and trademarks.

##### *Heirless Property*

The War Claims Act provides for the payment of \$500,000 out of the War Claims Fund for use in the rehabilitation and relief of needy persons in the United States who survived Nazi persecution. The payment is to be made to successor organizations in lieu of the return of property in the United States which belonged to heirless victims of such persecution.<sup>107</sup> A return had previously been directed,<sup>108</sup> if the former owner was

an individual who, as a consequence of any law, decree, or regulation of the nation of which he was then a citizen or subject, discriminatory against political, racial, or religious groups, has at no time between December 7, 1941, and the time when such law, decree, or regulation was abrogated, enjoyed full rights of citizenship under the law of such nation.<sup>109</sup>

Because the great bulk of persecutees were of Jewish origin, the Jewish Restitution Successor Organization, a charitable membership organization of New York, had been designated by the President as successor in interest to such deceased persons.<sup>110</sup> That organization had filed a total of 18,000 claims, but no payments had been made, primarily because of difficulties in proof of ownership of specific assets.<sup>111</sup> The lump-sum payment which

<sup>104</sup> Sec. 210.

<sup>105</sup> The Commission recommended "that all persons and organizations having a claim under the Act assemble the evidence necessary to support their claims." Release of Nov. 2, 1962.

<sup>106</sup> Sec. 211.

<sup>107</sup> Sec. 204(a) of Title II of the War Claims Act, as now amending Sec. 32(h) of the Trading with the Enemy Act, as amended, 50 U.S.C.A. App. 32.

<sup>108</sup> By Pub. Law 671, 79th Cong., 60 Stat. 50 (1946), amending Sec. 32(h) of the Trading with the Enemy Act.

<sup>109</sup> On the interpretation of this statutory provision by administrative decisions of the Office of Alien Property, see *Schilling v. Rogers*, 363 U. S. 666 (1960).

<sup>110</sup> By Exec. Order No. 10587, of Jan. 13, 1955, pursuant to Pub. Law 626 of Aug. 28, 1954, 68 Stat. 767.

<sup>111</sup> H. Rep. No. 1233, of Feb. 1, 1960, p. 2. Disposition of heirless property in Swiss banks, mostly in numbered accounts and originating likewise from victims of Nazi

"shall constitute a full and complete discharge of all claims" for return of vested property of heirless victims of Nazi persecution, may also be made to additional successor organizations designated by the President. All allocations shall be

in the proportions in which the proceeds of heirless property were distributed, pursuant to agreements to which the United States was a party, by the Intergovernmental Committee for Refugees and successor organizations thereto.<sup>112</sup>

### *Sale of Vested Property in Litigation*

By amending Section 9(a) of the Trading with the Enemy Act, which prohibits the sale of any vested property claimed in a lawsuit for return, the War Claims Act<sup>113</sup> provides for such authorization by a determination of the President, in time of war or national emergency, that the interest and welfare of the United States require such sale. The Office of Alien Property may thus sell the property and deposit the net proceeds in a special Treasury account pending the entry of a final judgment in the suit. Claimants who are successful in such suits for return of vested property as non-enemy-owned will have a choice either to be satisfied with the proceeds of the sale, or to waive their claim to such proceeds and to seek just compensation instead. The court in which the suit for the return was instituted will then "determine the amount which will constitute just compensation for such interest, right, or title, and shall order payment to the claimant of the amount so determined."<sup>114</sup> Such order will constitute a judgment against the United States, to be paid first from the net proceeds of the sale, and the balance in the same manner as judgments in certain civil actions against the United States.<sup>115</sup>

The purpose of this provision was to authorize the Attorney General to sell approximately 93 percent of the outstanding shares of General Aniline & Film Corporation, which had been vested as enemy (German)-controlled as early as 1943.<sup>116</sup> Considerable litigation on the return of this property occurred during the years, initiated by the Swiss owner of the vested shares, Société Internationale pour des Participations Industrielles et Commerciales, S.A., known as Interhandel A.G., formerly I.G. Chemie A.G.<sup>117</sup> The litigation is still pending<sup>118</sup> after an action by the Swiss

persecution, had been contemplated by the Swiss legislature. 8 Aussenwirtschaftsdienst 299 (1962).

<sup>112</sup> Cf. Art. 8 of the Paris Reparation Agreement of Jan. 10, 1946 (note 6 above): "allocation of a reparation share to nonpatriable victims of German action," and Art. 5(2) of the London Agreement on German External Debts, of Feb. 27, 1953, T.I.A.S., No. 2792.

<sup>113</sup> Sec. 203 of Title II of the War Claims Act of 1962.

<sup>114</sup> *Ibid.*

<sup>115</sup> Under Sec. 1346, Title 28, U. S. Code.

<sup>116</sup> Vesting Order No. 4, 7 Fed. Reg. 2923 (1943).

<sup>117</sup> For a summary of litigation, see H. Rep. No. 2046, of July 26, 1962, p. 4; 108 Cong. Rec. 14972 (Aug. 9, 1962); see also Mason, "The General Aniline and Film Co. Case," 1958 Proceedings, American Society of International Law 114.

<sup>118</sup> The Supreme Court reversed the dismissal of the case, *Société Internationale etc. v. Rogers*, 357 U. S. 197 (1958), 53 A.J.I.L. 177 (1959), and remanded it to the U. S.

Federation, on behalf of Interhandel A.G., had been dismissed by the International Court of Justice on March 21, 1959, for lack of exhaustion of remedies still available to the Swiss claimant in American courts.<sup>119</sup>

A provision, such as now appears in the War Claims Act, authorizing the sale of shares of General Aniline & Film Corporation, had been considered by Congressional committees in former years. The constitutionality of such a proposed enactment had been challenged by the representative of the Swiss shareholder in a memorandum first submitted in 1953<sup>120</sup> and again, with changes, in 1959.<sup>121</sup> The latter claimed that an authorization of sale of vested property would permit the taking of private property for purposes other than authorized public use and that such taking would be unconstitutional; moreover, the owner would have a vested right to recover his property in kind, if the vesting were not justified but erroneous insofar as the owner (Interhandel A.G.) was not enemy (German)-controlled. The constitutionality was also challenged by Senator Olin Johnston,<sup>122</sup> for the reason that the taking was not for public use but for disposition by sale to other private interests.<sup>123</sup> However, the present Attorney General of the United States and the Attorneys General in the previous Administration recommended the legislative authorization of sale as Constitutional.<sup>124</sup>

#### *Return of German and Japanese Vested Property*

The War Claims Act of 1962 does not provide generally for a return of German or Japanese vested property. On the contrary, Section 39 of the Trading with the Enemy Act, as added to by the War Claims Act of 1948, expressly prohibited a return; the wording of the section was not changed by the Act of 1962. The latter Act, however, provides for a restricted return of German and Japanese assets, namely, of certain rights in estates and trusts, of copyrights and trademarks.

#### *Divestiture of German and Japanese Interests in Estates and Trusts*

The War Claims Act of 1962 added a new Section 40 to the Trading with the Enemy Act on the divestment and return of undistributed rights and interests of the Government in vested estates and trusts.<sup>125</sup> The Act does

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District Court, Dist. Col., for further proceedings. See Annual Report, Office of Alien Property, Department of Justice, for the fiscal year ended June 30, 1961, p. 8.

<sup>119</sup> [1959] I.O.J. Rep. 6; 53 A.J.I.L. 671 (1959). See Briggs, "Interhandel: The Court's Judgment of March 21, 1959, on the Preliminary Objections of the United States," 53 A.J.I.L. 547 (1959); Jacoby, "Towards the Rule of Law?" 52 *ibid.* 107 (1958). The case has meanwhile been settled. Associated Press release of March 4, 1963.

<sup>120</sup> Amendments to the Trading with the Enemy Act, Hearings before a Subcommittee of the Senate Committee on the Judiciary on S. 2171, 83d Cong., 1st Sess., pp. 107-118 (1953).

<sup>121</sup> War Claims and Enemy Property Legislation, Hearings before a House Subcommittee of the Committee on Interstate and Foreign Commerce, 86th Cong., 1st Sess., pp. 571-581 (1959).

<sup>122</sup> See note 30 above.

<sup>123</sup> 108 Cong. Rec. 15289 (Aug. 13, 1962).

<sup>124</sup> *ibid.* 14978 (Aug. 9, 1962), and 18095 (Sept. 12, 1962).

<sup>125</sup> Sec. 205 of Title II of the War Claims Act of 1962.

not incorporate a restriction of former bills<sup>126</sup> whereby only interests would be divested in estates of American decedents and corpora of trusts created by American citizens. On the other hand, it restricts the divesting to the rights and interests of "individuals." Moreover, former enemy nationals convicted of war crimes<sup>127</sup> by a court of competent jurisdiction would not be entitled to the benefits of the Act.<sup>128</sup>

As to the decisive concept of "distributable interest," so called in a letter of the Department of Justice of March 21, 1962,<sup>129</sup> in former bills termed "any unliquidated interest,"<sup>130</sup> the final wording of the Act speaks of interests "which have not become payable or deliverable to or have not vested in possession in the Attorney General prior to December 31, 1961."<sup>131</sup> In spite of the termination of the vesting program by the Office of Alien Property on April 17, 1953,<sup>132</sup> the Attorney General took the position that the vesting of "rights, title and interest" gave the United States the continuing right to receive any further income from the estates and trusts. The obligation of banking and trust companies to pay income—as and when received—on such trusts and estates to the Attorney General had been contested in various court proceedings.<sup>133</sup> These obligations arise under wills and trust instruments where the wording of the documents and the intent of the decedent or settlor has to be determined, and also the applicable State law, which gives rise to the claim of the beneficiary. It may be that such claim, and, therefore, the obligation to pay ("payable and deliverable") exists only after a court determination sought by the trustee for interpretation of the trust agreement, or even only after the probate court's approval of an accounting. The concept of "payable" thus becomes a matter for determination under the State law governing the estate

<sup>126</sup> S. 291 and S. 495, 87th Cong., 1st Sess.; S. Rep. No. 1062, of Sept. 15, 1961, p. 8.

<sup>127</sup> "Murder, ill treatment, or deportation for slave labor of prisoners of war, political opponents, hostages, or civilian population in occupied territories, or of murder or ill treatment of military or naval persons, or of plunder or wanton destruction without justified military necessity." Sec. 40(b) of the (new) Sec. 40 of the Trading with the Enemy Act.

<sup>128</sup> This provision concerning German and Japanese nationals is somewhat different from Sec. 208 on the exclusion of certain American claimants.

<sup>129</sup> 108 Cong. Rec. 18122 (Sept. 12, 1962).

<sup>130</sup> "including any increase thereof," S. 291 and S. 495, 87th Cong., 1st Sess. (1961).

<sup>131</sup> The cut-off date (of Dec. 31, 1961) for the collection of income from estates and trusts was justified in that "with the passing years, the expense of collecting income and preserving remainder interest will become disproportionately large in relation to the volume of the property to be taken in." Letter of the Department of Justice, note 129 above.

<sup>132</sup> Domke, *American-German Private Law Relations, Cases 1945-1955*, p. 11 (1956).

<sup>133</sup> *St. Louis Trust Company v. Herf*, 235 S.W.2d 241 (Mo., 1950); *Estate of Stagnaro*, 107 Cal. App. 2d 98 (1951); *Harvard Trust Company v. Attorney General of the United States*, 329 Mass. 79 (1952); *National Savings and Trust Company v. Brownell*, 222 F.2d 395 (D.C. Cir., 1955), cert. den., 349 U. S. 955 (1955); *Brownell v. Union & New Haven Trust Company*, 143 Conn. 662 (1956); *Orme v. Northern Trust Company*, 410 Ill. 354, cert. den. sub nomine *Hardenberg v. McGrath*, 343 U. S. 921 (1952), 25 Ill.2d 151, 183 N.E.2d 505 (1962), cert. den., 371 U. S. 935 (Dec. 10, 1962).



or trust agreement.<sup>184</sup> In other words, an obligation to pay or to deliver exists only when the corresponding right of the beneficiary has become legally enforceable.<sup>185</sup> The divesting should be notified "at the earliest practical time . . . to the lawful owner or custodian of any interest."<sup>186</sup> It will thus, under State laws, enable trustees "to carry out the legal dispositions in accordance with the wishes of the persons establishing such trusts."<sup>187</sup>

### *Return of Vested German and Japanese Copyrights*

Finally, the War Claims Act, by adding a new Section 41 to the Trading with the Enemy Act, as amended,<sup>188</sup> provides for the divestment of the Government's interest in certain copyrights and prewar contracts on the use of copyrighted material in the United States. The divestment in favor of the former owners or their successors in interest occurs as "a matter of grace," as expressly stated in Sec. 41(c and d), and does not extend to royalties or other income accrued in favor of the Government. It would also not prejudice the rights of persons who had been licensed by the Office of Alien Property in respect to vested copyrights, nor does it prevent the Attorney General from suing for the infringement of such copyright during the period of the Government's ownership. During the fiscal year ending June 30, 1961, the Office of Alien Property received only about \$87,000 in royalties for approximately 300,000 vested copyrights.<sup>189</sup> As copyrights have a statutory life of 28 years, renewable for an additional 28 years, the amount of future royalties, steadily decreasing, would have soon fallen below the cost of administration. Excluded from the return, by reference to specific vesting orders, are moneys collected from the publication in the United States of Hitler's *Mein Kampf*, the diaries of Paul Joseph Goebbels, the memoirs of Alfred Rosenberg, and also the photo-

<sup>184</sup> Another bill, H.R. 1185, introduced on Jan. 3, 1961, provided that property to be received prior to December 7, 1941, from a trust fund established by Americans, should be returned to the "grantor of such trusts or his legal representative or successor in interest by inheritance, devise, bequest or operation of law." All government departments commented unfavorably on this bill, as conflicting with any rights which former owners or other beneficiaries may have. Said the Department of Justice: "In some instances the provision for payment to successors in interest to a deceased grantor may mean conferring a benefit on heirs of the grantor who were, by the latter's express wish, excluded from participating in the trust." Letter of Aug. 21, 1961, in War Claims and Enemy Property Legislation, Hearings, note 28 above, p. 18 (1961).

<sup>185</sup> "'Payable' means that the debt is payable at once, as opposed to 'owing'." Black's Law Dictionary, p. 1285 (4th ed., 1951).

<sup>186</sup> Sec. 40(c) of the Trading with the Enemy Act.

<sup>187</sup> Report, note 126 above, p. 9.

<sup>188</sup> Sec. 41(a) provides for proceedings before the Court of Claims on certain claims arising out of the vesting of shares of General Dyestuff Corporation, whose American owners were considered to be cloaks for German nationals. S. Rep. No. 1062, of Sept. 15, 1961, p. 8; H. Rep. No. 2513, of Oct. 2, 1962, p. 5. See *Duisberg v. U. S.*, 89 F. Supp. 1019 (Ct. of Claims, 1950), and *Halbach v. Markham*, 106 F. Supp. 475 (N.J., 1952), *aff'd*, 207 F.2d 503 (3rd Cir., 1953), cert. den., 347 U. S. 933 (1954).

<sup>189</sup> Report, note 126 above, p. 15.

graphic history of the Nazi Party formerly owned by Heinrich Hoffman, its official photographer.<sup>140</sup>

A new Section 43 of the Trading with the Enemy Act<sup>141</sup> authorizes the transfer of title to all vested motion picture prints to the Library of Congress, thus enabling it to keep any material of historic value and to dispose of such prints by reproduction or otherwise.

### *Return of German and Japanese Trademarks*

Trademarks had inadvertently not been mentioned with copyrights in the final wording of the War Claims Act of October 22, 1962. Therefore, a special law had to be enacted the following day, adding a new Section 42 to the Trading with the Enemy Act,<sup>142</sup> containing similar provisions for trademarks. It further provides that the Alien Property Custodian shall publish in the *Federal Register* a list of trademarks which at the date of vesting were owned by persons residing in the area of Germany "now in the Soviet Zone of Occupation or in the Soviet Sector of Berlin or in German territory under provisional Soviet or Polish administration."<sup>143</sup> Further, the Secretary of State shall publish in the *Federal Register* a certificate "identifying the cases in which an equivalent trademark has been registered in the Federal Republic of Germany for a person residing or having its sole or primary seat in the Federal Republic of Germany or in the western sectors of Berlin."<sup>144</sup> In such a case of certification of an equivalent trademark, the person who had been registered in the Federal Republic of Germany as its owner "shall succeed to the ownership of the divested trademark in the United States." Here, too, certain trademarks are exempted from divestment, namely, those which had already been transferred to American companies before the second World War, mostly to branches of German firms in the United States. In those cases the Alien Property Custodian had vested the interests of the German shareholders in the companies. By exempting these trademarks from divestment, claims of former owners against American companies would be avoided which might be alleged with respect to those parts of the enterprises where the trademarks are used. Those trademarks had indeed been used by the American companies whose business had been operated independently of the former German shareholders for many years.<sup>145</sup>

The Foreign Claims Settlement Commission of the United States will administer the adjudication of war claims of American individuals and

<sup>140</sup> Firms in the Eastern Zone of Germany are not excluded from the divestment of copyrights, other than that of trademarks, note 143 below, but most of the former owners of such copyrights are now residing in West Germany.

<sup>141</sup> An Act to amend the Trading with the Enemy Act, as amended, Pub. Law 87-861, of Oct. 23, 1962, 76 Stat. 1139. • <sup>142</sup> *Ibid.*

<sup>143</sup> Sec. 42(d) of the Trading with the Enemy Act.

<sup>144</sup> *Ibid.* Cf. *Rogers v. Ercosa Camera Corporation*, 246 F.2d 675 (D.C. Cir., 1960), and the Zeiss judgments of the West German Federal Supreme Court of July 25, 1957, A.J.I.L.L. 687 (1959); Feb. 6, 1959, *Sammlung der deutschen Entscheidungen zum zivilrechtlichen Privatrecht* 1958-1959, No. 140, pp. 400-413 (1962); and June 30, 1961, *Juristenzeitung* 412 (1962).

<sup>145</sup> Report, note 126 above, p. 15.

corporations, whereas the divestment of former German and Japanese property will be determined by the Office of Alien Property, Department of Justice. The Commission, whose work has been described in recent articles by its Chairman,<sup>146</sup> deals not only with war claims, but primarily with claims arising out of postwar nationalizations and other taking of property of Americans for which no compensation was given by the expropriating country. Cumulative judicial and administrative experience is shown in the valuable Reports of the Commission<sup>147</sup> and of its predecessors, the War Claims Commission and the International Claims Settlement Commission.<sup>148</sup> Many of the legal problems involved in the claims adjudicated by these Commissions will also have to be considered in the administration of the War Claims Act of 1962. Among them will be the constructive taking of property, the effective date of taking bonds, bank deposits and insurance, exchange rates applied, burden of proof and other means to establish ownership interest, claims for interest, approximate cause of loss and indirect losses, the liquidation of enterprises, remainder estates, and the manifold valuation questions. In all these respects, the Reports of the Commissions reveal a vast source of contemporary application of international law, both public and private, which will play a decisive rôle in the forthcoming adjudication of American private war claims against Germany and Japan.

<sup>146</sup> Re, "The Foreign Claims Settlement Commission and International Claims," 13 *Syracuse Law Rev.* 516 (1962); "The Foreign Claims Settlement Commission: Its Function and Jurisdiction," 60 *Michigan Law Rev.* 1079 (1962); "The Foreign Claims Settlement Commission and the Adjudication of International Claims," 56 *A.J.I.L.* 728 (1962).

<sup>147</sup> Semiannual Reports have been submitted to Congress, the tenth (1959) and the fourteenth (1961) covering not less than 280 and 209 pages respectively, with detailed indices to the questions dealt with in Proposed Decisions, Panel Opinions and Pilot Decisions on various claims.

<sup>148</sup> Settlement of Claims by the Foreign Claims Settlement Commission of the United States and Its Predecessors, from September 14, 1949 to March 31, 1955 (696 pp., 1955).

## EDITORIAL COMMENT

### INTERNATIONAL LAW AND THE QUARANTINE OF CUBA: A HOPEFUL PRESCRIPTION FOR LEGAL WRITING

At this writing, in January, 1963, professional commentary by international lawyers on the quarantine of Cuba in October, 1962, is just beginning to be published. There is as yet little in the way of detailed or detached analysis,<sup>1</sup> but certainly there is a flood to come. The directions that expected writings might take are not only fascinating subjects for speculation but of great potential significance for international law. Seldom has there been an international episode giving so much leeway for characterization or so tempting from the standpoint of the lawman's usual inclination toward doctrinal formulation. And seldom has the probability been as great as here that what scholars dispute will go beyond disagreements between them out into the stream of laymen's attitudes toward the reality or not of law in relationship to use of force.

It is probably fact that international law, both the customary and the newer organic, came to public attention during the crisis of October 22-28, 1962, to a degree beyond its association in the public mind with other crises in the international arena since World War II, not excluding the Suez and Hungarian affairs. As many professors of international law know from their own experiences during last October, laymen and mass media tended toward preoccupation with the legitimacy or not of the "quarantine" under the rules of the general international law on "blockade," the latter term being used rather imprecisely to cover mainly approach, visitation, search, and seizure on the high seas, rather than the interdiction of a particular port by a force effective to accomplish interdiction. A favorite popular syllogism in more or less informal logic was "'Quarantine' is just another name for 'blockade'; blockade is something that occurs during wars; therefore this 'quarantine' is an act of war." At one Eastern university seventy-odd non-law professors, led by a distinguished Sinologist,

<sup>1</sup> There is a short editorial, "The Legal Basis for the Quarantine of Cuba," in 48 A.B.A. Journal 1141 (December, 1962). The writer had the somewhat stressful experience of having to meet a Nov. 1, 1962, deadline for his working paper, "The Inter-American Security System and the Cuban Crisis," prepared for the Third Hammarckjold Forum of the Bar Association of the City of New York. Rewritten in part on the basis of radio reports and held "open" until late on the afternoon of Oct. 28, 1962, this paper only highlights, particularly in the accompanying outline (Appendix A, heading IV), the legal aspects of the Oct. 22-28 crisis. It may be of some use with regard to the legal setting at the time the crisis began. Eventually this paper and a report of the panelists' presentations and discussion, Nov. 19, 1962, will be re-published by the Association of the Bar in a Hammarckjold Forum Series. Of possible interest is the policy statement on the crisis by the American Association for the United Nations, adopted at its Third Biennial Convention, Nov. 17, 1962, 34 A.A.U.N. News 8 (Dec., 1962-Jan., 1963).

whose familiarity with contemporary international law had until then escaped attention, made legal arguments about blockade (as well as policy arguments in favor of a base-for-base negotiation) to the White House by telegram. Some other teachers of international law might have experienced, as this writer did, a degree of resistance (probably because of the novelty of the notion) among non-professionals, such as reporters and newscasters, to the suggestion that the meaningful legal issues in the crisis lay, not in the pre-World War I rules of neutrals' rights and duties under the Declaration of Paris, 1856, and the like, but in the Charters of the United Nations and of the Organization of American States.

While, on the whole, there seemed to be general realization that the decision-makers had taken the requirements of "international law" or of these Charters into account, there was little instruction given the public as to the precise nature of the inter-relationships between law and politics involved. Thus, the public probably has very little understanding or appreciation of the legal implications of some of the measures taken and of their timing, such as that the quarantine was put into effect only after the action of the Organization of American States, and that it was quite specifically limited to the traffic in missiles and called for diversion, not arrest, of the carrying vessels. How well understood are the differences in the missions of the United Nations and the Organization of American States that led to the splitting of the response to the Soviet challenge into (1) quarantine through the O.A.S. and (2) the demand for the dismantling of missiles already in Cuba to the Security Council? How many are aware of the victory for concrete proof that lay behind the votes of Mexico, Brazil, and other states in the Organization of American States? Oblivious to the earlier failures of the United States (Caracas, 1954, San José, 1960, and Punta del Este, earlier in 1962) to convince the other members that there was a clear and present danger of extra-hemispheric presence in Cuba, there was even some feeling expressed that the other American states just rubber-stamped actions that, in any event, would have been taken by the United States. After the crisis had passed the crest, sensational journalism reported hearsay from "hawks" (*unidentified*) that largely ignored legal considerations, although in an earlier, hour-by-hour study in decision-making published in the *New York Times* for November 2, the legal environment had been mentioned as a take-off point in the planning of the response. The unhappy addendum to a great moment—perhaps a turning point—in history may outlast the meticulous report in general recollection.<sup>2</sup>

And, of course, the *realpolitik* determinists are beginning to be heard from, certainly in college and high school classrooms across the land. As usual they knew it all along; as they have always said: law, international

<sup>2</sup> This writer has no reliable information upon which to judge the comparative accuracies of these reports; and it may be that the Attorney General, labeled a "dove" (or inclining initially to that viewpoint) in the Saturday Evening Post article, was as "legal" as he was "moral" in reported opposition to an air strike. Saturday Evening Post, Dec. 8, 1962, pp. 15-20 (Vol. 235, No. 44).

obligations, international institutions, do not ever really contain the pursuit of national interest, and that pursuit is always essentially unilateral. But, on the other hand, there come rumors that Professor A has warned a law school international law association that the quarantine of Cuba was a flouting of international law by the United States. Professor B, it is reported, supports the legality of the quarantine, arguing, as did Professor C in the case of Suez, that the action taken was not a use of force directed against the political independence or the territorial integrity of any state or in any manner inconsistent with the purposes of the Charter of the United Nations. When asked, during the question period following a symposium on "The Inter-American Security System and the Cuban Crisis,"<sup>3</sup> what evolutionary growth of doctrine the crisis had brought about, this writer, who may live to regret it, replied, with the aid of another panelist,<sup>4</sup> "the doctrine of anticipatory, collective self-defense." The response was immediately clothed with warnings that this was dangerous doctrine, a temptation to the impatient, the angry and the nervous, always to be handled with the greatest care. But the temptation to label was not resisted, as perhaps it should have been.<sup>5</sup>

This extremely serious crisis, involving at its roots Soviet disregard of two basic, although tacit, understandings, was brilliantly met by the course of action taken. No commentator can hope to appraise it accurately and providently on the basis of the record now available. Many things must, as the President has said, be left to history. Proponents of international law and order cannot now and on the basis of the present record say with the assurance of absolute credibility that the resolution of the crisis was an unqualified triumph for the law of the Charters or for any particular legal outlook, theory, or doctrine. On the other hand, there should be resistance to explanations based on simplistic, "power politics" determinism. At this stage of man's time, international social control of deviant conduct by states is in large part based upon expectations (in turn based upon obvious need) not inescapably contradicted by events. In some events of recent history it is very hard, or impossible, to find support for such expectations. But the Cuban crisis of October, 1962, was not one of these. Without waiting for history, and on the basis of the present public record, it can be brought out, explained, analyzed, developed that:

<sup>3</sup> Note 1 above.

<sup>4</sup> Not a North American member of the panel. As my momentary collaborator in doctrinal statement has probably not seen the transcript of the discussion, I do not feel at liberty to associate him by name here.

<sup>5</sup> Or there have been added some more modifiers, such as "for a limited and special purpose under direct nuclear threat." Some slight comfort is taken from the fact that it was my South American colleague who, if memory serves, made the analogy to the common law and the pragmatic growth and shift of norms in that system under the stress of new situations. The writer did point out the uncomfortable parallel between "anticipatory self-defense" and the "hip-pocket move" defense to homicide in a certain Southwestern State: the other fellow might have been reaching for his handkerchief, or, to pursue the analogy toward escalation, he might have intended just to hitch up his six-shooter a little—but turned out to be faster on the draw after he saw what was coming.

1. The leadership initiative of the United States was not unilateral action by the United States.

2. The response to the threat did take into account obligations under existing international agreements regarding the deployment of forces, and referred to the international organizations created by these agreements proposals or positions with respect to the resolution of the crisis; the organizations through their appropriate agencies acted effectively; and even the respondents—at least the main respondent—acquiesced without objecting as to the juridical competence of the acting entities.<sup>6</sup>

3. The quarantine was limited to a specific nuclear threat to the Hemisphere, was to last only so long as the missile shipments might continue, and operated under directives for diversion rather than more drastic action, except in case of resistance to diversion.

4. National and Hemispheric interest that the present regime in Cuba be displaced, but presenting the possibility of serious contradiction with the United Nations Charter, patently was not pursued, even after the danger of nuclear response had receded.

5. The action authorized by the Organization of American States was a defensive response to the gravest external threat the Hemisphere has ever faced.

6. This threat involved much more than a disregard for the basic political principle of the Monroe Doctrine, whether the historic unilateral or the present multilateral versions, and there was no claim of "intervention" by even the most sensitive of the Latin American countries with respect to the quarantine.<sup>7</sup>

If it be unwise at this stage to "package" the episode into doctrinal formulations, even by those who have no general aversion to such exercises, it seems to this writer equally unwise by hindsight to array the variables and argue that, as this event "came out right" in terms of such an analysis, the non-doctrinal methodology is proved as a displacing universal. "Reasonableness" here was fairly self-evident and the judges of it readily identifiable.

Finally, it is not too soon, it is believed, for the community of international law to study the quarantine in terms of what might be needed by way of additional, positive law development. Instead of arguing what the crisis has or has not proved as to the present law of free seas in relation-

<sup>6</sup> In contrast, the Soviet delegate insisted to the last, during the Security Council consideration of the Guatemalan affair in 1954, that the Security Council had competence, to the exclusion of the Organization of American States, regarding the use of force against the Arbenz regime. See "The Inter-American Security System and the Cuban Crisis," note 1 above, pp. 23-25, and notes 33, 34 ff.

<sup>7</sup> Brazil, Mexico, and Bolivia abstained from that portion of the Oct. 23, 1962, resolution of the Organ of Consultation of the Organization of American States that provided for the use of force "... to prevent the missiles in Cuba with offensive capability from ever becoming an active threat to the peace and security of the continent." The action on the quarantine portion of the resolution was unanimous, once Uruguay's abstention for lack of instructions was removed.

ship to current weapons technology, perhaps some will block out proposals for some new treaty law about the right of approach and the like for use, if adequate arms control arrangements do not come along soon. Another interesting and important, although very delicate, area for study involves the examination of the Organization of American States, as it showed itself in this crisis, as a possible model for nuclear weapons exclusion arrangements in other geographic regions, such as, for example, Africa.

Covey Oliver



## NOTES AND COMMENTS

### A CRITIQUE OF PROFESSOR MYRES S. McDUGAL'S DOCTRINE OF INTERPRETATION BY MAJOR PURPOSES

Professor McDougal is a legal realist: he denies the normative quality of the rules of international law and decides questions of "legality" under the law of nations by primary reference to extra-legal sources.

For example, take McDougal's answer to the question of the legality of the temporary assumption by the United States of exclusive control over a large part of the high seas in the South Pacific, in order to test hydrogen bombs. A traditional approach to this issue, whether analytic or sociological, would search for norms which circumscribe the open seas and define their consequences. These rules of law would reflect recent reductions in the size of the open seas, due to expansion of territorial waters, and would express the restrictions on complete freedom in the open seas found in the familiar doctrines of "hot pursuit," "quota" and "navicert" (replacing "contraband" and "blockade"), "piracy," and "continental shelf." The answer is not propounded here, but the question of legality would be answered by reference to these norms. (It is not implied that all important questions relating to the bomb tests are legal ones.)

Such an approach is expressly rejected by the author whose views<sup>1</sup> are here under examination: "The only rational policy for proponents of human dignity today is to demand . . . not merely spurious or naive legalisms. . . ." McDougal answers the question of legality in a different way. He starts with rules, but quickly rejects them as norms:

"[T]he regime of the high seas" [is] composed of two complementary sets of prescriptions . . . one . . . under the label of "freedom of the seas" . . . [t]he other . . . to honor . . . claims . . . which may interfere. . . . To the initiated, these prescriptions and technical terms are not absolute inelastic dogmas but rather flexible policy preferences, permitting decision-makers a very broad discretion . . . for promoting major policies.<sup>2</sup>

McDougal's rules are deprived of normative character by virtue of their complete permissiveness, one rule always authorizing what the other forbids. Thus, closed seas and open seas are like a lizard swallowing its tail. They are not truly prescriptions, because they do not prescribe behavior. The determination of the legality of a given exclusive appropriation of the sea cannot be made by reference to this kind of "rule."

<sup>1</sup> McDougal and Norbert A. Schlei, "The Hydrogen Bomb Tests in Perspective: Lawful Measures for Security," in McDougal, *et al.*, *Studies in World Public Order* 843 (New Haven: Yale University Press, 1960); reprinted from 64 *Yale Law J.* 648-710 (1955).

<sup>2</sup> McDougal, "The Hydrogen Bomb Tests and the International Law of the Sea," 49 *A.J.I.L.* 358-359 (1955), restated in *Studies in World Public Order*, *op. cit.*, p. xv.

The traditional view follows the principle of the excluded middle. It argues that the law either permits a given action or it does not; there are no gaps in the law wherein the same action is at once allowed and prohibited; even if sparse, the law is a seamless web. As part of a legal system, each rule cannot be met by an equal and opposite rule; exceptions may modify but may not neatly cancel rules. For example, *pacta sunt servanda* (agreements ought to be obeyed) is not automatically nullified by *rebus sic stantibus* (unless circumstances have changed); in any given dispute, lawfulness must be decided by reference to a complex of norms which define agreements and specify vitiating changes of condition.

McDougal goes on to argue that, in the case of the bomb tests, the rules do not apply anyway:

The claim of the United States is obviously an unprecedented one, with no close prior analogies, and plainly no existing prescriptions in the regime of the high seas are literally applicable. . . .

What is most relevant in prior prescriptions . . . is simply the test of *reasonableness*. . . .<sup>3</sup>

If McDougal is correct in asserting that appropriation of the open seas for testing nuclear weapons is unique, and not governed by the rule of non-exclusive freedom, he could use traditional legal analysis to conclude that the exclusion was lawful by analogy to the famous Scottish verdict of "[illegality] not proven." He does not choose to do this. Rather, he states that the rule to be applied is one of "reasonableness." He then proceeds to deprive "reasonableness" of any normative quality:

. . . "[R]easonableness" . . . is primarily indicated by the deeply vital importance of the tests to the security of the United States, and indeed of all free peoples. . . .<sup>4</sup>

McDougal amplifies this as follows:

The claim of the United States is in substance a claim to prepare for self-defense. . . . The United States has undertaken its program of atomic and thermonuclear weapons development to ensure that . . . free nations are not lacking either in the retaliatory power which may deter aggression or in the weapons of self-defense if deterrence fails.<sup>5</sup>

As a final step in his argument, McDougal asserts that American and Western security will foster the major policies of human dignity and world public order:

It is only by maintaining their capacity to defend their free institutions that proponents of human dignity can hope to achieve by peaceful procedures a world public order . . .<sup>6</sup>

<sup>3</sup> "The Hydrogen Bomb Tests and the International Law of the Sea," *loc. cit.* 361 (emphasis in original).

<sup>4</sup> McDougal and Florentino P. Feliciano, "Legal Regulation of Resort to International Coercion," 68 Yale Law J. 1181, note 209 (1959).

<sup>5</sup> McDougal and Schlei, *loc. cit.* 812-813. Also found in "The Hydrogen Bomb Tests and the International Law of the Sea," *loc. cit.* 361.

<sup>6</sup> McDougal and Schlei, *loc. cit.* 843.

To summarize, Professor McDougal answers the question of lawfulness by interpretation of legal rules "according to major purposes." He contends that the temporary exclusive appropriation of the seas for bomb tests was lawful because it helped preserve the possibility of eventual global order and dignity. Legality in this view is solely a factor of end and efficacy. These are clearly extra-legal criteria, and could quite easily be applied—in fact, are often applied—without reference to the legal system they originally set out to interpret. At this point, law ceases to exist as a normative order.

Is inelastic dogmatism the only alternative to the argument from necessity? Traditional legal doctrines permit claims to be proportioned to the needs they serve. Thus, the minimal American requirement for exclusive possession of the high seas is measured by the actual physical penetration of injurious wind, heat and radiation caused by a blast. If such a limited appropriation is unlawful, the consequence of illegality is a duty to redress proximate damage. Warnings of danger and delineations of zone can be construed as attempts to prevent inadvertent exposure and to impose assumption of risk on willful intruders. (Forceful exclusion of American nationals has an entirely different legal basis.) According to newspaper reports of the most recent tests, the nations concerned accepted the restraints imposed by rules such as these: the United States did not claim the right to exclude foreign nationals from the international waters, and the Russian observation vessels did not attempt to enter the posted zones.

Perhaps the rigid shoe is on the other foot. If the Soviet Union were to shift her nuclear tests to the sea, or if some third country were to trigger maritime fission or fusion, American protests would be limited by the extent of previous claims.<sup>7</sup> An unequivocal asseveration of the legality of exclusive appropriation, such as Professor McDougal's, would provide no flexibility.

Does the assimilation of law by policy permeate McDougal's voluminous authorship? Elsewhere, Professor McDougal indicates that rules are a necessary but not a sufficient basis for comprehending international law.<sup>8</sup> He defines the function of rules in the law of war as follows:

The realistic function of those rules . . . is . . . not mechanically to dictate specific decision but to guide the attention of decision-makers to significant variable factors in typical recurring contexts of decision, to serve as summary indices to relevant crystallized community expectations . . .

Each particular rule, however, points to certain specific factors and policies, and the significance of any specific factor or policy in a given case depends upon its interrelation with other factors and policies,

<sup>7</sup> Probably for this same reason, neither the United States nor the Soviet Union protests the other's missile tests over the high seas.

<sup>8</sup> McDougal, "The Impact of International Law upon National Law: A Policy-Oriented Perspective," in *Studies in World Public Order*, *op. cit.* 169-170 (reprinted from 4 South Dakota Law Rev. 265-912 (1959)).

including the presence or absence of such other factors and policies, in total context.<sup>9</sup>

The second of the quoted paragraphs seems to imply that the content of rules defines permissible courses of action to which the decision-maker is limited. However, the implication in the footnote referred to is greatly outweighed by more forthright and frequent statements of the non-restrictive nature of norms, such as:

. . . that rationality . . . demands that one pierce through technical rules and concepts to the underlying fundamental policies and continually appraise such rules and concepts in terms of contemporary and projected policies.<sup>10</sup>

The piercing process generally leads Professor McDougal to reject norms as determinative of legal disputes. The rejection was explicit in the open-sea hydrogen-bomb test controversy. Likewise, McDougal's opinion that the voluntary absence of the Soviet Union from the Security Council did not constitute a veto of the Council's decision to intervene in Korea was not based on an interpretation of the specifically pertinent provisions of the United Nations Charter. Rather, legality followed from the factual assertion that the police action fostered the peace-preserving purpose of the United Nations, and was necessary to the survival of the Organization: "The attack upon South Korea was an act of aggression pure and simple. To have allowed it to go unopposed would have spelled the end of the United Nations as an effective instrument for collective security."<sup>11</sup> Argument from necessity was also used to establish the legality of the Uniting for Peace Resolution: "These arguments [of illegality] represent attempts to find in the Charter a 'meaning' . . . more limited than . . . that which is required to effectuate the purposes of the organization."<sup>12</sup> Professor McDougal sums up his views on the Korean resolutions by arguing:

The choice is, in a blunt literality for once relevant, a choice between life and death, between survival and destruction—not for the organization alone, but also for the peace and freedom it was designed to secure.<sup>13</sup>

Peaceful change in international affairs may occur under the aegis of law, apart from that aegis, or in contravention of it. Those who believe that only through law can the reciprocal claims of nations be accommodated on a lasting basis work for the extension of the rule of law in world politics.

<sup>9</sup> McDougal and Feliciano, "International Coercion and World Public Order: The General Principles of the Law of War," in *Studies in World Public Order*, *op. cit.* 294-295, including note 137 (reprinted from 67 *Yale Law J.* 771-845 (1958)).

<sup>10</sup> *Ibid.* 333.

<sup>11</sup> McDougal and Richard N. Gardner, "The Veto and the Charter: An Interpretation for Survival," in *Studies in World Public Order*, *op. cit.* 733 (reprinted from 60 *Yale Law J.* 258-292 (1951)). The article's title reveals the nature of the argument it contains.

<sup>12</sup> *Ibid.* 757.

<sup>13</sup> *Ibid.* 759-760. (No comment on the merits of these disputes is intended here.)

This extension implies increasing centralized enforcement of a world-wide legal order.

Not everyone agrees that world peace is fostered by reliance on law. Some argue that international law is non-existent or so weak that to lean on it is to court disaster. The rule of law is thought to be Utopian and the notion of legality illusory. Professor McDougal seems to belong to this latter school. This is because he does not consider the rules of the legal system to be normative, quite apart from the fact that he does not believe there is any world-wide system:

[T]he contemporary world arena exhibits no . . . international law . . . effectively applied on a global scale. What we have instead is rather a variety of "international" laws and an anarchy of diverse, contending orders . . .<sup>14</sup>

The point here is not that the system may be diverse, but that, whether international law be monistic, dualistic, or pluralistic, it is not regarded as normative:

. . . all the [traditional] theories, by their focus on normative-ambiguous rules and putative interrelations of such rules . . . fail to offer an adequate framework of inquiry . . .<sup>15</sup>

Thus, McDougal's use of law is not "legalistic": he does not obtain the answer to questions of lawfulness by reference to law. The words of the law become mere wisps of sight or sound. Law is policy. Policy is human dignity. Human dignity is fostered in the long run by the success of American foreign policy. Therefore, law is the handmaiden of the national interest of the United States. (Other countries will substitute their own national policy in place of the American.) It is clear that such "law" does not regulate behavior: it does not restrain, but liberates. Law becomes merely an increment to power:

. . . Among the instruments of power, when power is comprehensively conceived, there might be recognized . . . not merely diplomacy, propaganda, armaments, and goods, but an international law which is an expression, not of arbitrary political fiat, but of the fundamental policies of peoples . . .<sup>16</sup>

Professor McDougal's approach is coherent, and is not simply the intrusion of advocacy into scholarship. But it is not a juristic system. It uses the word "law" in an honorific sense, so that "rule of law" is a euphemism.

<sup>14</sup> McDougal, "Perspectives for an International Law of Human Dignity," in *Studies in World Public Order*, *op. cit.* 987 (reprinted from 1959 Proceedings, American Society of International Law 107-132).

<sup>15</sup> McDougal, "The Impact of International Law upon National Law: A Policy-Oriented Perspective," *loc. cit.* 164.

<sup>16</sup> McDougal, "Dr. Schwartzberger's *Power Politics*," 47 A.J.I.L. 119 (1953). See also McDougal's review of Hans Morgenthau's *Politics Among Nations* (2nd ed., New York: Knopf, 1954), "The Realist Theory in Pyrrhic Victory," 49 A.J.I.L. 378 (1955): "The major fault we would find with Professor Morgenthau's analysis is . . . not that he emphasizes power too much but that he doesn't emphasize certain forms of power [*i.e.*, law] enough."

Other more hardy areas of the law may have been able to withstand the idoloclastic onslaughts of legal realism. If international law is moribund, it would be better to bury it forthrightly than to have it cannibalized by the realistic school for digestion into propaganda.

The adequacy and portent of international law cannot be treated here, but the present writer accepts the notion that law is a restraint on freedom of action, and especially on the freedom of action of nation-states. We have a Constitution to limit our Leviathan internally. Externally, sovereignty is boxed in by fear, by rudimentary international manners and morals, and, hopefully, by international law. Freedom of action could be more safely enlarged by reducing fear than by eliminating the modest prescriptions of law, no matter how subtle the means of elimination. Preserving respect for legal institutions is also a worthwhile purpose.

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#### A FOOTNOTE

The distinctive merit in Professor Anderson's comment is in the clarity with which it exhibits the differences between certain assumptions about the nature of international law.

The principal assumptions of Professor Anderson are that international law is properly conceived as a body of inherited rules, relatively unaffected by the power and other social processes in which they are prescribed and applied; that these rules have a meaning or "normative character" largely independent of the purposes of the people who make use of them; and that these rules admit, apparently without aid of criteria of interpretation, of practically automatic application in particular instances.

The contrasting assumptions which inspire the writings criticized by Professor Anderson are that international law is most usefully conceived, not as a pre-existing body of rules, but as a comprehensive process of authoritative decision in which rules are continuously made and remade; that the function of the rules of international law is to communicate the perspectives (demands, identifications, and expectations) of the peoples of the world about this comprehensive process of decision; and that the rational application of these rules in particular instances requires their interpretation, like that of any other communication, in terms of who is using them, with respect to whom, for what purposes (major and minor), and in what context.

Rational choice between these two sets of assumptions would appear to depend upon the differing degree in which they can be made to facilitate certain indispensable intellectual tasks of the lawyer and scholar, including, in the least: clarification of the common interests of peoples in relation to specific alternatives in decision; the description of past trends in decision; accounting for the factors affecting past decisions; predicting future decisions, and recommending alternatives in future decision more in accord with the common interests of peoples.

The lawyer or scholar who finds Professor Anderson's assumptions more helpful in the performance of these intellectual tasks should of course adopt those assumptions.

MYRES S. McDOUGAL

#### THE QUESTION OF REVISION OF THE BUSTAMANTE CODE

The Inter-American Juridical Committee, permanent committee of the Inter-American Council of Jurists, has produced a fifth report<sup>1</sup> on the subject of possible revision of the Bustamante Code—the Code of Private International Law which the Sixth International Conference of American States adopted in 1928<sup>2</sup> and which is in force in fifteen Latin American states.<sup>3</sup> The new report is a follow-up to the one presented in 1958 and commented upon in this JOURNAL.<sup>4</sup> The Committee had recommended to the Inter-American Council of Jurists that it decide that the rules of conflict of laws applied in the United States shall be excluded from consideration in the revision, and that the work be directed toward obtaining: (1) withdrawal or reduction of reservations made in ratifying the Code convention; (2) unification of the law of the Code with that of the Montevideo Treaties on Private International Law;<sup>5</sup> and (3) adherence to the Code convention of the states parties to neither of the instruments.<sup>6</sup> The Inter-American Council of Jurists, which considered the proposals at its meeting in 1959, ignored the suggestion that American law should be excluded from consideration, and asked the Committee to continue the study of possible revision of the Bustamante Code with the aim of obtaining uniformity of rules on conflict of laws in the different American states.<sup>7</sup> The Council reaffirmed its belief that the work on revision should tend to facilitate the withdrawal of reservations, achievement of uniformity of

<sup>1</sup> Inter-American Juridical Committee, Opinion of the Inter-American Juridical Committee on the Revision of the Bustamante Code (CIJ-62) (Pan American Union, Washington, D. C., Dec., 1961, mimeo.). The Reporter was the Colombian member, Dr. José María Caicedo Castilla. Inter-American Juridical Committee, Report on the Work Accomplished at its 1961 Meeting, July 1 to Sept. 30 (CIJ-64) (Pan American Union, Washington, D. C., Feb., 1962, mimeo.).

<sup>2</sup> Text in The International Conferences of American States 1889-1928 (Scott ed., 1931) 367; 4 Hudson, International Legislation 2279 (1931).

<sup>3</sup> Bolivia, Brazil, Chile, Costa Rica, Cuba, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Nicaragua, Panama, Peru, and Venezuela.

<sup>4</sup> Nadelmann, "A New Report of the Inter-American Juridical Committee on Revision of the Bustamante Code," 53 A.J.I.L. 652 (1959).

<sup>5</sup> 37 A.J.I.L. Supp. 95 (1943). Argentina, Uruguay, Paraguay, Bolivia, and Peru have ratified the treaties of 1889. Colombia adhered to the treaties on civil and commercial law in 1933. Argentina and Uruguay have ratified the revised treaties of 1940.

<sup>6</sup> Mexico, the United States.

<sup>7</sup> Res. VII, "Possibility of the Revision of the Bustamante Code," Fourth Meeting of the Inter-American Council of Jurists, Santiago, Chile, 1959, Final Act 26 (Pan American Union, Washington, D. C., 1960, mimeo.). Cf. Nadelmann, "Inter-American Cooperation in the Field of Conflict of Laws," 1 Inter-American Law Rev. 135, 140 (1959).

the law with that of the Montevideo Treaties, and adherence of the non-signatory states. It recommended a second circulation to the governments, for their comments, of the Comparative Study of the Bustamante Code, the Montevideo Treaties, and the Restatement of Conflict of Laws prepared by the Committee. It requested the governments which have ratified the Code convention with reservations, or have not ratified at all, to indicate in detail their difficulties with the Code; and it requested the Department of Legal Affairs of the Pan American Union to carry out studies along these lines.

The Inter-American Juridical Committee found at its 1961 session, held, like all sessions of the Committee, in Rio de Janeiro, that no further comments had come from governments; nor had the Pan American Union produced studies. The Committee, with eight of its nine members present,<sup>8</sup> felt that it should go ahead and make recommendations for the revision of the Code.

The recommendations in the new report, signed by seven members,<sup>9</sup> are twofold. The first is that the Council recommend to the governments of Bolivia, Chile, Costa Rica, Ecuador, and El Salvador that they consider withdrawal of their reservations to the Code. The five states have ratified the Code convention with general reservations of a kind which make the ratification practically meaningless.<sup>10</sup>

The second recommendation is in alternative form: Either the Council should recommend to the next Inter-American Conference the addition of a protocol to the Code convention which would make the law of the domicile the "personal law" and provide that existence, status, and capacity shall be determined by that law (acquired capacity not to be affected by a change of domicile; the Code presently leaves it to each state whether to apply as "personal law" the law of the domicile, or the national law, or any other law specified by the municipal legislation); or the Council should call an inter-American congress or specialized conference to study the various possibilities of revision of the Code, taking into account the Treaties of Montevideo of 1889 and 1940, each state to be represented by two delegates, preferably specialists in private international law.

The first recommendation contains nothing new, except that the states with general reservations are identified by name. Suggestions to withdraw the reservations have been made many times and nothing in the report suggests that another invitation would have better results. The Bustamante Code codifies the conflicts law for the entire field of law.

<sup>8</sup> Currently the Committee is composed of jurists from Argentina, Brazil, Chile, Colombia, the Dominican Republic, Mexico, Peru, Venezuela, and the United States. The member from the Dominican Republic was not present.

<sup>9</sup> Messrs. Raúl Fernandes (Brazil), Luis D. Cruz Ocampo (Chile), José Joaquín Caicedo Castilla (Colombia), Hugo Gobbi (Argentina), E. Arroyo Lameda (Venezuela), C. Echecopar Herce (Peru), James Oliver Murdock (United States).

<sup>10</sup> In practically similar ways, the reservations state that, in the case of a conflict between the national legislation and the Code, the Code shall not apply. Full text, *e.g.*, in Bustamante y Sirvén, *Código de Derecho Internacional Privado* (Cochabamba, 1944). For Chile see Albónico Valenzuela, *Manual de Derecho Internacional Privado* 120 (1950).



Apparently, blanket endorsement of such a comprehensive codification is difficult to obtain even from legal systems with codified law.<sup>11</sup> In fact, in the treaty work of Montevideo, civil law, commercial law, procedure, and criminal law are covered in separate treaties and, judging from experience elsewhere, especially at The Hague, a "step-by-step" approach is more promising. On judicial assistance, that is, international procedure, for example, agreement is easy to obtain because of the practical need for a solution.<sup>12</sup> Possibly an attempt should be made to obtain from all states ratification, in the present or a revised form, of the parts of the Bustamante Code which cover judicial assistance. This may be an obtainable goal. It would be of direct interest to the United States, engaged in finding a way for more effective co-operation in that field.<sup>13</sup> Other suitable areas of the law could be taken up later.

The second recommendation in the Report—that the next Inter-American Conference add to the Code convention a protocol making the law of the domicile the "personal law"—is of a more consequential character. Dr. Bustamante, the Cuban scholar who drafted the Code, considered his greatest problem the choice of the law to govern "status."<sup>14</sup> Continental Europe applied the national law of the person; and this doctrine was the law in a number of Latin American states, among them Cuba, Costa Rica, Haiti, the Dominican Republic, and Brazil. On the other hand, the Treaties of Montevideo of 1889 had made the law of the domicile the applicable law and this solution was considered by many the only one in accord with the interests of the New World. Inasmuch as earlier attempts at a general change to domicile had run into opposition, notably from Brazil, Dr. Bustamante felt that only by leaving the question unsettled could agreement be reached on the planned Code. And this is exactly what happened. As provided in Article 7 of the Code, contracting states "may apply as personal law either that of the domicile, or that of the nationality, or any other law which the municipal legislation prescribes."<sup>15</sup>

<sup>11</sup> This has been the experience in Europe also. The Benelux Convention of 1951 on Uniform Rules of Private International Law, 1 Int. and Comp. Law Q. 426 (1951), still needs to be ratified by two of the three countries involved, Belgium and The Netherlands.

<sup>12</sup> The Hague Convention of 1905 Regarding Civil Procedure was ratified by 20 nations, 1 Rabel, *Conflict of Laws: A Comparative Study* 35 (2d ed., 1958). The new Hague Convention of 1951, 1 A. J. Comp. Law 282 (1952), has been ratified by Austria, Belgium, Denmark, Finland, France, West Germany, Italy, Luxembourg, The Netherlands, Norway, Spain, Sweden, and Switzerland.

<sup>13</sup> On the creation, by Act of Congress in 1958, of the Commission on International Rules of Judicial Procedure, see Jones, "Commission on International Rules of Judicial Procedure," 8 A. J. Comp. Law 341 (1959).

<sup>14</sup> See Bustamante, "The American Systems on the Conflict of Laws and Their Reconciliation," 5 Tulane Law Rev. 537, 563 (1931); Bustamante y Sirvén, *La Comisión de Jurisconsultos de Río de Janeiro y el Derecho Internacional* 93 (1927); Bustamante y Sirvén, *La Nacionalidad y el Domicilio. Estudio de Derecho Internacional Privado* (1927).

<sup>15</sup> In signing the Code convention, Argentina, Guatemala, and Paraguay, in reservations, expressed their preference for the law of the domicile, the Dominican Republic

Views in the field of conflict of laws have changed greatly since the preparation of the Bustamante Code in the nineteen-twenties. As regards the law which should govern "status," Brazil changed in 1942 from nationality to domicile on the occasion of a major legislative reform;<sup>16</sup> and, even in Europe, the principle of the law of nationality has lost ground.<sup>17</sup> Yet it is not correct to say, as the new report suggests, that wide agreement exists in Latin America on application of the law of the domicile to questions of "status." Already at the time of the preparation of the Code a third system was used in a number of states—a mixed system. Local law is applied to foreigners, but the national law to citizens, even when abroad, generally or with restrictions.<sup>18</sup> The existence of this third system led to the three-way wording of Article 7 of the Code. If today the principle of the national law has lost support, the third (mixed) system has gained in strength. With variations, it is the law in Chile,<sup>19</sup> Colombia,<sup>20</sup> Ecuador,<sup>21</sup> Costa Rica,<sup>22</sup> El Salvador,<sup>23</sup> Peru,<sup>24</sup> Venezuela,<sup>25</sup> and Mexico.<sup>26</sup> With the New World growing older, the interest in bringing the newcomer under the local law has become merely one of several interests with which to be concerned. Similar developments have been noticeable elsewhere.

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for the national law. Cf. Bustamante y Sirvén, *El Código de Derecho Internacional Privado y la Sexta Conferencia Panamericana* 54 (1929).

<sup>16</sup> Introductory Law to the Civil Code, Art. 7 (1942). See Garland, *American-Brazilian Private International Law* 25 (1959). In Guatemala, a "domicile" state, the statutory basis now is: Constitutive Law on Judicial Power, Basic Principles, Art. XVII; Law on Foreigners, Arts. 17 and 18 (1936). See Matos, *Curso de Derecho Internacional Privado* 274 (2d ed., 1941).

<sup>17</sup> See Batiffol, "Une Évolution possible de la Conception du Statut personnel dans l'Europe continentale," *XXth Century Comparative and Conflicts Law—Legal Essays in Honor of Hessel E. Yntema* 295 (Nadelmann, von Mehren, and Hazard, eds., 1961); De Winter, "Le Principe de la Nationalité s'effrite-t-il Peu à Peu?" *De Conflictu Legum—Essays Presented to R. D. Kollewijn/J. Offerhaus* 514 (Leiden, 1962); reprinted from *Nederlands Tijdschrift voor Internationaal Recht*, Vol. 9 (Special Issue, October, 1962).

<sup>18</sup> See Lorenzen, "The Pan-American Code of Private International Law," 4 *Tulane Law Rev.* 499, 522, note 134 (1930); 1 Rabel, *op. cit.* note 12 above, at 126; 2 (I) Alfonso, *Curso de Derecho Internacional Privado* 65 (Montevideo, 1961).

<sup>19</sup> Civil Code, Arts. 14, 15 (1855). See 2 Albónico Valenzuela, *op. cit.* note 10 above, at 15, 20.

<sup>20</sup> Civil Code, Arts. 18, 19 (1886). See Eder, *American-Colombian Private International Law* 12, 41 (1956); Caicedo Castilla, *Derecho Internacional Privado* 246 (5th ed., 1960).

<sup>21</sup> Civil Code, Arts. 13, 14. See Salazar Flor, *Derecho Civil Internacional* 391 (1955).

<sup>22</sup> Civil Code, Art. 3 (1886). See Ortiz Martín, *Curso de Derecho Internacional Privado* 282 (1947).

<sup>23</sup> Civil Code, Arts. 14, 15, 16(3).

<sup>24</sup> Civil Code, Prel. Tit., Art. V (1) (1936). See Alvarado, *Apuntes de Derecho Internacional* 43 (1940).

<sup>25</sup> Civil Code, Arts. 8, 9 (1942). See Febres Pobeda, *Apuntes de Derecho Internacional Privado* 84 (1957).

<sup>26</sup> Civil Code for the Federal District, Art. 12 (1932). See Arce, *Derecho Internacional Privado* 167 (2d ed., 1955). But cf. Siqueiros, "Ley aplicable al estado de los extranjeros en México," 15 *Boletín del Instituto de Derecho Comparado de México* 345 (No. 44, 1962).

On the third system only passing remarks are found in the Committee report. The reader is given the impression that the choice is between nationality and domicile and that the Code will become acceptable to all states in Latin America, if amended to prescribe application of the law of the domicile to existence, status, and capacity. However, the Report fails to say which of the non-signatories will ratify the Code convention if the change is made; or which of the states having made general reservations will drop them. Nor is it even asserted that the ten states which have ratified without a general reservation<sup>27</sup> will all accept the proposed change. Lack of agreement on what law shall govern "status" is merely one controversy out of several involving the Code,<sup>28</sup> which led to non-ratification or ratification with a general reservation. No prima facie case has been made out to show that, with the proposed change, greater uniformity will be achieved.

In support of the substantive merit of the proposal, arguments in favor of the law of the domicile, which were in the Committee's second (1952) report,<sup>29</sup> are reproduced by way of quotation. The 1952 Report was not unanimous. The dissent of the United States member<sup>30</sup> dealt with this very question. It was asserted that making all questions of capacity depend upon the law of the domicile would not be in accord with reality and present trends. For capacity to contract, for example, some courts seem to look at the law governing the contract. This is a controversial question, much discussed both in the civil-law and the common-law world.<sup>31</sup> Yet neither the dissent nor the controversy is mentioned in the new report. Is it suggested that the Inter-American Council of Jurists can act on the basis of such an insufficient briefing?

The report contains, as we noted at the outset, an alternative proposal. If it is found that further studies and consultations of specialists in private international law are necessary, and that the legislation of each state as well as its intentions for the future must be taken into account for the revision of the Code, then, it is said, a congress of specialists should

<sup>27</sup> Brazil, Cuba, Dominican Republic, Guatemala, Haiti, Honduras, Nicaragua, Panama, Peru, and Venezuela.

<sup>28</sup> See Inter-American Juridical Committee, Comparative Study of the Bustamante Code, the Montevideo Treaties, and the Restatement of the Law of Conflict of Laws (Pan American Union, Washington, D. C., Sept., 1954, mimeo.); also in Documentos Oficiales, Vol. V, p. 110 (Rio de Janeiro, 1962). Other principal areas of disagreement between the Code and the Montevideo Treaties are the rules governing contracts and those governing succession. See statement of the Argentine member of the Committee in Second Opinion of the Inter-American Juridical Committee on the Possibility of Revision of the Bustamante Code (Pan American Union, Washington, D. C., March, 1953, mimeo.).

<sup>29</sup> Inter-American Juridical Committee, Second Opinion, *op. cit.* note 28 above.

<sup>30</sup> *Ibid.* at 28 (Mr. George H. Owen).

<sup>31</sup> See Rabel, *op. cit.* note 12 above, at 194; Cheshire, Private International Law 230 (6th ed., 1961); Batiffol, *Traité élémentaire de Droit international privé* 470 (8rd ed., 1959); 2 (I) Alfonsain, *op. cit.* note 18 above, at 183; 2 Goldschmidt, *Derecho Internacional Privado* 101 (2d ed., 1954); Valladão, *Estudos de Direito Internacional Privado* 187, 194 (1947); De Winter, *loc. cit.* note 17 above, at 521.

be called, with each state represented. This proposal, in our view, is premature at best. Meetings of the kind suggested fail unless prepared properly. The history of codification, including that of the Bustamante Code, may be recalled. The only working material produced is the Committee's Comparative Study of the Code and the Montevideo Treaties. That this is insufficient for the preparation of the revision of the Code has become evident for a long time. The national laws, especially of the non-signatories and of signatories with reservations, need to be taken into account in planning the revision.

If the Inter-American Council of Jurists finds, as it may, that further studies are needed and that they must be made in advance of a general conference of specialists, how shall these studies be produced? Judging from past history, the likelihood that they will come from the Inter-American Juridical Committee would seem to be remote. The Committee works under a handicap which it cannot surmount. Its assignments are in three different areas of the law: public international law, private international law, and unification of law.<sup>82</sup> Because of the political implications, the principal effort of the Committee has been in the public international law field,<sup>83</sup> and appointments to the Committee of Nine have gone primarily to experts in that field.<sup>84</sup> Under such circumstances, successful work on such a difficult assignment as unification of the rules of private international law cannot, in fairness, be expected of the Committee.

The Inter-American Council of Jurists has not been unaware of the situation. In its resolution of 1959 the Council suggested to the Department of Legal Affairs of the Pan American Union that it assist the Committee by producing basic studies on the questions set for consideration. And, at the request of the Council, the Department has produced such studies in other areas, for example, for the work on unification of the law on International Judicial Assistance.<sup>85</sup>

To make progress, other working methods must indeed be developed. The importance of method cannot be overrated. Two international meet-

<sup>82</sup> "The purpose of the Inter-American Council of Jurists is to serve as an advisory body on juridical matters; to promote the development and codification of public and private international law; and to study the possibility of attaining uniformity in the legislation of the various American countries, insofar as it may appear desirable." Charter of the Organization, Art. 67.

<sup>83</sup> In 1961 the Committee produced a report of 125 pages on the Principles of International Law that Govern the Responsibility of the State, a one-page resolution on Unification of the Law of International Sales, and the report on Revision of the Bustamante Code.

<sup>84</sup> "The Juridical Committee shall be composed of jurists of the nine countries selected by the Inter-American Conference. The selection shall be made by the Inter-American Council of Jurists from a panel submitted by each country chosen by the Conference." Charter of the Organization, Art. 69. Currently, of the nine members, five are ambassadors. Of course, an ambassador may be a specialist in private international law.

<sup>85</sup> International Cooperation in Judicial Procedures—Background Material relating to the Laws, Doctrine and Jurisprudence of the American Republics (Pan American Union, Washington, D. C., July, 1962, mimeo.).

ings held in recent years of organizations concerned with unification of law dealt exclusively with problems of method.<sup>36</sup> Unfortunately, the Inter-American Juridical Committee was not represented. That staff work is needed to achieve results is clear today. If the postwar sessions of the Hague Conference on Private International Law were fruitful, the proper preparation of the sessions by the staff of the Permanent Bureau has had something to do with it.<sup>37</sup> And, of course, the delegates to the Hague sessions all are specialists in the topic to be dealt with. With the Inter-American Juridical Committee composed overwhelmingly of specialists in public international law, preparatory work by a qualified professional staff becomes even more necessary.

A further point needs to be made. The work of the Inter-American Juridical Committee becomes known to a few only. The reports are not printed or are printed after a lapse of many years, and their availability in mimeographed form at the Pan American Union is not publicized, or not publicized in an efficient way. Publication of the *Inter-American Juridical Yearbook*, which at least provided summaries, was stopped in 1957 for unclear reasons—a deficiency to which attention was directed by the American Society of International Law.<sup>38</sup> The first thing to do, it would seem, is to print all reports on revision produced by the Committee, together with the Council's decisions, in one volume.

A second matter to be noted, closely related to the first, is the lack of contact between the members of the Committee and the specialists in the Hemisphere, indeed the specialists in their own countries. Under the Charter, the members represent all member states of the Organization.<sup>39</sup> Yet the fact is that the work proceeds in an ivory tower—the intellectual resources of the Hemisphere in the field of private international law have not even been tapped.

The Charter of the Organization of American States imposes upon the Inter-American Council of Jurists the duty, among other things, to promote the development and codification of private international law.<sup>40</sup> Conflicting conflicts rules and doubts as to applicable law interfere with the establishment of satisfactory private law relations in the Hemisphere. The assignment given the Council thus is more than an idealistic aim, it is a matter of practical importance.<sup>41</sup> Conditions should be created by

<sup>36</sup> Proceedings in International Institute for the Unification of Private Law, Unification of Law Yearbooks for 1956 (Vol. II) and 1959 (Unidroit, Rome). Cf. Nadelmann, "Ways to Unify Conflicts Rules," *De Conflictu Legum*, *op. cit.* note 17 above, at 349.

<sup>37</sup> On its working method, see report in the 1959 Yearbook, *op. cit.* note 36 above, at 171, 182.

<sup>38</sup> See resolution adopted at the 1962 annual meeting, 1962 Proceedings 74; 56 A.J.I.L. 779 (1962).

<sup>39</sup> "The Members of the Juridical Committee represent all Member States of the Organization." Charter, Art. 69.

<sup>40</sup> Art. 67, note 32 above.

<sup>41</sup> This is being more and more recognized. For the interest taken by the American Bar in international unification of laws efforts, see the Report of the American Bar Association Special Committee on Unification of Private Law, 1961 A.B.A. Reports

the Organization which will make execution of the assignment a possibility. The Sixth International Conference of American States, held in 1928, had created separate committees for public international law, private international law, and unification of law.<sup>42</sup> As it turns out, it has been a mistake to charge one and the same committee with work in all three fields.<sup>43</sup> Amendment of the Charter would seem to be indicated.

KURT H. NADELMANN

IN MEMORY OF DR. JACOB TER MEULEN

On Sunday, August 12, 1962, Dr. Jacob ter Meulen, who was Librarian of the Peace Palace, The Hague, from 1924 to 1952, passed away.

Dr. Ter Meulen was born on December 3, 1884, in The Hague, the son of the painter, François Pieter ter Meulen, while on his grandmother's side he was descended from a Mennonite family.

He studied at the Municipal University in Amsterdam and later in Zürich. As a young man he was attracted by the pacifist movement, and in Zürich he attended the lectures of the famous Max Huber, who took an important part in the Second Hague Peace Conference of 1907. In 1913 Ter Meulen took the first step on the road to his later work, viz., an historical sketch (in Dutch) of the development of the community of states.<sup>1</sup> In January, 1914, Ter Meulen obtained his doctorate *magna cum laude* under Huber with a thesis entitled *Beitrag zur Geschichte der internationalen Organisation 1300-1700* (The Hague, Nijhoff, 1916). It contains two parts of the first volume of his standard work, *Der Gedanke der Internationalen Organisation in seiner Entwicklung* (The Hague, Nijhoff, 1917, 1929, 1940). This major work deals with peace projects from 1300 to 1889, the period of independent Utopian thinkers, according to the author. His character, family background and work, as well as the international situation, brought Ter Meulen to an active Christian pacifism: he was, for instance, Secretary of the International Mennonite Peace Committee.

In 1917 Ter Meulen made his entry into the field of libraries as assistant in the University Library at Utrecht, particularly for the creation of a systematic juridical catalogue. From 1922 to 1923 he was Chief Librarian at the Netherlands School of Economics in Rotterdam. On January 1, 1924, began the main period of Ter Meulen's life. On that date he was appointed by the Dutch Carnegie Fund Director of the Library of the Peace Palace, the seat of the Permanent Court of Arbitration, the Permanent Court of International Justice and the Hague Academy of International Law, with its well-known courses.

219, separately published by the American Bar Foundation in 1961, reviewed by the present writer in 11 A. J. Comp. Law 112 (1962).

<sup>42</sup> Resolution on Future Codification of International Law, Final Act, p. 176, reprinted in The International Conferences of American States 1889-1928, *op. cit.* note 2 above, at 439; 1931 Proceedings, American Society of International Law 184.

<sup>43</sup> "The Inter-American Juridical Committee of Rio de Janeiro shall be the permanent committee of the Inter-American Council of Jurists." Charter, Art. 68.

<sup>1</sup> Grotius Internationaal Jaarboek voor 1918, pp. 19-53 (The Hague, Nijhoff).

Ter Meulen was the right man in the right place. A sound foundation for his work had been laid by Dr. P. C. Molhuysen, the first librarian (1913 to 1920). At that time the Library had about 50,000 volumes, mostly in the field of international law, but also in the domains of politics, diplomatic history and national law. With all his spirit and enthusiasm Ter Meulen devoted himself to the further development of the young library.<sup>2</sup> The many difficulties during the war—the Library remained open—and the problems of reconstruction did not dampen his enthusiasm. A good example of co-operation with his fellow workers is given by the articles in the Dutch periodical, *Bibliotheekleven*, Vol. 9 (1924), of Ter Meulen and the Deputy Librarian, Dr. A. Lysen, about the subject catalogue of the Library of the Peace Palace. The systematic *Catalogue de la Bibliothèque du Palais de la Paix*, 2<sup>me</sup>[et] 3<sup>me</sup> supplément, Leiden (Sijthoff), 1930, 1937, is also their handiwork. This catalogue also constitutes a valuable bibliographical tool.

Of his special initiatives we mention the Central Juridical Catalogue (foreign national law in Dutch libraries), as well as the building up of an outstanding collection on the First World War, on which there is no other special documentation center in The Netherlands. An extra task was also the collection of publications about pacifism and anti-militarism. Those materials often consist of short-lived periodicals and other small and irregular publications which are not easily to be found elsewhere and which can be of significance for further research.

In 1934 there appeared a *Bibliographie du mouvement de la paix avant 1899 (listes provisoires)* [Période: 1776–1899] (La Haye, Bibliothèque du Palais de la Paix), compiled by Dr. W. S. Russer and G. Berlage, under the guidance of Ter Meulen. This was soon followed by Ter Meulen, J. Huizinga and G. Berlage, "*Bibliographie der Friedensbewegung für die Periode 1480–1776*," in *Die Friedens-Warte*, Vol. 36 (1936), pp. 82–89, 149–161; published separately as *Bibliographie du mouvement de la paix avant 1899 (listes provisoires)*, Période: 1480–1776 (La Haye, Bibliothèque du Palais de la Paix, 1936).

Of importance were Ter Meulen's activities in the field of Grotiana. A Grotius collection of merit had already been started by Dr. Molhuysen. In connection with the commemoration of the appearance in 1625 of *De Jure Belli ac Pacis*, Ter Meulen had the task of preparing the book section for the exhibition which was held in The Hague from June 13 to July 5, 1925. After the exhibition, the works of Grotius were placed in the Director's room of the Library, where Ter Meulen liked to show them to visitors with

<sup>2</sup> Cf. his *De Bibliotheek van het Vredespaleis Doel, omvang, inrichting en gebruik* (Leiden, Sijthoff, 1935), anonymous, and his surveys: "La Bibliothèque du Palais de la Paix," in *Grotius Annuaire international pour l'année* 1925, 1926, 1927, 1930, 1933. In the *Annuaire*, 1936, pp. 54–74, a description is given of the exhibition in the Peace Palace in November–December, 1935, on the occasion of the commemoration of Carnegie's birthday in 1835; in *Grotius Annuaire*, 1940–1946, pp. 303–305 (La Haye, 1948), a survey about the period of the war (the collection had risen then to about 200,000 volumes) and immediately after. Cf. also A. Lysen, "History of the Carnegie Foundation and of the Peace Palace at The Hague" (*Lugduni Batavorum Brill*, 1934) (*Bibliotheca Visseriana*, Vol. V), pp. 119–131.

an interesting and illuminating commentary. A direct result of the exhibition was the *Concise Bibliography of Hugo Grotius* by Jacob ter Meulen, preceded by an abridged genealogy by E. A. van Beresteyn, and a sketch of Grotius' life, adopted from the catalogue of the Grotius exhibition, *The Hague, 1925* (Leiden, Sijthoff, 1925). The same year saw the publication of the extensive annotated *Liste bibliographique de 76 éditions et traductions du De iure belli ac pacis de Hugo Grotius* (Leiden, Brill, 1925), which also appeared in the *Bibliotheca Visseriana*, Vol. V (1925), pp. 151-200. Additions to the *Concise Bibliography* are given in Ter Meulen, *La Bibliothèque du Palais de la Paix en 1925* (La Haye, Nijhoff, 1926), pp. 14-18, and in the ten volumes of the periodical, *Grotiana* (The Hague, Humanitas), 1928-1947.

The Grotius collection expanded continuously. Together with Dr. P. J. J. Diermanse, Ter Meulen compiled the bulky *Bibliographie des écrits imprimés de Hugo Grotius* (La Haye, Nijhoff, 1950), followed by the *Bibliographie des écrits sur Hugo Grotius imprimés au XVIIe siècle* (La Haye, Nijhoff, 1961).

Ter Meulen also played a rôle in the world of Dutch libraries as Chairman of the Dutch Association of Librarians and as a member of the Advisory Committee on Libraries of the Dutch Government.

His devotion to his tasks will be long remembered by his collaborators.

P. J. J. DIERMANSE and B. LANDHEER  
Library of the Peace Palace

#### WORLD CONFERENCE ON PEACE THROUGH LAW

The first world conference of lawyers to discuss ways and means of achieving world peace through the extension of the rule of law in international affairs will be held in Athens, Greece, from June 30 to July 6, 1963. The Conference will be sponsored by the American Bar Association in collaboration with a Greek Lawyers' Committee under the chairmanship of President M. S. Pallis of the Athens Bar Association. Lawyer delegates from 111 nations will be invited to take part in the Conference, which may also be attended by any lawyer from any nation as an observer.

The General Chairman of the Conference will be Charles S. Rhyne, former president of the American Bar Association and Chairman of its Committee on World Peace Through Law, under whose auspices preparatory regional conferences have been held in San José, Costa Rica; Tokyo, Japan; Lagos, Nigeria; and Rome, Italy.<sup>1</sup> An International Executive Committee for the Conference will include Sir A. Ademola, Chief Justice of Nigeria; Fernando Fournier, President of the Costa Rica Bar Association; Dr. Nubuo Naritomi, President of the Japan Federation of Bar Associations; and Vittorio Malcangi, President of the Bar Association of Italy.

The Athens Conference will consider, among other subjects, international courts for the settlement of disputes among nations, and the means of

<sup>1</sup> See note by Mr. Rhyne, with appended Consensus of San José and Rome, in 56 A.J.I.L. 1001 (1962).



extending the rule of law in the fields of international trade, investment and taxation. It represents the first organized attempt of the legal profession on a world-wide basis to formulate a program to accelerate the growth of law in the world community.

#### 13TH CONFERENCE OF THE INTER-AMERICAN BAR ASSOCIATION

The Inter-American Bar Association will hold its XIIIth Conference in Panama City from April 19 to 26, 1963.<sup>1</sup> The theme of the Conference will be: The Contribution of Law to Economic and Social Development.

The Conference will be organized into eight working groups devoted to consideration of (1) International Law; (2) Economic Integration; (3) Development of International Trade; (4) Industrial Development and Capital Investment; (5) Tax Reforms—Tax Law Reform in the Americas; (6) Agrarian Reform; (7) Status of Law, Administration of Justice, and Protection of Human Rights; (8) Rôle of the Lawyer in an Evolving Society.

The working group on international law will consider reports of the following committees: Permanent Committee on the Uses of International Rivers; Special Committee on World Peace through Law; Special Committee on Interplanetary Space Law. The group will also consider Revision of the United Nations Charter; Judicial Assistance in the Administration of Justice; International Judicial Assistance—Canadian Rules; and Recent Developments in Suits against the State in the Western Hemisphere.

The working group on economic integration will consider common market problems with respect to Latin America, while the group on the development of international trade will discuss, among others, questions of private international law and its unification in various aspects, such as domestic relations, copyright, trademarks and patents, administrative law and procedure, and space communications.

The working group on industrial development and capital investment will discuss the Alliance for Progress, the Inter-American Development Bank, labor law and related subjects, and the report of a Special Committee on Peaceful Uses of Atomic Energy.

The working group on the status of law, administration of justice, and protection of human rights, will hear reports of the Special Committees on Independence of Judicial Power, the Juridical Defense of Western Democracy, and on Commercial Arbitration. Among other subjects it will also consider reports on the protection of human rights in the inter-American system, and extradition in the Americas.

The working group on the rôle of the lawyer in an evolving society will consider legal education and activities of lawyers, including a report on the Inter-American Academy of Comparative and International Law, the

<sup>1</sup> For accounts of previous conferences of the Inter-American Bar Association, see this JOURNAL, Vol. 37 (1943), pp. 106, 666; Vol. 38 (1944), p. 684; Vol. 39 (1945), p. 553; Vol. 42 (1948), p. 423; Vol. 43 (1949), p. 130; Vol. 49 (1955), p. 249; Vol. 51 (1957), p. 778; Vol. 53 (1959), p. 152; Vol. 54 (1960), p. 881.

Inter-American University for the Study of Law, activities of the Inter-American Bar Association and the lawyer and the Alliance for Progress.

April 19, 20, and 21 will be devoted to registration of delegates and a meeting of the Executive Committee and Council. President Carlos Arosemena Arias and his wife will give a cocktail party on the evening of April 20 for the members of the Executive Committee and Council. On the afternoon of April 21, at the Hippodrome President Remón, there will be the running of the "XIII Inter-American Bar Conference" Classic.

The opening session of the Conference on April 22 will be addressed by the Honorable Roberto F. Chiari, President of the Republic of Panama, who will give a reception to the delegates at the Presidential Palace later the same day. The delegates to the Conference will also be entertained at receptions by the Supreme Court of Justice of Panama, and by the Panama Bar Association. On the evening of the last day of the Conference, April 26, President and Mrs. Arosemena will tender a farewell reception to the delegates. The program of activities also includes a trip to the Panama Canal on the U. S. S. *Las Cruces* and the U. S. S. *Atlas*, and a reception to the delegates by the Free Zone at Colón.

#### INTERNATIONAL JUDGES' CONGRESS

The second International Judges' Congress will be held at The Hague from June 10 to 14, 1963, under the auspices of the Union Internationale des Magistrats, which is composed of Judges' Associations of Austria, Belgium, Brazil, France, Germany, Greece, Italy, Japan, Luxembourg, The Netherlands, and Tunisia. Participation in the Congress is open to members of the judiciary of all countries, whether or not they are members of affiliated associations.

The two main topics of the Congress will be the modernization of civil procedure, and the international effects of criminal judgments. Two sessions will be held each day, in addition to which a number of interesting tours and social events have been arranged in connection with the Congress.

The Chairman of the Organizing Committee is L. van Lookeren Campagne, Deputy Justice at the High Court of Military Justice at The Hague, Deputy Judge in the Court of Appeal at Bois-le-Duc, and former Vice President of the Court of Appeal at The Hague. Vice Chairman of the Committee is L. Erades, Vice President of the District Court at Rotterdam.

Further information concerning the Congress may be obtained by writing directly to the Secretariat of the 2nd International Judges' Congress, c/o Holland Organizing Centre, 16 Lange Voorhout, The Hague.

#### CONFERENCE ON LEGAL PROBLEMS OF TRADE AND INVESTMENT IN LATIN AMERICA

A Conference on Legal Problems of Trade and Investment in Latin America was held at the Columbia Law School from February 28 to March 2, 1963. The Columbia Society of International Law sponsored the conference, under the auspices of the Parker School of Foreign and Comparative Law and the Columbia Law School, in association with the Association of Student International Law Societies.

The Conference opened on Thursday, February 28, at 1:30 p.m. with a welcoming speech from Dean William C. Warren, of the School of Law. Dean Warren was followed by Professor A. J. Thomas, Jr., of the School of Law of Southern Methodist University, who delivered an address on "The Evolution of Latin American Attitudes Toward Foreign Investment." Following Professor Thomas' address, two symposium panels were held. The first panel, of which Mr. Phanor J. Eder, of the New York Bar, was Moderator, considered the subject of "The Law Regarding Foreign Investment at Present: The Rôle of General Investment Statutes and Investment Treaties." The participants in the panel were Hans Aufricht, Associate General Counsel, International Monetary Fund; F. V. García-Amador, Director, Department of Legal Affairs, Organization of American States; and Albert J. Parreno, of the New York Bar.

The second panel, of which Dr. Martin Domke, Vice President of the American Arbitration Association, was Moderator, considered the subject of "Settlement of Disputes: International Law Claims, Exhaustion of Local Remedies, Espousal of Claims." The participants in this panel were Richard C. Allison, of the New York Bar; William D. Rogers, Special Counsel, Alliance for Progress, Agency for International Development; and Richard Young, of the New York Bar.

Following a buffet dinner on the evening of February 28, an address was delivered by Mr. Thomas D. Hogan, of the Singer Sewing Machine Company, on the subject of "Social, Political and Economic Factors Affecting the Growth of Free Trade Associations and Common Markets in Latin America." His address was followed by a general discussion.

On Friday morning, March 1, Professor Robert J. Alexander, Visiting Professor, Institute of Latin American Studies, Columbia University, spoke on "The Consequences of Land Laws and Social Reform to Investment Expectations." He was followed by a symposium panel on "The Protection of Foreign Investors' Property Rights." Professor Henry P. de Vries, Associate Director of the Parker School of Foreign and Comparative Law of Columbia University, was Moderator of the panel. The members of the panel were Enrique Ferrer-Vieyra, of the Department of Legal Affairs, Organization of American States; Victor C. Folsom, Vice President and General Counsel of United Fruit Company; and John C. Pirie, Vice President and General Counsel of Pan American World Airways.

On the afternoon of March 1 an address was given by Frank E. Nattier, Jr., of the New York Bar, on "The Legal Nature of Different Forms of Business Organization." Following Mr. Nattier's address, symposium panels were held on Concession Agreements; Government Regulation of the Going Business; The Rights of Private Investors in, and Legal Nature of Joint Ventures with Foreign Governments; and Local Tax Consequences of Forms of Business Organization. Professor Oliver J. Lissitzyn, of the School of Law of Columbia University, was Moderator of the panel on Concession Agreements, in which the participants were George J. Eder, of the Harvard Law School; George W. Haight, General Counsel of the Asiatic Petroleum Corporation; and Monroe Leigh, of the District of Columbia Bar.

Professor E. Allen Farnsworth, of the Columbia Law School, acted as Moderator of the panel on Government Regulation of the Going Business, which considered Repatriation of Capital and Profits, Exchange Controls and Diversification. The members of the panel were Manuel R. Angulo, Joseph S. Cardinale, and Henry Harfield, all of the New York Bar.

Professor Wolfgang Friedmann, of the Columbia Law School, acted as Moderator of the panel which considered "The Rights of Private Investors in, and Legal Nature of Joint Ventures with Foreign Governments." The participants in the panel were George Kalmanoff, Associate Director of the Columbia Law School Project on Public International Development Financing; Thomas E. Monaghan, General Counsel of Standard Oil Company of New Jersey; and John C. Pirie.

The Panel on Local Tax Consequences of Forms of Business Organization had as its Moderator Professor Robert Anthoine, of the Columbia Law School. The other participants were George J. Eder; Albert J. Parreno; and Felix D. Uno, of the Celanese Corporation of America.

On Friday evening a banquet was held, following which an address was delivered on "The Rôle of the Alliance for Progress: Aid and Social Reform."

On Saturday morning, March 2, a panel symposium was held on "Labor Problems: Employment Contracts, Collective Bargaining Agreements, Regulation of Hiring Practices, Employees' Rights." The participants in the panel were Joaquin Bazan, of the U. S. Department of Labor; George S. Howard, Assistant General Counsel of the United Fruit Company; William J. Moody, Supervisor of Employee Relations of Foreign Texaco, Inc.; and Clinton Sammond, of the New York Bar. Professor Robert J. Alexander acted as Moderator.

The final subject for discussion on Saturday morning was a "Case Study: Problems of Doing Business Abroad: American and Foreign Power Company, Inc." The participants in this discussion were Henry W. Balgooyen, Executive Vice President of American & Foreign Power Company, Inc.; Edwin D. Ford, Jr., of the New York Bar; and Kenneth Lawder, Financial Vice President of W. R. Grace & Company.

#### HARVARD LAW EXCHANGE PROGRAM

There has been initiated at the Harvard Law School a Law Exchange Program, which is now in its third year of operation, as a responsibility of the International Law Club at that school. The Harvard International Law Club is a law student organization of over 400 members. The Law Exchange Program is operated in co-ordination with affiliates at Yale Law School and the Echanges Internationaux de Juristes in Geneva, Switzerland. The latter organization acts as the European counterpart of the Harvard Law Exchange Program in securing traineeships in Europe for American trainees, and as a clearing house for European candidates for positions in the United States.

The purpose of the program is to provide opportunities for a useful exchange of knowledge between lawyers and law students of different legal

systems by means of reciprocal traineeships for students and recent graduates of American law schools in foreign countries, and for foreign law students and recent graduates in law offices and corporate legal departments in the United States. Traineeships extend for a period of three to nine months.

The Law Exchange Program operates to facilitate the establishment of initial contacts between prospective employers and prospective trainees. It will forward to interested law firms and corporate legal departments the background résumés of qualified foreign applicants. Upon request the Program will also assist in appraising the credentials of individual trainees. In some instances it may be possible to arrange interviews of an applicant by a law firm abroad known to the prospective employer in this country. The Program assumes responsibility for arrangements relating to the visa sponsorship, arrival, and orientation of trainees.

The obligations of the participating law firm are: (1) to employ the trainee in legal work which will provide an opportunity for training and experience for a period of three to nine months, depending upon the mutual desires of the firm and trainee; (2) to pay the trainee a living wage, estimated at \$80-\$100 per week; (3) to pay a \$50 fee to the Law Exchange Program to cover costs of administration and the provision of visas. Transportation and other expenses are borne by the trainee. Robert Haydock, Jr., Esquire, of Bingham, Dana & Gould, One Federal Street, Boston 10, Massachusetts, has offered to communicate with any firm which would like information about their experience in hiring a trainee in connection with the Program.

Further information concerning the Program may be obtained by addressing inquiries to: The Law Exchange Program, Room 205, I. L. S. Wing, Harvard Law School, Cambridge 38, Massachusetts.

ELEANOR H. FINCH

57TH ANNUAL MEETING OF THE SOCIETY, APRIL 25-27, 1963

THE STATLER HILTON HOTEL, WASHINGTON, D. C.

## PROGRAM

### LAW AND CONFLICT: CHANGING PATTERNS AND CONTEMPORARY CHALLENGES

An examination, highlighted by the Presidential address and developed through a series of panels, of the changing assumptions and challenges confronting international law in the contemporary world.

THURSDAY, APRIL 25, 1968

2:15 p.m.—Federal Room

Panel: *Cuban Quarantine: Implications for the Future*

Chairman: Arthur Larson, *Director, World Rule of Law Center, Duke University*

Panelists: Richard J. Barnet, *Visiting Research Associate, Center of International Studies, Princeton University, and Institute for Policy Studies, Washington, D. C.*: "The Cuban Crisis: Implications for Inspection and Compliance"

Honorable Abram Chayes, *The Legal Adviser, Department of State*: "The Cuban Quarantine: A Study in Collective Security"

Honorable Dean Acheson, *of the District of Columbia Bar, former Secretary of State*

Quincy Wright, *Visiting Professor, Columbia University*

Reporter: Richard A. Frank, *Office of the Legal Adviser, Department of State*

2:15 p.m.—Pan American Room

CONFERENCE ON THE APPLICATION OF SOCIAL SCIENCE TO THE STUDY OF  
INTERNATIONAL LAW

Chairman: Wesley L. Gould, *Department of Government, Purdue University*: "International Law in Political Science Departments: A Report on the Society's Teaching Survey"

Panelists: Chadwick F. Alger, *Department of Political Science, Northwestern University*

Stanley Hoffmann, *Department of Government, Harvard University*: "International Law from the Viewpoint of the Theory of International Relations"

H. Merrill Jackson, *Mental Health Research Institute, University of Michigan*: "Anthropological Methods for the Study of Intrasociety and Intersociety Conflict Control"

Commentator: David R. Deener, *Department of Political Science, Tulane University*

Reporter: Lawrence Hoover, Jr., *Office of the Legal Adviser, Department of State*

8:30 p.m.—Federal Room

Address by President Hardy C. Dillard: "Conflict and Change: The Rôle of Law"

Panel: *Friendly Relations and Co-operation among States: The Legal Accommodation of Contending Systems*

Chairman: Edward T. McWhinney, *Law Faculty, University of Toronto*: "International Law in the Nuclear Age: Soviet-Western, Inter-Bloc, International Law"

Panelists: Harold D. Lasswell, *Edward J. Phelps Professor of Law and Political Science, Yale Law School*: "A Brief Discourse about Method in the Current Madness"

Stephen M. Schwebel, *Assistant Legal Adviser, Department of State*: "The United Nations and the Challenge of a Changing International Law"

John N. Hazard, *Professor of Public Law, Columbia University*: "A Pragmatic View of the New International Law"

Reporter: Harold F. Burman, *Office of the Legal Adviser, Department of State*

FRIDAY, APRIL 26, 1963

9:30 a.m.—Federal Room

Panel: *The Rôle of Force and the Rôle of Law in the Resolution of Contemporary Conflicts between States*

Chairman: Roger Fisher, *Harvard Law School*

Panelists: Kenneth Boulding, *Department of Economics, University of Michigan*

T. C. Schelling, *Professor of Economics, Center for International Affairs, Harvard University*: "The Threat of Violence in International Affairs"

Commentators: Harry G. Frankfurt, *Department of Philosophy, Harpur College*; Steven Muller, *Director, Center for International Studies, Cornell University*

Reporter: Lawrence Hargrove, *Office of the Legal Adviser, Department of State*

9:30 a.m.—South American Room

Panel: *Social Conflict in the World Today and the Future of the Legal Protection of Foreign Investment*

Chairman: Stanley D. Metzger, *Georgetown University Law Center*

Panelists: A. A. Fatouros, *Faculty of Law, University of Western Ontario*: "International Economic Development and the Illusion of Legal Certainty"

Wolfgang Friedmann, *Professor of International Law and Director of International Legal Research, Columbia University*

Charles M. Spofford, *of the New York Bar*

Reporter: Edison W. Dick, *Office of the Legal Adviser, Department of State*

2:15 p.m.—Federal Room

Panel: *Fundamental Challenges to Legal Doctrines Affecting International Coercion: Aggression, Self-Defense, Non-Intervention, Self-Determination, Neutrality*

Chairman: Milton Katz, *Director, International Legal Studies, Harvard Law School*

Panelists: Alan Karabus, *McGill University Law School*; Louis Henkin, *Professor of International Law and Diplomacy, Columbia University Law School*

Commentator: Myres S. McDougal, *Sterling Professor of Law, Yale Law School*

Reporter: Knute E. Malmberg, Jr., *Office of the Legal Adviser, Department of State*

2:15 p.m.—South American Room

Panel: *Status of Competing Claims to Use Outer Space*

Chairman: Monroe Leigh, *of the District of Columbia Bar*

Panelists: Howard J. Taubenfeld, *Southern Methodist University Law School, Visiting Research Scholar, Carnegie Endowment for International Peace*: "An American Viewpoint"

Franco Florio, *Republic of San Marino*: "A Small Country Viewpoint"

Speaker to be announced: "A Socialist Viewpoint"

Reporter: Jerry C. Trippe, *Office of the Legal Adviser, Department of State*

5:30 p.m.—South American Room

Informal Reception for Officers and Members of the Society  
and Their Guests

8:30 p.m.—Federal Room

Panel: *The Management of Violence by International Institutions: United Nations, Regional Organizations, International Control Commissions*

Chairman: Saul Mendlovitz, *Rutgers University Law School*

Panelists: Oscar Schachter, *Director, General Legal Division, United Nations*: "Preventing the 'Internationalization' of Domestic Conflict: A Legal Analysis of the U. N. Experience in the Congo"

Louis B. Sohn, *Bemis Professor of International Law, Harvard Law School*: "The Rôle of the United Nations in Civil Wars"

Richard N. Gardner, *Deputy Assistant Secretary of State for International Organization Affairs*

Reporter: Jerome H. Silber, *Office of the Legal Adviser, Department of State*

8:30 p.m.—South American Room

Panel: *Emerging Patterns of Federalism in a World of Conflict*

Chairman: Arthur W. Macmahon, *Eaton Professor Emeritus of Public Administration, Columbia University*

Panelists: Carl J. Friedrich, *Eaton Professor of the Science of Government, Harvard University*: "New Dimensions of Federalism"

Denis Cowen, *Director of Legal Research (New Nations) and Professor of Law, University of Chicago Law School*: "Federalism and Constitution-Making in Contemporary Africa"

Edward T. McWhinney, *Law Faculty, University of Toronto*: "Federalism vs. Supra-National Integration or Treaty-Based Association: The Relevance and Limitations of 'Classical' Federalism"

Reporter: Peter Pfund, *Office of the Legal Adviser, Department of State*

SATURDAY, APRIL 27, 1963

9:30 a.m.—Federal Room

Business Meeting and Election of Officers



2:15 p.m.—Pan American Room

Student Moot Competition involving an International Law Case

2:15 p.m.—Federal Room

*Status of International Law: Some Perspectives of Foreign Scholars*

Chairman: Francis Deak, *Executive Associate, Carnegie Endowment for International Peace*

Speakers: Aleksandar Magarašević, *Professor of International Law, University of Novi-Sad Law School, Yugoslavia*

M. K. Nawaz, *Research Associate, World Rule of Law Center, Duke University*: "International Law in Contemporary Practice of India: Some Perspectives"

Reporter: Walter E. Barnett, *Office of the Legal Adviser, Department of State*

6:00 p.m.—South American Room

Informal Reception

7:00 p.m.—Federal Room

#### ANNUAL DINNER

Presiding: The President of the Society

Speakers: Ambassador Francis T. P. Plimpton, *Deputy United States Representative to the United Nations*

## CONTEMPORARY PRACTICE OF THE UNITED STATES RELATING TO INTERNATIONAL LAW

The material for this section has been prepared by a committee consisting of RICHARD B. BILDER, HAROLD S. BURMAN, STANLEY L. COHEN, THOMAS T. F. HUANG, SYLVIA E. NILSEN, HERBERT K. REIS, and ALFRED P. RUBIN, under the chairmanship of ERNEST L. KERLEY, all of the Office of the Legal Adviser, Department of State, with the exception of Mr. Rubin, who is in the Department of Defense.

### TERRITORIAL JURISDICTION AND TERRITORIAL LIMITS

#### *High seas—territorial waters—United States position regarding the Uruguayan and Argentine Declaration establishing exterior limit of Rio de la Plata*

The Department of State instructed the American Embassy, Montevideo, Uruguay, to communicate to the Foreign Office the position of the United States regarding the declaration signed on January 30, 1961, between the Ministry of Foreign Affairs and the Argentine Ambassador. The Department of State instruction stated in part:

The Declaration signed on January 30, 1961, between the Ministry of Foreign Affairs and the Argentine Ambassador purports to lay down the exterior limit of the River Plate dividing it from the Atlantic Ocean. The dividing line as defined in paragraph 1 of the Declaration is an imaginary straight line which unites Punta del Este in Uruguay with Punta Rasa of the Cabo San Antonio in Argentina.

Paragraph 2 of the Declaration provides that the dividing line will also be the baseline from which the territorial sea is measured.

The effect of these provisions if valid would be to reduce all of the waters of the River Plate estuary landward of the dividing line to the status of internal waters seaward of which would be the territorial sea belt.

The Government of the United States considers that these provisions are contrary to international law as understood by it and as reflected in the Convention on the Territorial Sea and the Contiguous Zone adopted at the First Law of the Sea Conference at Geneva in 1958. Article 7 of that Convention sets forth the principles governing the status of bays, the coasts of which belong to a single State. By the provisions of Article 7 closing lines for such bays must not exceed twenty-four miles. With the exception of bays whose coasts belong to a single State there is no known basis in international law for coastal States claiming the waters of a bay (or estuary) beyond the limit of the territorial sea measured from low water mark on the coast as the baseline. Thus, in the case of a multi-national bay the waters of the bay outside the territorial sea along the coasts must be regarded as high seas. Agreements between the coastal States of a multi-national bay cannot be considered to be binding on others than the parties to such agreements or to affect the rights of non-parties under international law.

It is noted that the parties to the Declaration of January 30, 1961 purport to base their action on Article 13 of the above Convention on the Territorial Sea and the Contiguous Zone. However, that Article relates to rivers which flow directly into the sea which is not the situation of the River Plate which flows into an estuary or bay. Furthermore, it is the view of the United States Government that the provisions of Article 13 relate only to rivers which flow directly into the sea from the territory of a single State and not to rivers whose coasts belong to two or more different States.

For the reasons indicated above, it is the opinion of the United States Government that the provisions of the Declaration of January 30, 1961 so far as they purport to be applicable to others than the parties to the Declaration are inconsistent with general principles of international law and are not supported by the provisions of Article 13 of the Geneva Convention referred to. Accordingly, the Government of the United States reserves its position on the Declaration and does not regard it as affecting in any way its rights and those of its nationals under international law. (Unclassified airgram A-46, December 14, 1962.)

#### *Territorial sea—fisheries*

In response to a recommendation by a private party that the United States adopt a twelve-mile fisheries limit, the Department of State, in a letter dated July 13, 1962, stated in part:

Under international law, the high seas are open to all nations and no State may validly subject any part of them to its sovereignty. This freedom of the high seas includes, amongst others, freedom of fishing, and the United States has strongly protested actions of other countries purporting to reduce to their exclusive fisheries jurisdiction, by unilateral act, areas of the high seas. Both the first and second Conferences on the Law of the Sea, held at Geneva under United Nations auspices in 1958 and 1960, respectively, considered the question of a zone contiguous to the territorial sea in which the coastal State would have exclusive fisheries rights. Neither conference was able to reach agreement on the matter although the United States-Canadian proposal put forward at the second Law of the Sea Conference, which contained provisions for a twelve-mile fisheries zone, narrowly failed of adoption. In the circumstances, it must be concluded that in the present state of international law, there is no valid basis for the assertion by a coastal State of a twelve-mile exclusive fisheries zone. (Letter on file in the Office of the Legal Adviser, Department of State.)

#### *Territorial sovereignty—Panama Canal Zone—display of flag—admission of foreign consuls*

The Department of State released the following communiqué and aide-memoire:

##### JOINT COMMUNIQUE

The Representatives of the Governments of the Republic of Panama and of the United States of America, appointed to discuss points of dissatisfaction in United States-Panamanian relations with regard to the Canal Zone have periodically met during the last five months.

Various aspects of pending questions have been discussed up to the present, with the following results:

First: It has been agreed that the flag of the Republic of Panama will be flown together with the flag of the United States of America on land in the Canal Zone where the flag of the United States of America is flown by civilian authorities. Private organizations and persons in the Zone are free to display flags at will over their places of residence or business. Other aspects of the flag question will be discussed later.

Second: Foreign Consuls, on the basis of exequaturs issued by the Government of Panama and, in accordance with procedures and understandings which have been agreed upon by the Government of Panama and the Government of the United States, may function in the Canal Zone. Subject to these procedures and understandings the United States Government will cease issuing documents of exequatur.

Third: The representatives of both Governments have discussed labor problems relating to Panamanian citizens who work in the Canal Zone. Special attention has been devoted to the subject of wage scales, equal opportunities for Panamanian and United States citizens at all levels, and Social Security benefits. All these problems continue to be under discussion.

Fourth: The representatives of Panama submitted for discussion the question of using Panamanian postage stamps in the Canal Zone postal system. The U. S. Government has proposed the use of Panamanian stamps in the Zone in accordance with technical arrangements now under consideration and in conformance with international postal standards.

Fifth: In accordance with instructions, the representatives have discussed Panama's need for pier facilities and have visited the present pier facilities in Cristobal. This subject continues to be under discussion.

The representatives of the Governments of the United States of America and of the Republic of Panama will continue their present discussions aimed at finding solutions to other problems which remain unresolved.

The discussions are continuing in the spirit of the joint communique issued by the President of Panama and the President of the United States of America at the end of the visit which the President of Panama made to Washington in June of last year.

From time to time additional joint communiques outlining the progress of the discussions will be issued.

#### AIDE MEMOIRE

January 8, 1963

With reference to the conversations between His Excellency the Minister of Foreign Affairs and the American Ambassador concerning the meeting on September 11, 1962, of the United States and Panamanian representatives to discuss improvement of United States-Panamanian relations with regard to the Canal Zone, His Excellency will recall that the following decision was reached.

It was agreed that the practice heretofore followed on the part of the United States with respect to the issuance of exequaturs for use in the Canal Zone would be changed as follows:

The United States Government would not be agreeable to the exercise of consular functions by a consular officer from a government not

recognized by the United States. Also, the Government of the United States will notify the Government of Panama and will prohibit a consular officer from acting in the Canal Zone if, for example, in the opinion of the United States Government, a situation arises in the future in which a consular officer accredited by Panama is a security risk, or his functioning would interfere with the operation, maintenance, or defense of the Canal.

Hereafter, when the Government of Panama has on request issued an exequatur to a consular officer to function in Panama, and has notified the Department of State to that effect, the Department of State, providing it has no objection in accordance with the preceding paragraph, will inform the Government of Panama by note that said consular officer may function in the Canal Zone, and the Government of Panama will so inform said consular officer; in the event the Department of State objects in accordance with the preceding paragraph, information to that effect will be supplied the Government of Panama and the consular officer may not undertake to perform consular functions in the Canal Zone. (Department of State Press Release No. 17, January 10, 1963; 48 Dept. of State Bulletin 171-173 (1963).

*Supremacy of territorial sovereign—international law and sovereignty over natural resources*

In response to an inquiry concerning the General Assembly's consideration of the item "Permanent Sovereignty over Natural Resources," Ambassador Adlai E. Stevenson replied by a letter dated December 21, 1962, reading in part as follows:

I am happy to be able to inform you that the General Assembly of the United Nations adopted, on December 14, 1962, by a vote of 87-2-12, a resolution on the subject which substantially meets [your] concerns . . . In my view, the Assembly's resolution strikes a sound balance between the rights and obligations of sovereignty in this sphere.

The following points are particularly noteworthy:

(1) The resolution provides that foreign capital shall be governed by the terms of its import, by national legislation and "by international law." Thus the resolution incorporates by reference the requirement of international law that foreign capital shall not be subjected to discriminatory treatment.

(2) It declares that nationalization, expropriation or requisitioning "shall be based on grounds or reasons of public utility, security or the national interest . . ."

(3) Where there is a taking of foreign property, the resolution prescribes that "the owner shall be paid appropriate compensation," in accordance with national legislation and "in accordance with international law." The United States consistently interpreted "appropriate" compensation in accordance with international law to equate with "prompt, adequate and effective" compensation.

(4) Where compensation gives rise to controversy, the resolution provides that national jurisdiction—that is, local remedies—of the State in question, shall be "exhausted." The right of diplomatic recourse when local remedies are exhausted, or when they do not exist, is thus preserved.

(5) The resolution continues: "However, upon agreement by the

sovereign States and other parties concerned, settlement of the dispute should be made through arbitration or international adjudication."

(6) Most significantly, the resolution affirms that: "Foreign investment agreements freely entered into by, or between, sovereign States shall be observed in good faith." The record of the Commission equally demonstrates that these agreements include contracts between States and private foreign investors. To my knowledge, this is the first time that a multilateral, international declaration has affirmed that the rule of *pacta sunt servanda* embraces agreements between States and aliens. . . .

The resolution also affirms the permanent sovereignty of States over their natural wealth and resources. As the United States made clear in the course of discussion at the United Nations, it naturally wholly favors every country enjoying the full benefits of its natural wealth and resources.

While the resolution is not binding upon Member States, it is expressive of the views of the great majority of the nations of the world. In the view of the United States, its balanced provisions should contribute to the enhancement of the international investment climate. . . .

(Letter on file in the Office of the Legal Adviser, Department of State.)

The resolution referred to is General Assembly Resolution 1803 (XVII), entitled "Permanent Sovereignty over Natural Resources," adopted by the Assembly at its 1194th plenary meeting on December 14, 1962, by a vote of 87 (U. S.)-2-12.

*Exemption from territorial jurisdiction—sovereign immunity—property of foreign government exempt from execution*

The Ambassador of the Czechoslovak Socialist Republic, representing the diplomatic and consular interests of the Cuban Government in the United States, requested that the United States recognize the sovereign immunity from execution of two vessels allegedly belonging to the Government of Cuba. The Department of State informed the Attorney General of the United States that such vessels were exempt from execution. The letter stated in part:

The Ambassador states, and this is confirmed by information available to the Department from other sources, that the boats have been attached to satisfy a judgment . . . in a suit against the Republic of Cuba, case No. 6012257, pending in the Circuit Court of the Eleventh Judicial Circuit in and for Dade County Florida.

It will be further observed from the Ambassador's note that the court has directed the sale of the two vessels on August 27, 1962, after prior advertisement.

The Department accepts the representation that the two vessels are the property of the Government of Cuba which representation does not appear to be contested and recognizes and allows the sovereign immunity of the vessels from execution. It will be appreciated if appropriate instructions can be issued to the United States Attorney to file with the court a suggestion of immunity in accordance with established practice.

(Letter dated August 8, 1962, on file in the Office of the Legal Adviser, Department of State.)

*Exemption from territorial jurisdiction—sovereign immunity—property of foreign government exempt from execution*

In response to a private inquiry regarding the position of the United States Government with respect to a court action by a judgment creditor to seize property of the Cuban Government in the United States to satisfy a judgment, the Department of State, on September 18, 1962, stated in part:

Since this Government recognizes the Castro Government as the Government of Cuba even though it has no diplomatic relations with that Government, it must, nevertheless, be accorded such rights as accrue to the Government of a sovereign State under international law. It is the Department's view that the property of the Government of a sovereign State is immune from execution under international law. Consequently, upon the request of the Czechoslovak Government, representing Cuban interests in the United States, the Department recognized the immunity from execution of certain property belonging to the Cuban Government which had been levied on by a judgment creditor of that Government. Accordingly, the Department of Justice was requested to instruct the appropriate United States Attorney to file a suggestion of immunity with the court in which the action was pending.

While the Department has the greatest sympathy with American citizens who have legitimate grievances against the Castro Government, the laws and policy of the Government must be applied uniformly. (Letter on file in the Office of the Legal Adviser, Department of State.)

*Diplomatic premises—tax exemption*

In a note to the Ambassador of Finland, dated November 26, 1962, the Department communicated a reply from the President of the Board of Commissioners of the District of Columbia, which had considered the request of the Government of Finland for tax-exempt status for a residence, owned by that Government and used to house certain members of the Embassy staff and visiting guests, as being used for "governmental purposes" under Article XXI of the Convention with Finland of 1934, stating that the Commissioners will record an exemption of that property as long as its ownership and usage correspond either to Article XXI of the Convention or the terms of Title 47, Section 801 (c) of the District of Columbia Code. (Note on file in the Office of the Legal Adviser, Department of State.)

TREATIES

*Conclusion—reservations—depositary functions—laws and practices*

Recently the Department of State, through the United States Mission to the United Nations, has submitted to the Secretariat of the United Nations, at its request, informative material for inclusion in United Nations publications regarding laws and practices of states with respect to treaties. Such material relating to the United States appears in the United Nations Legislative Series "Laws and Practices Concerning the Conclusion of Treaties" (ST/LEG/SER.B/3 December 1952) on pages 125-134. At the

Secretariat's request, the Department of State has reviewed that material and has submitted to the Secretariat a revision for inclusion in a contemplated republication of the series by the United Nations. In response to a "Questionnaire With Respect to Depositary Practice in Relation to Reservations in Accordance with General Assembly Resolution 1452(XIV)B" the Department of State has submitted to the Secretariat the responses of the United States Government to the questions under headings such as *Rules Governing Reservations*, *Reservation vs. Declaration*, *Reservations upon Signature*, *Reservations upon Ratification or Accession*, *Objections to Reservations*, and *Entry into Force*. Together with those responses there was submitted a list of multilateral treaties, conventions, and other international agreements for which the United States Government performs depositary functions. It is understood that this material will be incorporated in a United Nations compilation.

#### RECOGNITION OF STATES

##### *Effect of non-recognition—non-recognition of authentication originating in Eastern Germany*

A private inquiry asked two questions of the Department of State: (1) Would a document certified by an "official" of the East German regime and authenticated by a Soviet official be recognized by the United States Government? (2) Would such a document be objectionable if certified and authenticated by Soviet officials in East Germany? In a reply dated April 24, 1962, the Department of State said in part:

As you are aware, the United States does not recognize the East German regime and does not have relations with it. The United States considers that the Soviet Union is the responsible authority insofar as United States relations with East Germany are concerned.

In dealing with documents relating to matters of concern to the United States Government emanating from East Germany, the Department would consider that authentication by Soviet officials constituted a validization of the document. It would not require a given document to be both certified and authenticated by Soviet officials.

The question of what constitutes an acceptable certification or authentication in situations where private legal matters are involved is considered a matter for determination by the courts rather than an issue for decision by the Department of State. Accordingly, the Department believes that the question raised in your letter regarding the validity of the document originating in East Germany is one for determination by the Surrogate Court. (Letter on file in the Office of the Legal Adviser, Department of State.)

##### *Foreign governments—severance of diplomatic relations—effect of recognition of Cuban Government*

In response to a private inquiry regarding the amenability of the Cuban Government to suits in United States courts, the Department of State, on June 28, 1962, stated in part:



1. The United States has severed diplomatic relations with Cuba.
2. Although the United States has severed diplomatic relations with Cuba, it has not withdrawn recognition from the Castro Government as the government of Cuba. Consequently, the Government of Cuba can sue or be sued in the United States courts on the same basis as any other Government. (Letter on file in the Office of the Legal Adviser, Department of State.)

#### CONSULS

##### *Powers and duties—action on behalf of East German nationals*

In response to a private inquiry regarding the capacity of the consular officers of the Federal Republic of Germany to act in the United States on behalf of German nationals residing in the Eastern zone of Germany, the Department of State, in a letter dated May 23, 1962, said in part:

The United States does not recognize the regime in Eastern Germany as either a state or a government. The United States considers that the area is under the effective control of the Soviet Union and that the East German regime is but a local instrument of the Soviet Government.

The question which you raise concerning the capacity of consular officers of the Federal Republic has arisen on a number of occasions in the past and the position of the Department of State has been that consuls of the Federal Republic are not authorized to act on behalf of German nationals residing in Eastern Germany. (Letter on file in the Office of the Legal Adviser, Department of State.)

##### *Powers and duties—administration of estates*

In response to a private inquiry regarding the administration of the estate of a national of Lithuania, the Department of State, in a letter dated November 26, 1962, stated in part:

The United States has not recognized the incorporation of Lithuania into the Union of Soviet Socialist Republics, and hence regards Lithuanian diplomatic and consular officers (not Soviet diplomatic and consular officers) as duly authorized to act on behalf of nonresident Lithuanian nationals with respect to distributive shares owing to them from the estates of persons dying in the United States.

Since the administration of estates is not a Federal matter but comes within the jurisdiction of the appropriate State or local court, the Department considers that that court has entire discretion in the distribution of the estate, in the absence of applicable treaty provisions, which is the case between the United States and Lithuania. (Letter on file in the Office of the Legal Adviser, Department of State.)

##### *Powers and duties—administration of estates*

In response to a private inquiry regarding the position of the United States Government with respect to the powers of Soviet consuls in the administration of estates of Estonian nationals, the Department of State, in a letter dated March 28, 1962, stated in part:

The United States has never recognized the incorporation of Estonia into the Soviet Union. Consequently, the Department does not regard Soviet consular officers, or their attorneys, as having any right to act

on behalf of Estonian nationals with respect to distributive shares owing to them from estates of persons dying in the United States. In the case of Estonian nationals such right has been reserved to consular officers of Estonia (Article XXIV of the Treaty of Friendship, Commerce and Consular Rights of 1925 between the United States and Estonia. . . .<sup>1</sup> (Letter on file in the Office of the Legal Adviser, Department of State.)

*Powers and duties—civil actions—official acts—functions for determination by the Executive rather than the Judicial Branch*

In response to a note from the Panamanian Ministry of Foreign Affairs, dated November 14, 1962, and addressed to the American Embassy in Panama, regarding a civil action alleging defamation and slander brought against the Consul General of Panama at Los Angeles, the Department, in an unclassified airgram dated December 19, 1962, informed the Ministry that, while the United States Government deemed it a matter within the determination of the Executive Branch to issue a certificate whether a person is recognized in his consular capacity and the extent of his consular district, it is a legal matter and hence for the courts to determine whether or not a particular act of a consul is one in his official capacity and within the scope of his functions and pursuant to specific instructions of his government. Therefore, the Executive Branch would decline to submit a statement to the court on the latter questions, although the Consul's attorney was free to do so. (Reply on file in the Office of the Legal Adviser, Department of State.)

*Powers and duties—protection of interests of fellow nationals—obligation of host state to notify consuls of arrest of fellow nationals*

The Department of State transmitted to the Governors of States, by letter dated February 6, 1963, the following compilation of treaty provisions relating to the duty of the United States to notify consuls of the arrest of their fellow nationals:

TREATY PROVISIONS IN FORCE BETWEEN THE UNITED STATES OF AMERICA  
AND OTHER COUNTRIES RELATING TO NOTIFICATION OF CONSULAR  
OFFICERS OF THE ARREST OF THEIR FELLOW NATIONALS

Compiled January 1, 1963

ALGERIA. Convention of establishment with protocol and joint declaration between the United States and France and applicable to Algeria, signed at Paris November 25, 1959. (TIAS 4625; 11 UST 2398.) Section 1 of protocol, paragraphs 1(a) and (b). . . .

Continued application has not been determined.

CHINA. Treaty for the relinquishment of extraterritorial rights in China and the regulation of related matters, signed at Washington January 11, 1943. (TS 984; 57 Stat. 767.)

<sup>1</sup> December 23, 1925. 44 Stat. 2379; U. S. Treaty Series, No. 736; 20 A.J.I.L. Supp. 152 (1926).

## Article VI

The Government of the United States of America and the Government of the Republic of China mutually agree that the consular officers of each country, duly provided with exequaturs, shall be permitted to reside in such ports, places and cities as may be agreed upon. The consular officers of each country shall have the right to interview, to communicate with, and to advise nationals of their country within their consular districts; they shall be informed immediately whenever nationals of their country are under detention or arrest or in prison or are awaiting trial in their consular districts and they shall, upon notification to the appropriate authorities, be permitted to visit any such nationals; and, in general, the consular officers of each country shall be accorded the rights, privileges, and immunities enjoyed by consular officers under modern international usage.

It is likewise agreed that the nationals of each country, in the territory of the other country, shall have the right at all times to communicate with the consular officers of their country. Communications to their consular officers from nationals of each country who are under detention or arrest or in prison or are awaiting trial in the territory of the other country shall be forwarded to such consular officers by the local authorities.

COSTA RICA. Consular convention, signed at San Jose January 12, 1948. (TIAS 2045; 1 UST 247.)

## Article VII (paragraph 2(b))

2(b). A consular officer shall be informed immediately by the appropriate authorities of the receiving state when any national of the sending state is confined in prison awaiting trial or otherwise detained in custody within his consular district by such authorities.

CYPRUS. Consular convention and protocol of signature between the United States and the United Kingdom and applicable to Cyprus, signed at Washington June 6, 1951. (TIAS 2494; 3 UST 3426.) Article 16, para. (1). . . .

In the treaty between the United Kingdom, Greece, Turkey, and the Republic of Cyprus, signed August 16, 1960, it was agreed that all international obligations, responsibilities, rights, and benefits of the United Kingdom would, in so far as they might be held to have application to Cyprus, be assumed by the Republic of Cyprus.

DENMARK. Treaty of friendship, commerce and navigation, with protocol and minutes of interpretation, signed at Copenhagen October 1, 1951. (TIAS 4797; 12 UST 908.)

## Article III

2. If, within the territories of either Party, a national of the other Party is accused of crime and taken into custody, the nearest consular representative of his country shall on the demand of such national be immediately notified. Such national shall: (a) receive reasonable and humane treatment; (b) be formally and immediately informed of the accusations against him; (c) be brought to trial as promptly as is consistent with the proper preparation of his defense; and (d) enjoy all means reasonably necessary to his defense, including the services of competent counsel.

ETHIOPIA. Treaty of amity and economic relations, signed at Addis Ababa September 7, 1951. (TIAS 2864; 4 UST 2134.)

Article VI (paragraph 2)

2. Nationals of either High Contracting Party shall receive the most constant protection and security within the territories of the other High Contracting Party. When any such national is in custody, he shall in every respect receive reasonable and humane treatment; and, on his demand, the diplomatic or consular representative of his country shall be immediately notified and accorded full opportunity to safeguard his interests. He shall be promptly informed of the accusations against him, allowed ample facilities to defend himself and given a prompt and impartial disposition of his case, in accord with modern standards of justice.

FRANCE. Convention of establishment with protocol and joint declaration, signed at Paris November 25, 1959. (TIAS 4625; 11 UST 2398.)

Section 1 of protocol

1. (a) The protection provided in Article 1 engages the competent authorities of each High Contracting Party to inform immediately the consuls of the other High Contracting Party of the arrest or detention of any of its nationals, if the latter so requests. The consul may then be authorized to visit such national, in conformity with the regulations of the institution of detention, and to confer with him. The competent authority will assure the transmission to the consul of all correspondence directed to him by such national.

(b) Such national shall have the right to all guaranties provided in the laws of the High Contracting Party within the territories of which he is detained, and which assure accused persons of humane treatment, the right to be informed immediately of the accusations against them, to be defended by an attorney of their choice, and to be judged as rapidly as possible.

GERMANY. Treaty of friendship, commerce and navigation with protocol and exchanges of notes, signed at Washington October 29, 1954. (TIAS 3593; 7 UST 1839.)

Article III (paragraph 2)

2. If, within the territories of either Party, a national of the other Party is taken into custody, the nearest consular representative of his country shall on the demand of such national be immediately notified and shall have the right to visit and communicate with such national. Such national shall: (a) receive reasonable and humane treatment; (b) be formally and immediately informed of the accusations against him; (c) be brought to trial as promptly as is consistent with the proper preparation of his defense; and (d) enjoy all means reasonably necessary to his defense, including the services of competent counsel of his choice.

GHANA. Consular convention and protocol of signature between the United States and the United Kingdom and applicable to the Gold Coast (with exception of paragraph (1) of Article 7), signed at Washington June 6, 1951. (TIAS 2494; 3 UST 3426.) Article 16, para. (1). . . :

By notes dated September 4 and December 21, 1957, and February 12,

1958 (TIAS 4966), the United States and Ghana agreed that the rights and obligations of various treaties and agreements, including this convention and protocol, entered into between the United States and the United Kingdom, would continue in force between the United States and Ghana.

IRAN. Treaty of amity, economic relations, and consular rights, signed at Tehran August 15, 1955. (TIAS 3853; 8 UST 899.)

#### Article II

4. Nationals of either High Contracting Party shall receive the most constant protection and security within the territories of the other High Contracting Party. When any such national is in custody, he shall in every respect receive reasonable and humane treatment; and, on his demand, the diplomatic or consular representative of his country shall without unnecessary delay be notified and accorded full opportunity to safeguard his interests. He shall be promptly informed of the accusations against him, allowed all facilities reasonably necessary to his defense and given a prompt and impartial disposition of his case.

IRELAND. Treaty of friendship, commerce, and navigation, signed at Dublin January 21, 1950. (TIAS 2155; 1 UST 785.)

#### Article II (paragraph 2)

2. If, within the territories of either Party, a national of the other Party is accused of crime and taken into custody, the diplomatic representative or nearest consular representative of his country shall on the demand of such national be immediately notified. Such national shall: (a) receive reasonable and humane treatment; (b) be formally and immediately informed of the accusations against him; (c) be brought to trial as promptly as is consistent with the proper preparation of his defense; and (d) enjoy all means reasonably necessary to his defense.

Consular convention, signed at Dublin May 1, 1950, and supplementary protocol, signed at Dublin March 3, 1952. (TIAS 2984; 5 UST 949.)

#### Article 16 (paragraph (1))

(1) A consular officer shall be informed immediately by the appropriate authorities of the territory when any national of the sending state is confined in prison, is awaiting trial or is otherwise detained in custody within his district, unless such national shall request that such information not be given. A consular officer shall be permitted to visit without delay, to converse privately with and to arrange legal representation for, any national of the sending state who is so confined or detained. Any communication from such a national to the consular officer shall be forwarded without delay by the authorities of the territory.

ISRAEL. Treaty of friendship, commerce, and navigation, signed at Washington August 23, 1951. (TIAS 2948; 5 UST 550.)

#### Article III (paragraph 2)

2. If, within the territories of either Party, a national of the other Party is accused of crime and taken into custody, the nearest diplomatic or consular representative of his country shall on the demand of such

national be immediately notified. Such national shall: (a) receive reasonable and humane treatment; (b) be formally and immediately informed of the accusations against him; (c) be brought to trial as promptly as is consistent with the proper preparation of his defense; and (d) enjoy all means reasonably necessary to his defense, including the services of competent counsel.

JAMAICA. Consular convention and protocol of signature between the United States and the United Kingdom and applicable to Jamaica, signed at Washington June 6, 1951. (TIAS 2494; 3 UST 3426.) Article 16, para. (1). . . .

The United Kingdom and the Government of Jamaica exchanged notes August 7, 1962, agreeing that all responsibilities, rights and benefits of the Government of the United Kingdom which arise from any valid international instrument shall henceforth be assumed by the Government of Jamaica in so far as such instrument may be held to have application to Jamaica.

JAPAN. Treaty of friendship, commerce and navigation, signed at Tokyo April 2, 1953. (TIAS 2863; 4 UST 2063.)

#### Article II (paragraph 2)

2. If, within the territories of either Party, a national of the other Party is taken into custody, the nearest consular representative of his country shall on the demand of such national be immediately notified. Such national shall: (a) receive reasonable and humane treatment; (b) be formally and immediately informed of the accusations against him; (c) be brought to trial as promptly as is consistent with the proper preparation of his defense; and (d) enjoy all means reasonably necessary to his defense, including the services of competent counsel of his choice.

KOREA. Treaty of friendship, commerce and navigation with protocol, signed at Seoul November 28, 1956. (TIAS 3947; 8 UST 2217.)

#### Article III (paragraph 2)

2. If, within the territories of either Party, a national of the other Party is taken into custody, the nearest consular representative of his country shall on the demand of such national be immediately notified and shall have the right to visit and communicate with such national. Such national shall: (a) receive reasonable and humane treatment; (b) be formally and immediately informed of the accusations against him; (c) be brought to trial as promptly as is consistent with the proper preparation of his defense; and (d) enjoy all means reasonably necessary to his defense, including the services of competent counsel of his choice.

MALAYA. Consular convention and protocol of signature between the United States and the United Kingdom and applicable to Malaya, signed at Washington June 6, 1951. (TIAS 2494; 3 UST 3426.) Article 16, para. (1). . . .

The United Kingdom and the Federation of Malaya exchanged notes September 12, 1957, transferring to Malaya as of August 31, 1957 (date of independence), rights and obligations of treaties and agreements entered

into between the United Kingdom and any other government in so far as such instruments may be held to have application to Malaya. In an exchange of notes between the United States and the Federation of Malaya dated January 7 and February 2, 1960, the two governments agreed that the consular convention of 1951 is in force between the two countries.

MUSCAT. Treaty of amity, economic relations and consular rights, signed at Salalah December 20, 1958. (TIAS 4530; 11 UST 1835.)

#### Article II (paragraph 2)

2. Nationals of either Party shall receive all possible protection and security within the territories of the other Party. When any such national is in custody, he shall receive reasonable and humane treatment, and, on his request, the nearest consular representative of his country shall be notified as soon as possible. He shall be promptly informed of the accusations against him, allowed ample facilities to defend himself and given a prompt and impartial disposition of his case.

NETHERLANDS. Treaty of friendship, commerce and navigation with protocol and exchange of notes, signed at The Hague March 27, 1956. (TIAS 3942; 8 UST 2043.)

#### Article III (paragraph 2)

2. If, within the territories of either Party, a national of the other Party is taken into custody, the nearest consular representative of his country shall on the demand of such national be immediately notified and shall have the right to visit and communicate with such national. Such national shall: (a) receive reasonable and humane treatment; (b) be promptly informed of the accusations against him; (c) be brought to trial as promptly as is consistent with the proper preparation of his defense; and (d) enjoy all means reasonably necessary to his defense, including the services of competent counsel of his choice.

NICARAGUA. Treaty of friendship, commerce and navigation, and protocol, signed at Managua January 21, 1956. (TIAS 4024; 9 UST 449.)

#### Article III

2. If, within the territories of either Party, a national of the other Party is taken into custody, the nearest consular representative of his country shall on the demand of such national be immediately notified. Such national shall: (a) receive reasonable and humane treatment; (b) be formally and immediately informed of the accusations against him; (c) be brought to trial as promptly as is consistent with the proper preparation of his defense; and (d) enjoy all means reasonably necessary to his defense, including the services of competent counsel of his choice.

NIGERIA. Consular convention and protocol of signature between the United States and the United Kingdom and applicable to Nigeria, signed at Washington June 6, 1951. (TIAS 2494; 3 UST 3426.) Article 16, para. (1). . . .

The United Kingdom and the Federation of Nigeria exchanged notes October 1, 1960, agreeing that all obligations, responsibilities, rights, and

benefits of the Government of the United Kingdom which arise from any valid international instrument shall be assumed from October 1, 1960 (date of independence) by Nigeria in so far as such instrument may be held to have application to Nigeria.

PAKISTAN. Treaty of friendship and commerce, and protocol, signed at Washington November 12, 1959. Entered into force February 12, 1961. (TIAS 4683; 12 UST 110.)

#### Article III

2. If, within the territories of either Party, a national of the other Party is taken into custody, the nearest consular representative of his country shall on the demand of such national be immediately notified and shall have the right to visit and communicate with such national. Such national shall: (a) receive reasonable and humane treatment; (b) be formally and immediately informed of the accusations against him; (c) be brought to trial with all convenient speed, with due consideration to proper preparation of his defense; and (d) enjoy all means reasonable necessary to his defense, including the services of competent counsel of his choice.

PHILIPPINES. Consular convention, signed at Manila March 14, 1947. (TIAS 1741; 62 Stat. 1593.)

#### Article VII (paragraph 2)

2. Consular officers of either High Contracting Party shall, within their respective districts, have the right to interview, to communicate with, and to advise nationals of their country; to inquire into any incidents which have occurred affecting the interest of such nationals; and to assist such nationals in proceedings before or relations with authorities in the territories of the other High Contracting Party. Consular officers of either High Contracting Party shall be informed immediately whenever nationals of their country are under detention or arrest or in prison or are awaiting trial in their consular districts and they shall, upon notification to the appropriate authorities, be permitted without delay to visit and communicate with any such national.

SIERRA LEONE. Consular convention and protocol of signature between the United States and the United Kingdom and applicable to Sierra Leone, signed at Washington June 6, 1951. (TIAS 2494; 3 UST 3426.) Article 16, para. (1). . . .

The United Kingdom and the Government of Sierra Leone exchanged notes May 5, 1961, agreeing that all obligations, responsibilities, rights and benefits which arise from any valid international instrument shall be assumed from April 27, 1961 (date of independence) by Sierra Leone in so far as such instrument may be held to have application to Sierra Leone.

TANGANYIKA. Consular convention and protocol of signature between the United States and the United Kingdom and applicable to Tanganyika, signed at Washington June 6, 1951. (TIAS 2494; 3 UST 3426.) Article 16, para. (1). . . .

The Government of Tanganyika declared in a communication to the



United Nations that it would continue to apply bilateral treaties validly concluded by the United Kingdom on behalf of the territory of Tanganyika for a period of two years from date of independence (*i.e.* until December 8, 1963) unless abrogated or modified earlier by mutual consent.

TRINIDAD AND TOBAGO. Consular convention and protocol of signature between the United States and the United Kingdom and applicable to Trinidad and Tobago, signed at Washington, June 6, 1951. (TIAS 2494; 3 UST 3426.) Article 16, para. (1). . . .

The Government of Trinidad and Tobago has agreed to assume all obligations, responsibilities, rights and benefits of the United Kingdom arising from any valid international instrument in so far as such instrument may be held to have application to Trinidad and Tobago.

UGANDA. Consular convention and protocol of signature between the United States and the United Kingdom and applicable to Uganda, signed at Washington June 6, 1951. (TIAS 2494; 3 UST 3426.) Article 16, para. (1). . . .

Continued application has not been determined.

UNITED KINGDOM. Consular convention with protocol of signature, signed at Washington June 6, 1951.<sup>1</sup> (TIAS 2494; 3 UST 3426.)

#### Article 16 (paragraph (1))

(1) A consular officer shall be informed immediately by the appropriate authorities of the territory when any national of the sending state is confined in prison awaiting trial or is otherwise detained in custody within his district. A consular officer shall be permitted to visit without delay, to converse privately with and to arrange legal representation for, any national of the sending state who is so confined or detained. Any communication from such a national to the consular officer shall be forwarded without delay by the authorities of the territory.

VIET-NAM. Treaty of amity and economic relations, signed at Saigon April 3, 1961. (TIAS 4890; 12 UST 1703.)

#### Article 1

2. Nationals of either Party shall receive the most constant protection and security within the territories of the other Party, in no case less than that required by international law. When any such national is in custody, he shall in every respect receive reasonable and humane treatment; and, on his demand, the diplomatic or consular representative of his country shall be immediately notified and accorded full opportunity to safeguard his interests. He shall be promptly informed of the accusations against him, allowed ample facilities to defend himself, and given a prompt and impartial disposition of his case.

<sup>1</sup> The convention applies on the part of the United States to all territories subject to the sovereignty or authority of the United States, excepting the Panama Canal Zone, and on the part of the United Kingdom to Great Britain and Northern Ireland, Southern Rhodesia, to all colonies and protectorates, to all territories under the protection of the United Kingdom, and to all territories under trusteeship administered by the Government of the United Kingdom.

## MILITARY OCCUPATION

*Laws in force in occupied territory—tort law*

Under the Treaty of Peace dated September 8, 1951, between Japan and 25 Powers with which Japan was at war (including the United States), T.I.A.S., No. 2490, Article 3, the United States has "the right to exercise all and any powers of administration, legislation and jurisdiction over the territory and inhabitants" of the Ryukyu Islands. Okinawa is one of the Ryukyu Islands. In reply to a letter from a private person, the Director of Civil Affairs and Civil Defense, Department of the Army, wrote in part:

With regard to your inquiry as to whether the Civil Tort Law of Japan, as of 1945, is still in effect on Okinawa, I should like to note that the substantive law in the Ryukyu Islands concerning liability for torts (*fuho koi* in Japanese; ordinarily translated into English as "unlawful acts") is contained in Chapter V of Book III of the Civil Code, consisting of Articles 709 through 724. These articles are presently in effect in precisely the same form as in 1945, since no changes have been made therein by any agency of the United States (by reason of either the military occupation of Okinawa or the Peace Treaty with Japan) or by the Government of the Ryukyu Islands. (Letter on file in the Office of the Assistant General Counsel, International Affairs, Department of Defense.)

## INTERNATIONAL COURT OF JUSTICE

*Compulsory jurisdiction—settlement of disputes clause in Marriage Convention*

On November 7, 1962, United States Ambassador Philip M. Klutznick delivered a statement at the 1166th plenary meeting of the United Nations General Assembly concerning a draft convention and draft recommendation on consent to marriage, minimum age for marriage and registration of marriages. In discussing a settlement-of-disputes clause contained in the draft convention, Mr. Klutznick said:

Now I should like to say a few words about the draft amendment found in document A/L.398, jointly sponsored by the delegations of Liberia, Sweden, Congo (Leopoldville) and my own. At the outset, may be expressed our gratitude to the representative of Sweden for his very lucid statement of introduction.

This amendment would replace the word "all" with the three words "any one of" in Article 8 of the marriage convention. This amendment appears to be a small one, but its effect is far from small. The adoption of this amendment would provide the marriage convention with a clause dealing with the settlement of disputes, creating a meaningful obligation, operable at the request of any one of the parties, to submit to the International Court of Justice a dispute arising out of the interpretation or application of the marriage convention which is not settled by other means.

The United States has traditionally supported the inclusion in international instruments of an article dealing with the reference of

disputes to the International Court of Justice. Such an article would constitute a referral to the Court under Article 36, paragraph 1, of the Statute of the International Court of Justice. That paragraph provides that:

"The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force."

The marriage convention is such a convention, which we hope will be in force. We consider that it should provide that disputes arising out of its interpretation or application could be submitted to the Court at the request of any one of the parties. It is our view that the International Court of Justice is the proper body to which disputes relating to interpretation and application of the convention should be submitted, and especially so a convention concluded under United Nations auspices.

My delegation proposed the adoption of a suitable settlement of disputes clause in the Third Committee. This clause is identical to the one found in the Convention on the Nationality of Married Women and resembles similar clauses found in many other such conventions, in spite of statements intended to have led us to conclude otherwise and recently made from this rostrum. This clause would have provided that any dispute arising out of the interpretation or application of the marriage convention would, unless the parties in dispute agreed to another mode of settlement, be submitted to the International Court of Justice at the request of any one of the parties. This would have constituted a real obligation on the part of States Members.

However, certain delegations sought to remove this obligation and proposed to amend the language to the effect that disputes could not be submitted to the International Court of Justice unless all parties were agreed to this end. Unfortunately, the views of these delegations prevailed within the Committee by a very close vote. As a result we have before us, in the convention proposed to you, a clause that is utterly devoid of any meaning. Even in its absence States could always agree to submit disputes arising out of the interpretation or application of the marriage convention to the International Court of Justice. The amendment which was so narrowly enacted in the Third Committee renders Article 8 meaningless. It makes a mockery of this article. We would like to return some sense of meaning to the settlement of disputes clause. It is for this reason that we have joined the other delegations in co-sponsoring the amendment in document A/L. 398.

We must make it clear that we are not dealing here with the acceptance of the jurisdiction of the International Court of Justice under paragraph 2 of Article 36 of the Statute of the International Court of Justice. We are merely considering whether disputes arising out of the interpretation and application of this convention, the marriage convention, are to be referred to the International Court at the request of any one of the parties if it has not been otherwise resolved.

This is an obligation which the States co-sponsoring the amendment in document A/L. 398 are willing and, in fact, eager to undertake. We trust that this Marriage Convention merits such an understanding by Member States. . . .

See United Nations document A/P.V.1166, November 7, 1962, pp. 37-41. At its 1167th plenary meeting on November 7, 1962, the Assembly adopted Resolution 1763 (XVII). Part A of that resolution opens for signature and

ratification as of December 10, 1962, the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages, the text of which is annexed to the resolution. Article 8 of the Convention contains the following settlement-of-disputes clause:

Any dispute which may arise between any two or more Contracting States concerning the interpretation or application of the present Convention which is not settled by negotiation shall, at the request of all the parties to the dispute, be referred to the International Court of Justice for decision, unless the parties agree to another mode of settlement.

The amendment to Article 8 contained in A/L. 398 and Add. 1 (to replace the word "all" with the words "any one of") referred to by Mr. Klutznick was not adopted, having received a vote of 45 (U.S.)-46-13. As of January 1, 1963, 10 states, including the United States, had signed the Convention.

#### UNITED NATIONS

##### *Acceptance of advisory opinions of International Court of Justice— advisory opinion on financial obligations of United Nations Members*

On December 3, 1962, United States Ambassador Philip M. Klutznick delivered a statement in Committee V of the United Nations General Assembly on the obligations of Members under the United Nations Charter with regard to the financing of the United Nations Emergency Force and the United Nations operations in the Congo in the light of the advisory opinion of the International Court of Justice in the proceeding, *Certain Expenses of the United Nations*.<sup>1</sup> Mr. Klutznick said in the course of this statement:

When the Legal Adviser of the Department of State was privileged to address the International Court of Justice on the case of *Certain Expenses of the United Nations*, he declared that: "In the view of the Government of the United States, no more important question has ever been before the International Court." Correspondingly, few more important questions have ever been before this Committee. The issue before us raises questions of a fundamental character: the role and the rule of international law; the standing of the International Court of Justice and the relation of this Assembly to that Court; the ability of the United Nations to keep the peace; and the financial integrity of this Organization—with all it implies for the continued existence and effectiveness of the United Nations.

The obligations of Members, under the Charter of the United Nations, in respect of the expenses of UNEF and ONUC, has in the past given rise to dispute in this Committee. The character of these obligations likewise gave rise to dispute in the Working Group of Fifteen. That group wisely decided that before the question of financing could be defined, the prior question of legal obligation—a question of law—needed to be settled through legal proceedings. It recommended that the General Assembly seek an advisory opinion from the International Court of Justice. That this Assembly decided to do.

<sup>1</sup> Advisory Opinion of July 20, 1962. [1962] I.C.J.Rep. 151; 56 A.J.I.L. 1053 (1962).

That decision was equally wise. Where there is a legitimate question about the obligations of Members of the United Nations, and about the obligations of the United Nations to its Members, and where that question has led to controversy among us, it is highly desirable and highly important that that doubt be dealt with through judicial means. The Charter provides that "the principal judicial organ of the United Nations" is the International Court of Justice. It further provides that the General Assembly may request the International Court of Justice "to give an advisory opinion on any legal question." This Assembly did request an opinion; and it is that opinion that is before us today.

My delegation is pleased that there is before us an opinion of the Court. We are no less pleased that this vital question was presented to the Court actively and with deep conviction by those holding differing views. This was not a *pro forma* proceeding. A score of governments presented written statements to the Court. Nine member states participated in the Court's oral argument, among them a distinguished representative of the Soviet Union. This marked the first time that the Soviet Union has participated in oral argument in a case before the World Court in its forty-year history.

The number of Members participating by way of written or oral argument in this advisory proceeding was the largest that has participated in any advisory proceeding. This is eloquent testimony to the importance of this opinion.

My delegation does not approach this opinion retrospectively, in a spirit of who was right and who was wrong about yesterday's debates on the nature of obligations concerning certain United Nations expenses. Rather we do so in the hope we may all call a page of history closed while we examine calmly, deliberatively, and constructively, the course opened to us by the light shed through the judicial process. We have asked the Court for its advice. The Court has given it. The law is now clear. What remains is for us to act.

My delegation is privileged to cosponsor two resolutions. The first, reproduced in A/C.5/L.760, provides, in its sole operative paragraph, that this Assembly "accepts the opinion of the Court on the question submitted to it."

The second resolution is reproduced in A/C.5/L.761. In essence it reestablishes the Working Group of Fifteen to consider methods of financing, in the future, peacekeeping operations of the United Nations involving heavy expenditures. In a sense, one resolution deals with the past, the other with the future. One is not dependent on the other. Permit me initially to speak to the first resolution.

The draft resolution submitted in Document L.760 refers to the action taken last year requesting the Court's opinion, which set forth this Assembly's "need for authoritative legal guidance as to obligations of Member States under the Charter of the United Nations in the matter of financing the United Nations operations in the Congo and in the Middle East." It recalls the question submitted to the Court, and summarizes the Court's holding. Finally, in its operative paragraph, this Assembly would accept the opinion of the Court. The operative paragraph is phrased so as to specify that the Assembly would accept the Court's opinion only on the specific question submitted to it.

By adopting the draft resolution, the Assembly would not pass upon the reasoning of the Court. In the view of my delegation the Court,

in its opinion of 20 July 1962, has measured up to the highest standards of judicial service. Yet we should make it clear that my Government sees no need for this Assembly to pass upon, or even to go into, the reasoning of the Court.

In accepting the Court's opinion on the question submitted to it, this Assembly would not necessarily accept any particular argument or implication of the Court's opinion. It would neither commend nor criticize the Court on its reasoning. This is no more our function than to commend or criticize those Member States who in the past have contended for their varying views on the question before this Committee or before the Court. We would merely accept the precise answer of the Court on the precise question the Assembly put to it.

The draft resolution anticipates the General Assembly performing a function which is proper to it. The General Assembly is not a court. It is not a judicial organ of the United Nations, and still less is it "the principal judicial organ of the United Nations," as Article 92 of the Charter describes the International Court of Justice. It is not the function of this Assembly—and certainly not of this Committee—to act as a court to review the International Court of Justice. To do so would be to depart from the Charter's clear intention. When the Court's opinion is asked, establishment and interpretation of the law, in the design of the Charter, is the function of the Court; action to implement the law is, as the case may be, the function of other organs of the United Nations.

In both advisory and contentious cases the Court has declared the law. The difference between a judgment in a contentious case and an advisory opinion relates not to the validity of the Court's statement of the law but to the obligations that flow from that statement. While an advisory opinion does not have binding force, it does not follow that it is not an authoritative statement of the law. As the Court has pointed out, "The Court, being a Court of Justice, cannot, even in giving advisory opinions, depart from the essential rules guiding their activity as a Court."

The advisory opinion has no binding force because in advisory proceedings there are no parties on whom the obligation of compliance can be imposed. But this fact, as a leading authority on the Court has said, "does not affect the quality of the opinion as an authoritative pronouncement of what the law is." As Judge Azevedo has pointed out, while in League of Nations practice the ordinary advisory opinion did not produce the effect of *res adjudicata*, that fact "is not sufficient to deprive an advisory opinion of all the moral consequences which are inherent in the dignity of the organ delivering the opinion, or even of its legal consequences."

Indeed, in a report of a committee composed of Judges Loder, Moore and Anzilotti, which accompanies a clause in the Rules of the Court, it was concluded in 1927 that: "In reality, where there are in fact contending parties, the difference between contentious cases and advisory cases is only nominal . . . so that the view that advisory opinions are not binding is more theoretical than real." The distinguished Polish jurist, Judge Winiarski, who is now President of the Court, and who read in open court the opinion before us, in another opinion has declared that the Court "must in view of its high mission, attribute" to advisory opinions "great legal value and a moral authority." His Yugoslav colleague, Judge Zoricic, noted that "the Court's advisory opinions enjoy the same authority as its judgments, and are cited by jurists who attribute the same importance to them

as to judgments. The Court itself refers to its previous advisory opinions in the same way as to its judgments." He concludes: "... an advisory opinion which is concerned with a dispute between States from a legal point of view amounts to a definitive decision upon the existence or non-existence of the legal relations, which is the subject of the dispute."

It would profit little to delve further into the complex jurisprudential question of the precise force of advisory opinions. My delegation holds the view that an advisory opinion of the International Court of Justice—this Organization's "principal judicial organ"—is authoritative. This is the view which this Assembly has adopted in the past. The Sixth Committee in its report to the General Assembly in connection with the *Reparation* case noted: "the authoritative nature of the advisory opinion should be taken for granted."

In this connection permit me to advert to the position taken by the distinguished delegate of France in considering the Assembly's response to the Court's opinion in the *Reparation* case. Madame Bastid described the Court as "the highest juridical and constitutional authority that exists in the world today." She stated that, while an opinion of the Court is not binding upon states, "it is authoritative. . . ." She said: "Jurists in this General Assembly and delegates in this Assembly have appealed to the Court on a problem upon which they could not take a decision. They thereby recognized that there should be an opinion of the highest judicial authority that exists."

"Now," she asked, "before taking action, should we refer this advisory opinion once again to the states and have it filtered and screened by the Assembly? We do not believe that this is necessary. The role of the General Assembly, of the political body, is to take a decision for action either by following, or by failing to follow, or following in part the opinion of the Court." We agree with this view.

May we burden the Committee with one more quotation, both because of the eminence of its author and its pertinence to the point before us. Sir Gerald Fitzmaurice, now a Judge of the Court, declared in this Assembly:

"Advisory opinions were not binding in the sense that judgments of the Court were, because in the case of advisory opinions the General Assembly was not bound to act in accordance with the opinion. The Assembly could take other factors into consideration; it was also free to accept or reject that opinion. It could not be said, however, that the opinion of the Court was wrong from the legal standpoint or that the Assembly did not agree with the Court in its findings, because the Assembly had no competence in a legal matter to agree or disagree with the Court on a point of law. The Court was the highest authority on matters of international law and its findings were necessarily authoritative."

Now it has been the uniform practice of this Assembly in the past to accept or act upon the Court's advisory opinions. My Government has consistently favored this practice, even where it disagreed with the opinion of the Court. Thus, in 1954, the Fifth Committee debated acceptance of the Court's advisory opinion in the case of *Effects of Awards of Compensation Made by the United Nations Administrative Tribunal*. Senator Fulbright, speaking for the United States, stated: "... while the United States delegation did not share the Court's opinion . . . it would maintain its consistent policy and continue to respect the Court's authority and competence."

The response to Senator Fulbright's declaration was instructive. The distinguished delegate of India declared that his delegation "was pleased to hear . . . that the United States delegation accepted the Court's opinion, in accordance with that true democratic tradition which demanded respect for the decisions of judicial bodies. . . ." And the distinguished delegate of France, Mr. Ganem, whose wisdom and experience continue to grace this Committee, declared that France "had no difficulty whatever in accepting the Court's opinion . . . in that connection, the French delegation noted with satisfaction that the United States, in accordance with its finest tradition, bowed before the decision of a judicial body . . ."

We do not recall these facts to imply special merit but to suggest that there is no sound path open to us but to act in accordance with the law as the competent body finds the law to be. This is the essence of our relationship to one another. If we leave the moorings of the law we can only lose ourselves in the swift currents where power alone dominates.

Now let us return to the practice of this Assembly with respect to advisory opinions. There have been nine advisory opinions requested by the General Assembly of the International Court of Justice, apart from the one that now concerns us. In all of these cases—with one exception, of which we shall speak in a moment—the General Assembly adopted a resolution at the conclusion of its discussion of the opinion. The form of the resolution adopted has varied somewhat according to the circumstances of each case.

In the operative paragraphs of these resolutions the Assembly has given effect to the opinions of the Court. On occasion, it has authorized or directed the Secretary General, or called on Member States to act in accordance with the Court's opinion. On other occasions the Assembly has explicitly accepted or accepted and endorsed the Court's opinion. The resolution contained in Document L. 760 wholly conforms to the Assembly's traditional terminology.

In every instance, the General Assembly has followed the Court's opinion, either expressly or tacitly. The one case in which it did not adopt a resolution enunciating its decision to follow the Court's opinion was on the *Competence of the General Assembly for the Admission of a State to the United Nations*. There the Court was asked whether the admission of a state to membership pursuant to Article 4 of the Charter can be effected by a decision of the General Assembly when the Security Council has made no recommendation for admission, either by reason of the candidate failing to obtain the requisite majority or because of the negative vote of a permanent member upon a resolution recommending admission. The Court replied that a positive recommendation of the Security Council was necessary for the General Assembly to admit a Member. The Assembly acted in accordance with this opinion by abandoning any consideration of admitting new Members where the Security Council had not given a positive recommendation.

Actually, the record is even more persuasive. While nine advisory opinions have been put to the Court, seventeen questions have been embraced in answers to the nine requests. The General Assembly has accepted or acted upon the replies of the Court in all seventeen instances. The Assembly's response, uniform as it has been, has not varied with the majority by which the Court rendered its opinion. But some may raise the question of the majority by which this decision



was adopted. That majority is of no relevance, for when the Court renders an opinion, it is the opinion of the Court, whatever its majority.

But it may be of interest to note that the majorities in the prior nine cases sometimes have been larger and sometimes smaller than that in the opinion before us. The first advisory opinion rendered by the Court, on 17 November 1947, responded to each of the two questions put to the Court by a vote of 9 to 6; the second opinion, of 11 April 1949, answered the first part of the first question put to it unanimously and the second part by 11 votes to 4. A second question was answered by 10 votes to 5. In some subsequent cases the majority votes were larger and in others smaller. Speaking for a country whose Supreme Court has decided great cases by a single vote, the majority in this instance of 9 to 5 is impressive.

Now, while the Court's opinion sets forth the law of the matter, this Assembly *can* choose not to follow the Court's authoritative holding. The effect of any such decision—considering it, for a moment, from simply a legal point of view—could not be underestimated. Since an opinion of the World Court has never before been rejected in all the history of the League of Nations and the United Nations, to reject this opinion would be to strike a massive blow against the Court itself. Since the Court's advisory opinions are generally acknowledged to be authoritative statements of the law, to reject the Court's opinion would sap the vitality of international law and its role in the United Nations. To reject the Court's opinion, whether directly or indirectly, would hardly promote that high purpose which the Preamble of the Charter proclaims: "to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained. . . ." (U. S. Delegation Press Release 4112, Dec. 3, 1962; 48 Dept. of State Bulletin 30-35 (1963).)

On the basis of a report of Committee V (A/5380), the General Assembly at its 1199th plenary meeting on December 19, 1962, adopted Resolution 1854 (XVII). Part A of this resolution, adopted by a vote of 76 (U.S.)-17-8, reads as follows:

*The General Assembly,*

*Having regard to* resolution 1731 (XVI) of 20 December 1961, in which it recognized "its need for authoritative legal guidance as to obligations of Member States under the Charter of the United Nations in the matter of financing the United Nations operations in the Congo and in the Middle East",

*Recalling* the question submitted to the International Court of Justice in that resolution,

*Having received* the Court's advisory opinion of 20 July 1962, transmitted to the General Assembly by the Secretary-General under document A/5161, declaring that the expenditures authorized in the General Assembly resolutions designated in resolution 1731 (XVI) constitute "expenses of the Organization" within the meaning of Article 17, paragraph 2, of the Charter,

*Accepts* the opinion of the Court on the question submitted to it.  
(Footnote omitted.)

Part B of this resolution re-establishes the Working Group of Fifteen to consider methods of financing future United Nations peace-keeping operations. (48 Dept. of State Bulletin 37 (1963).)

*Customary international law—present validity—United States statement in United Nations Legal Committee*

On November 21, 1962, Senator Albert Gore, United States Representative, delivered a statement in Committee VI (Legal) on the agenda item entitled "Consideration of principles of international law relating to friendly relations and cooperation among States in accordance with the Charter of the United Nations." Senator Gore said in part:

Until very recently, Communist writings on international law seemed to take the position that only international law flowing from treaties is worthy of respect. The expressly consensual element in the formation of international law was stressed to the exclusion of other lawmaking processes. This approach derived from an extreme and archaic view of the sovereignty of the state, a view which, reduced to simple terms, taught that only the specific, articulated consent of the state could operate to subject the state to international law. Thus, at our 717th meeting on November 21st last year, the distinguished representative of the Soviet Union, Professor Tunkin, said:

"The transformation which took place in the human society and, above all, the changes in its economic structure led to alterations in international law. Those alterations were effected by *agreement between States* which constituted the *only means of creating and changing the norms of international law.*"

This extreme doctrinal emphasis on treaty law at the same time attempted to portray the great body of customary international law as outmoded, obsolete, colonialist; as bourgeois, creditor-oriented, and—in some sinister sense—"Western." While the Czechoslovak resolution, which has been supported by a number of delegations from Communist states, gives increased weight to customary international law, neither it nor the comments of our Communist colleagues clearly disavow the imputations against customary international law to which I have alluded. If I may, Mr. Chairman, I should like for a moment to discuss this question, which so importantly relates to our concern with the progressive development of international law.

Surely we all recognize that a part of what was international law, now irrevocably dead, could not today be justified. The nineteenth century capitulations between certain European and certain Asian and African states cannot be defended. However, not only have these capitulations long since ceased to exist. They represented international law not flowing from custom but from international agreements. They were, in fact, treaties.

Equally a thing of the past is the phenomenon by which consular officers of a number of European states, including Russia, and the United States, exercised quasi-sovereign prerogatives in other states. These arrangements never became a part of modern international law. Moreover, the jurisdictional prerogatives of the consuls arose from contractual arrangements—from treaties, not from custom.

This is not to say that customary international law has carried forward no elements that require pruning, no aspects that require revision. On the contrary, the very concept of the progressive development of international law imports change. My delegation recognizes that existing international law, whether springing from custom or from treaty, or other source, needs to be strengthened; that the rule of law in international affairs is far from realized. International law

must grow, it must change, and it must change for the better. In the process of change, the new states of the world can make a contribution of particular importance. That contribution can be made in the International Law Commission and in the process of treaty-making to which the Commission's work gives rise. It can be made by participation in the work of the United Nations. It can be made in other ways.

At the same time, as we jointly undertake the progressive development of international law, we must take care not to depreciate and discard that which is of value in existing international law. Today's international law, whether stemming from treaty or custom, or general principles of law, is a valuable law, responsive to the needs of states the world over, whether new or old, whether of the East or of the West. The fact that the older states of Europe and the Americas have played a predominant role in the creation of customary international law does not mean that that law is not of universal validity and appeal. There is much in international law that flows from the mere existence of states; the content of the law has not been determined by the region of the world in which those states happen to have been located. Moreover, to the extent that international law does have a specifically Western content—a content which can easily be exaggerated—that is not necessarily occasion for apology. There is much in the tradition of Western legal thought and practice of which every man, whatever the geographical accident of his birth, can be proud. . . . (U. S. Delegation Press Release 4101, Nov. 21, 1962; 47 Dept. of State Bulletin 972-979 (1962).)

#### OUTER SPACE

##### *Military uses*

On December 3, 1962, Senator Albert Gore, United States Representative, delivered a statement in Committee I of the United Nations General Assembly, of which the following is an excerpt:

The development of law for outer space requires more than the formulation of general principles, and it requires more than the conclusion of agreements on specific problems, such as liability, and rescue and return. It requires the constructing of adequate assurance that the exploration and use of outer space will be for peaceful purposes. I should like to state quite explicitly the views of my Government on the most pressing aspects of this problem.

It is the view of the United States that outer space should only be used for peaceful—that is, non-aggressive and beneficial—purposes. The question of military activities in space cannot be divorced from the question of military activities on earth. To banish these activities in both environments we must continue our efforts for general and complete disarmament. Until this is achieved the test of any space activity must *not* be whether it is military or non-military, but whether or not it is consistent with the United Nations Charter and other obligations of international law.

There is, in any event, no workable dividing line between military and non-military uses of space. American and Russian astronauts are members of the Armed Forces, but this is no reason to challenge their activities. A navigational satellite in outer space can guide a submarine as well as a merchant ship. The instruments which guide

a space vehicle on a scientific mission may also guide a space vehicle on a military mission.

One of the consequences of these facts is that any nation may use space satellites for such purposes as observation and information gathering. Observation from space is consistent with international law, just as is observation from the high seas. Moreover, it serves many useful purposes. Observation satellites can measure solar and stellar radiation and observe the atmosphere and surfaces of other planets. They can observe cloud formations and weather conditions. They can observe the earth and add to the science of geodesy.

Observation satellites obviously have military as well as scientific and commercial applications. But this can provide no basis for objective to observation satellites.

With malice toward none, science has decreed that we are to live in an increasingly open world, like it or not, and openness can only serve the cause of peace. The United States, like every other nation represented here, is determined to pursue every non-aggressive step which it considers necessary to protect its national security and the security of its friends and allies, until that day arrives when such precautions are no longer necessary.

As I have said, we cannot banish all military activities in space until we banish them on earth. This does not mean, however, that no measures of arms control and disarmament in space can be undertaken now. On the contrary, the United States believes that certain things can be done immediately to prevent an expansion of the arms race into space.

In the first place, it is the policy of the United States to bring to a halt the testing of nuclear weapons in outer space. In addition to proposing a comprehensive treaty banning all nuclear weapons tests in all environments with only that amount of international inspection necessary to ensure compliance, the United States has also offered a treaty banning testing under water, in the atmosphere, and in outer space with no international inspection. Thus, the testing of nuclear devices in space can be banned at any hour the Soviet Union agrees to do so.

In the second place, even though it is now feasible, the United States has no intention of placing weapons of mass destruction in orbit unless compelled to do so by actions of the Soviet Union. The draft treaty for general and complete disarmament, proposed by the United States and now before the Conference in Geneva, includes a provision against the placing of weapons of mass destruction into orbit during the first stage of the disarmament process. Nonetheless, while the difficult negotiations continue for the actual elimination of nuclear weapons and the means of delivering them, it is especially important that we do everything now that can be done to avoid an arms race in outer space—for certainly it should be easier to agree not to arm a part of the environment that has never been armed than to disarm parts that have been armed. We earnestly hope that the Soviet Union will likewise refrain from taking steps which will extend the arms race into outer space.

Outer space is not a new subject, it is just a new place in which all the old subjects come up. The things that go on in space are intimately related to the things that go on here on earth. It would be naive to suppose that we can insulate outer space from other aspects of human existence.

Some limited measures of arms control, as I noted earlier, may be

achieved. But the key to the survival of mankind lies in the progress which we make toward disarmament on earth as well as in space. It is with this fact in mind that the United States has advanced three proposals for reducing world armaments: a draft outline of basic provisions of a treaty for general and complete disarmament; a draft treaty to ban all nuclear testing in all environments with a minimal amount of international inspection; and a draft treaty to ban all testing under water, in the atmosphere, and in outer space without any inspection at all. Progress on these proposals would provide the greatest single contribution we could make to law and order in outer space. (U. S. Delegation Press Release 4101, Nov. 21, 1962; 48 Dept. of State Bulletin 22-24 (1963).)

On the basis of a report of Committee I on the Peaceful Uses of Outer Space (A/5381), the General Assembly at its 1192nd plenary meeting on December 14, 1962, unanimously adopted Resolution 1802 (XVII). Part A of this resolution reads as follows:

*The General Assembly,*

1. *Notes* with regret that the United Nations Committee on the Peaceful Uses of Outer Space has not yet made recommendations on legal questions connected with the peaceful uses of outer space;

2. *Calls upon* all Member States to co-operate in the further development of law for outer space;

3. *Requests* the Committee on the Peaceful Uses of Outer Space to continue urgently its work on the further elaboration of basic legal principles governing the activities of States in the exploration and use of outer space and on liability for space vehicle accidents and on assistance to and return of astronauts and space vehicles and on other legal problems;

4. *Refers* to the Committee on the Peaceful Uses of Outer Space as a basis for this work all proposals which have been made thus far, including the draft declaration of the basic principles governing the activities of States pertaining to the exploration and use of outer space, submitted by the Union of Soviet Socialist Republics; the draft international agreement on the rescue of astronauts and spaceships making emergency landings, submitted by the Union of Soviet Socialist Republics; the draft proposal on assistance to and return of space vehicles and personnel, submitted by the United States of America; the draft proposal on liability for space vehicle accidents, submitted by the United States of America; the draft code for international co-operation in the peaceful uses of outer space, submitted by the United Arab Republic; the draft declaration of basic principles governing the activities of States pertaining to the exploration and use of outer space, submitted by the United Kingdom; the draft declaration of principles relating to the exploration and use of outer space, submitted by the United States of America; and all other proposals and documents presented to the General Assembly during its debates on this agenda item and the records of those debates. (Footnotes omitted.) (48 Dept. of State Bulletin 28 (1963).)

## JUDICIAL DECISIONS

BY COVEY OLIVER

*Of the Board of Editors*

DECISIONS OF THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES \*

*European Economic Community—proceeding to establish violation of Treaty by Member State—Article 169—unilateral suspension of pork imports violation of Article 31—defense based on general principles of public law rejected—remedy under Article 226 exclusive*

COMMISSION OF THE EUROPEAN ECONOMIC COMMUNITY *v.* GOVERNMENT OF THE REPUBLIC OF ITALY. Case No. 7-61. 7 Sammlung der Rechtsprechung des Gerichtshofes 693 (1961). CCH 1962 Common Market Reports ¶ 8001.

Court of Justice of the European Communities. Judgment of Dec. 19, 1961.

In this action, instituted by the Commission of the European Economic Community against Italy under Article 169<sup>1</sup> of the European Economic Community Treaty, the Commission sought a ruling by the Community Court declaring that Italy had violated Article 31<sup>2</sup> of the treaty by unilaterally suspending the importation of certain pork meats from other Member States.

Pursuant to Article 31, Italy in 1958 transmitted to the Commission for consolidation among the Member States a list of liberalized products which included the above-mentioned meats. But by interministerial order dated June 18, 1960, Italy temporarily suspended the importation of these

\* Reported by Thomas Buergenthal, Assistant Professor of Law, School of Law, State University of New York at Buffalo. Quotations are taken from the English translation found in Commerce Clearing House 1962 Common Market Reports.

<sup>1</sup> Art. 169 provides: "If the Commission considers that a Member State has failed to fulfil any of its obligations under this Treaty, it shall give a reasoned opinion on the matter after requiring such State to submit its comments.

"If such State does not comply with the terms of such opinion within the period laid down by the Commission, the latter may refer the matter to the Court of Justice."

<sup>2</sup> Art. 31 provides: "Member States shall refrain from introducing as between themselves any new quantitative restrictions or measures with equivalent effect.

"This obligation shall, however, only apply to the level of liberalisation attained in application of the decisions of the Council of the Organisation for European Economic Co-operation of 14 January 1955. Member States shall communicate to the Commission, not later than six months after the date of the entry into force of this Treaty, the lists of the products liberalised by them in application of these decisions. The lists thus communicated shall be consolidated between Member States."

meats. Since the Italian Government did not respond to the Commission's communication, wherein it was informed that the Commission viewed the import suspension as an infringement of Article 31, the Commission on December 21, 1960, formally charged the Italian Government with a violation of the treaty, giving Italy a period of one month within which to remedy the default. In its reply the Italian Government advised the Commission of its decision to extend the import suspension to March 31, 1961. This action, Italy submitted, was necessary in order to cope with "the exceptional situation prevailing on the Italian market," and should be authorized by the Commission as a safeguard measure under Article 226.<sup>3</sup> While the Commission advised Italy of its willingness to consider this reply as an application for authorization of the safeguard measures provided for in Article 226, it expressed the view that such an application could not suspend the proceedings instituted under Article 169. Accordingly, the Commission commenced the present action in the Community Court on March 20, 1961. On July 1, 1961, and while this appeal was pending, the Italian Government lifted the import suspension.

In its opinion the Court first rejected the argument that the appeal should be dismissed, because the Italian Government had in the meantime complied with the opinion addressed to it by the Commission. The Court reasoned that, if a state fails to discharge the obligations incumbent upon it under the treaty within the time specified by the Commission in a proceeding instituted under Article 169, any subsequent compliance cannot deprive the Commission of its interest in obtaining a judgment "as to whether the failure has or has not occurred." The Court also agreed with the Commission that Italy's application for authorization to invoke the safeguard measures under Article 226 did not suspend the proceedings instituted by the Commission under Article 169. Accordingly, the Court ruled that it had jurisdiction to hear the appeal, and proceeded to examine the merits of the charge that Italy had violated the treaty.

Here the Italian Government did not dispute the contention that the imposition of new import restrictions on previously liberalized and consolidated products violated Article 31 of the treaty. Instead, it advanced a series of arguments designed to show that its action was justified under the circumstances. It pointed first to the temporary nature of the interministerial decree and to Italy's professed willingness to lift the import restrictions as soon as market conditions permitted. In the Court's view, however, "the 'standstill' obligation provided by Article 31 is absolute" and "admits of no exception either partial or temporary." Furthermore, if a contrary interpretation of Article 31 were accepted, it would "open the door to unilateral actions by Member States directly opposed to the objective pursued by the Treaty in matters of the free trade of goods."

<sup>3</sup> Art. 226(1) provides: "In the course of the transitional period, where there are serious difficulties which are likely to persist in any sector of economic activity or difficulties which may seriously impair the economic situation in any region, a Member State may ask for authorisation to take measures of safeguard in order to restore the situation and adapt the sector concerned to the Common Market economy."

The Italian Government also submitted that "general principles of public law authorize every state in emergencies to take temporary measures necessary to relieve critical situations." Without addressing itself to the validity of this general proposition, the Court rejected it as a justification of Italy's action, by emphasizing that Article 226 of the treaty contains a specific emergency provision designed to deal effectively with any serious economic situation. Its very existence indicates, the Court asserted, that Member States may not, in reliance upon the gravity or emergency of the situation, take unilateral action in order to circumvent the provisions contained in Article 226. Accordingly, the Court ruled that "the Italian Government, in temporarily suspending the importation of the products in question from Member States, has failed in its obligation established in Article 31, paragraph (1), of the Treaty."

*European Economic Community—Article 14—tariff reductions—basic duty fixed by reference to duty actually applied by Member States—Article 234—GATT—treaty overrides prior conventions in matters it regulates*

COMMISSION OF THE EUROPEAN ECONOMIC COMMUNITY *v.* GOVERNMENT OF THE REPUBLIC OF ITALY. Case No. 10-61. 8 Sammlung der Rechtsprechung des Gerichtshofes 1 (1962). CCH 1962 Common Market Reports ¶ 8002.

Court of Justice of the European Communities. Judgment of Feb. 27, 1962.

In this action the Commission of the European Economic Community charged the Italian Government with a violation of Article 14 of the European Economic Community Treaty because it computed its tariff reductions on imports of radio tubes and similar products by reference to a different basic duty than the Commission deemed applicable to these products.

The facts underlying this litigation may be summarized as follows: After the Tariff Conference held at Annecy in 1949, Italy imposed a 35% customs duty on the products here in question. At the 1956 Geneva Tariff Conference this duty was deconsolidated between the parties to the General Agreement on Tariffs and Trade (GATT) in favor of a mixed duty of 30% coupled with a minimum levy of 150 lire. Pending Italy's ratification of the 1956 GATT schedule, this new duty was temporarily enacted pursuant to an order of the President of the Republic dated July 12, 1956. This order also repealed the temporary 10% reduction applicable since 1951 to the 35% duty. There were thus two tariff schedules in force in Italy, *viz.*, the old 35% duty and the 30% duty coupled with the 150-lire minimum levy. Under these circumstances, the Italian Ministry of Finance advised the customs authorities on July 13, 1956, to give importers an option to pay the duty more favorable to them. On January 2, 1958, Italy ratified the GATT schedule and repealed the old 35% duty.

Article 14(1) of the Economic Community Treaty provides in part that



"in respect of each product, the basic duty which shall be subject to successive reductions shall be the duty applied on 1 January 1957." In implementing two successive tariff reductions on imports from Member States, Italy ordered its customs officials to consider only the mixed duty of 30% coupled with the 150-lire minimum levy as the basic duty applicable on January 1, 1957. In the Commission's view, this action violated Article 14, because on January 1, 1957, an importer of radio tubes had an option in Italy of paying the 35% duty or the above-mentioned mixed duty. The Commission therefore demanded that Italy's basic duty be adjusted accordingly. Since Italy refused, the Commission submitted the dispute to the Community Court, which sustained the Commission's position and held that Italy had violated the treaty.

In the Community Court the Italian Government argued, first, that the term "applied duties" as used in Article 14 of the treaty must be understood to mean duties *lawfully* applied. On January 1, 1957, it submitted, the only duty lawfully applied in Italy was the 30% charge coupled with the 150-lire minimum levy. This could not be said of the option granted to importers, Italy contended. It was a mere courtesy lacking any force of law. The Court rejected this argument and held that Article 14 referred to those duties which were actually applied on January 1, 1957. It observed, in this connection, that Italy's argument, if accepted, would require the Commission and eventually the Court to ascertain whether a given domestic administrative enactment conformed to the law of the particular Member State. Such a result would be untenable, the Court asserted, because the treaty only confers upon these institutions the function of ensuring the orderly application of the treaty.

Italy next pointed to Article 234(1) of the treaty, which provides that

the rights and obligations resulting from conventions concluded prior to the entry into force of this Treaty between one or more Member States, on the one hand, and one or more third countries, on the other hand, shall not be affected by the provisions of this Treaty.

This provision indicates, the Italian Government contended, that Italy has an obligation to apply the customs duty established in Geneva at the 1956 GATT Conference. By agreeing at Geneva to charge the 30% rather than the 35% duty, Italy obtained the right to introduce a minimum levy of 150 lire. Article 234(1) accordingly recognizes Italy's right to use the GATT schedule as its basic duty in computing tariff reductions between the Member States.

Finding this argument to be without merit, the Court agreed instead with the Commission's assertion that

the term "rights and obligations" of Article 234 refers, so far as "rights" are concerned, to rights of third countries, and so far as "obligations" are concerned, to obligations of Member States,

and that

under the principles of international law, a State, assuming a new obligation contrary to the rights it possesses under a previous treaty,

relinquishes . . . these rights to the extent necessary for the fulfillment of the new obligation.

While pointing out that "in matters which it regulates, the E.E.C. Treaty overrides conventions made prior to its coming into force, including the conventions . . . concluded under GATT," the Court observed in this connection

[C]onsidering that it follows from Article 234 that the Member States and third countries, though parties to the same 1956 Geneva agreement, are, in fact, applying different tariffs; that this is the normal effect of the Treaty establishing the E.E.C.; that the way in which the Member States proceed in reducing customs duties among themselves may not be criticized by third countries, provided that this customs disarmament is accomplished in accordance with the provisions of the Treaty and does not affect the rights of third countries under existing conventions.

*U. S.-Polish Claims Settlement Agreement of 1960—lump-sum award includes 6% interest from date of taking*

CLAIM OF PROACH. Mimeographed Decision No. PO-652.\*

Foreign Claims Settlement Commission of the United States, Dec. 10, 1962.

. . . An important question presented to the Commission in this case is whether interest should be added to awards made under the Polish Claims Agreement of 1960 for the nationalization, appropriation or other taking of property. The Agreement is silent as to this matter, and the International Claims Settlement Act of 1949, as amended, 64 Stat. 12 (1950), 22 U.S.C. §§ 1621-42 (1958), contains only general terms with reference to interest. Section 7(a) of that Act authorizes and directs the Secretary of the Treasury to pay, as prescribed by Section 8, "an amount not exceeding the principal of each award, plus accrued interest *on such awards as bear interest . . .*" (64 Stat. 16 (1950), 22 U.S.C. § 1626 (a) (1958) (Emphasis added)). And Section 8 of the Act, after providing for certain initial and additional payments on the principal of each award, directs the Secretary of the Treasury, "after payment has been made of the principal amounts of all such awards, to make pro rata payments on account of accrued interest *on such awards as bear interest.*" (64 Stat. 17 (1950), 22 U.S.C. § 1627 (c) (1958) (Emphasis added).) Nowhere does the Act specify *which* awards should bear interest.

In a case of this nature, the Commission is expressly directed by Congress to apply "the applicable principles of international law, justice, and equity" (International Claims Settlement Act of 1949, as amended, 64 Stat. 12 (1950), 22 U.S.C. § 1623 (a) (1958)).

Although some commissions have refused to allow interest in claims of this type on the ground that interest is a matter of contract which should

\* Reported in excerpt through the good offices of the Honorable Edward D. Re, Chairman. See the note at 56 A.J.I.L. 544 (1962).

be specifically provided for in the protocol, (see Borchard, *Diplomatic Protection of Citizens Abroad* 428 (1928) and authorities cited therein), this Commission regards it as a settled principle of international law that "interest, according to the usage of nations, is a necessary part of a just national indemnification." (6 Moore, *A Digest of International Law* 1029 (1906), citing Davis, *Notes, Treaty Vol.* (1776-1887); Wirt, *At. Gen.*, 1 Op. 28, Crittenden, *At. Gen.*, 5 Op. 350; *Geneva Award, 4 Papers Relating to the Treaty of Washington*, 53.)

"The award of interest is usually considered to be merely a part of the duty to make full reparation . . . arbitral tribunals have felt that it was not outside of their jurisdiction to award interest, *even though the Convention by which they were set up made no mention of interest.*" (Eagleton, *The Responsibility of States in International Law* 203-4 (1928) (Emphasis added).)

The theories upon which interest is founded are varied. Some tribunals have expressed the idea that interest is given as compensation for the loss of the use of the principal during the period within which the payment thereof continues to be withheld, (see *Opinions of Commissioners, United States-Mexican General Claims Commission* 189 (1927) (Illinois Central R.R. Co. v. United Mexican States)). Interest has been included by one author as a natural part of the compensation for the "improper withholding of satisfaction", (see Borchard, *op. cit. supra*, at 428).

Again, it has been said that the awarding of interest is in the nature of damages from the date of the loss. (*Opinions of Mixed Claims Commission, United States and Germany* 1925-1926, 62 (Consol. Ed. 1927) (Ad. Dec. No. 3).)

On whatever theory the awarding of interest is based, we are constrained to adhere to the international law principle, to which we deem it proper to give effect, that interest must be regarded as a proper element of compensation. The Commission therefore concludes that the award of interest in the instant case is not only in conformity with the principles of international law and the Polish Claims Agreement of 1960, but is required by equity and justice, and should therefore be allowed.

The Commission is next faced with the problem of the rate of interest to be allowed. This rate has generally varied from three to six per cent, although higher amounts have been granted on occasion, (see authorities cited in Borchard, *op. cit. supra* at 429). The Mixed Claims Commission of the United States and Germany, *supra*, granted 5%; the Spanish-American Commission of 1871 allowed 8%. (For a list of commissions in which interest has been allowed on awards, together with the various rates of interest, see Ralston, *International Arbitral Law and Procedure* 82-87 (1910).)

Although there is no settled rule as to the rate of interest, it is an appropriate exercise of the jurisdiction of the Commission to determine this rate in accordance with all the circumstances before it, including the applicable principles of international law, justice, and equity. Its object

in so doing is to arrive at a just and equitable compensation for the wrong. The Commission may also consider its own decisions concerning the applicable rate of interest in its prior international claims programs. In these programs, the Commission has adopted the figure of 6% as a traditional and customary interest rate for claims of this nature.

In light of this international law precedent, custom, and tradition, the Commission therefore concludes that an award of interest in the present case at the rate of 6% is an appropriate, equitable, and just measure of compensation under all the circumstances.

Similarly, there is no settled rule in universal effect as to the period during which the interest shall run. Various terminal dates have been applied by different commissions, including the date of the original injury, the date of the notice of the claim, or the date of payment, (see authorities cited in Eagleton, *op. cit. supra* at 204-05; Borchard, *op. cit. supra*, at 428-29). The Commission notes, however, that the prevailing opinion in international law is that such interest should run from the date the claim arose until the "date of payment" (*ibid.*). The Commission notes further that the date the claim arose in this case is the date of loss, (*cf. Polish Claims Agreement of 1960, supra*, at Article II; Annex, Paragraph A.) The Commission concludes that, for the purpose of this decision, the "date of payment" in the above context is the date of the Polish Claims Agreement of 1960, under the terms of which all claims of this type were fully settled and discharged. (*Polish Claims Agreement of 1960, supra*, at Article I).

Accordingly, the amount of the award in this claim shall be increased by interest thereon at the rate of 6% per annum from March 19, 1956, the effective date of loss of the property and the date on which the claim arose, to July 16, 1960, the effective date of the Polish Claims Agreement and the date on which the claim was settled.

#### NOTES

*Nationalization—Cuba—suit by nationalizing government for conversion of proceeds of nationalized property—act of state doctrine—invalidity of taking under international law—adequacy of compensation*

Petition for certiorari was filed in the Supreme Court of the United States September 4, 1962, 31 U. S. Law Week 3095 (No. 403, 1962 Term), and the questions presented were stated as follows:

(1) May federal court declare invalid Cuban decree nationalizing property of all United States controlled corporations within its boundaries;

(2) did Cuban nationalization decree fail to provide adequate compensation for property nationalized and did it involve retaliatory purpose and discrimination against United States, and, if so, did decree violate international law;

(3) may corporation organized under laws of Cuba claim rights against Cuban government under international law merely because most of its stockholders are residents of United States?

On November 19, 1962, the Supreme Court invited the Solicitor General to file a brief expressing the views of the United States. *Banco Nacional de Cuba v. Sabbatino*, 371 U. S. 907 (1962); certiorari granted, Feb. 18, 1963.<sup>1</sup>

*Foreign relations law of the United States—substantial Federal question—State laws controlling inheritance by legatees in certain countries—dissenting opinion of Douglas and Black, JJ.*

The Supreme Court of the United States dismissed for lack of a substantial Federal question an appeal by the assignee in Great Britain of an assignor residing in Czechoslovakia, who had attempted to transfer an interest in estate funds that had been deposited with the Treasurer of the State of New York for the benefit of the assignor under a State law authorizing this procedure where the Surrogate finds that the legatee is unlikely, because of governmental conditions at his residence, to be able to enjoy the interest. Mr. Justice Douglas, for the dissenting justices, believed that a substantial Federal question was presented:

... The descent and distribution of property in one state to the citizens of another state is clearly a proper subject of international relations. . . .

Many areas of our law reflect the view that foreign policy can be shaped solely by the Federal Government. . . .

... even in absence of a treaty, a State's policy may disturb foreign relations. . . . The practice of state courts in withholding remittances to legatees residing in Communist countries or in preventing them from assigning them is notorious. . . .

The issue is of importance to our foreign relations and I think this Court should decide whether, under existing federal policy and practice, the New York statute should be given effect. . . .

*Ioannou v. New York*, 371 U. S. 30 (Oct. 22, 1962).

*Civil aviation—Chicago Convention—injunction forbidding variation in charges favoring domestic air carriers lifted*

The Court of Appeals has reversed the holding reported in 56 A.J.I.L. 214 (1962), taking the position that Article 15 of the Convention on International Civil Aviation,<sup>2</sup> does not give foreign air carriers the benefit

<sup>1</sup> The opinion of the District Court, 193 F. Supp. 375 (S.D.N.Y., 1961), was digested in 55 A.J.I.L. 741 (1961); the opinion of the Court of Appeals, 307 F. 2d 845 (2d Cir., 1962), was published in 56 A.J.I.L. 1085 (1962).

<sup>2</sup> 61 Stat. 1184 (signed at Chicago Dec. 7, 1944; in force for the United States, April 4, 1947). Art. 15 provides that "every airport in a contracting state which is open to public use by its national aircraft shall likewise . . . be open under uniform conditions to the aircraft of all other contracting states," and that any charges imposed by a contracting state for the use of such airports shall not be higher, "as to aircraft engaged in scheduled international air services, than those that would be paid by its national aircraft engaged in similar international air services."

of lower charges provided to domestic carriers by contract before the effective date of the treaty, prior to any international use of the airport, and involving concessions made to sustain the airport in its infancy. *Board of County Commissioners of Dade County, Florida v. Aerolineas Peruanas, S. A., et al.*, 307 F. 2d 802 (U.S.Ct.A., 5th Cir., Aug. 31, 1962).

*Rupture of diplomatic relations—standing of plaintiff, if an agency of the Castro regime in Cuba, to sue for failure of carrier to deliver cargo to Cuba—rôle of the Department of State*

The plaintiff sued as consignee of food products loaded at American and Canadian Great Lakes ports for failure of the carrier, an American-owned, Liberian-flag vessel, to deliver to Havana as agreed. Following the general embargo announced by the United States Government, effective 12:01 a.m., October 20, 1960, on the export of merchandise, except food and medicine, to Cuba, the carrier demanded a bond of \$75,000 to deliver the shipment to Cuba, and the plaintiff refused to post the bond. The District Court found that the defendant was in breach of its contract of carriage, and awarded plaintiff the value of the cargo, prepaid freight, and other expenses. The Court of Appeals, without the point having been raised by the appellant carrier, remanded the case for a determination of appellee's right to sue in the courts of the United States, if an agency of the Cuban Government, with which the United States has broken relations. Even though the question was not raised by the appellant, the District Court should "... ascertain from the Department of State, appellee's relationship with the Cuban government, the status of that government in our courts during the cessation of diplomatic relations, and whether the United States or a national thereof would be allowed to maintain an action similar to the one before us, in the courts of Cuba. . . . If the report of the Department of State is unfavorable, then the District Court should dismiss the libel . . . ." *P & E Shipping Corp. v. Banco para el Comercio Exterior de Cuba*, 307 F. 2d 415 (U.S.Ct.A., 1st Cir., Sept. 5, 1962).

*Choice of law—Cuban confiscatory decree aimed at Cuban nationals rejected*

Cuban nationals now residing in the United States sued domestic corporations on insurance policies that had been sold to them while they had resided in Cuba. After the plaintiffs fled Cuba, the Castro regime purported to vest in itself all plaintiffs' interests in the policies. The trial court dismissed the action on the defendant's plea of *forum non conveniens*. The Court of Appeals held this an abuse of discretion and, while finding the act of state doctrine inapplicable, directed the trial court to determine whether the Cuban decrees were "... confiscatory or whether the particular decrees [were] otherwise violative of fundamental concepts of justice and, therefore, without status. . . ." *Rodriguez v. Pan American Life Ins. Co.*, 311 F. 2d 429 (U.S.Ct.A., 5th Cir., Oct. 17, 1962).

*Non-recognition—Soviet seizure of Lithuania—power of attorney to an agency of the Soviet Government to represent a Lithuanian distributee of an estate under administration in New York*

On the application of the Consul General of Lithuania (in exile) a power of attorney executed by Lithuanian distributees to "*Iniurcolleguia*," a body of Soviet lawyers and an agency of the Soviet Government, was declared invalid on the ground that the incorporation of Lithuania into the U.S.S.R. is not recognized by the United States. *In re Mitzkel's Estate*, 233 N.Y.S. 2d 519 (Surr. Ct., Kings County, New York, Oct. 15, 1962).

*Immigration to Israel—Law of Return—effect of conversion to Christianity*

Petitioner was born a Jew in Poland and, while hiding from the German invaders in a convent, was converted to Catholicism and became a monk. After renouncing his Polish nationality he claimed a right to an immigrant's certificate under the Israeli Law of Return, providing that every Jew has the right to come to Israel as an immigrant. The Court saw the issue as being whether the petitioner was a "Jew" within the meaning of the statute. Differentiating the Jewish religious law that an "apostate" remains a Jew, the Court held that "Jew" as used in the statute could not include the petitioner. *Oswald Rufeisen v. Minister of Interior* (H. C. 72/62) (Sup. Ct. of Israel, Dec. 6, 1962), *The Jerusalem Post Law Report*, Dec. 14, 16, 19, 1962.<sup>1</sup>

CANADIAN AND BRITISH CASES\*

*Sovereign immunity—state-owned vessel engaged in commerce—restrictive theory of sovereign immunity—effect of contract clause conferring jurisdiction on courts of foreign sovereign*

The decision of Pottier, D. J., in Admiralty, reported in 56 A.J.I.L. 558 (1962), was appealed to the Exchequer Court of Canada, [1962] Ex. C.R.I., and resulted in this decision being reversed. A further appeal was taken to the Supreme Court of Canada.

The Court held that it was doubtful whether an action would be maintainable, as the ships were no longer in the ownership of the Banco but in that of the Government of the Republic of Cuba, which was not a party to the Lease-Purchase Agreement, unless that Agreement resulted in a maritime lien attaching to the ships by virtue of the Admiralty Act, R.S.C. 1952, c. 1. There was no need to deal with this point, however, as there was nothing to show that these ships were not "the property of a foreign state devoted to public use in the traditional sense." Although leaning towards the relative theory of sovereign immunity, the Court felt it did not have to decide whether that theory or the absolute theory of sovereign

<sup>1</sup> Text of opinion supplied by courtesy of the Embassy of Israel.

\* Reported by Professor Egon Guttman, Howard University Law School, Washington, D. C.

immunity would be applied by Canadian courts. At all material times these ships, though in the harbor of Halifax, Nova Scotia, were owned by, and in the possession of, the Government of Cuba. Although equipped for passenger and freight service, there was no evidence which showed the purpose for which these ships were intended by the Government of Cuba. It was therefore not possible to state that they were to be used for ordinary trading purposes. They were available for whatever purpose the Government of Cuba might elect to use them, and until such election was made, must be regarded as "public ships of a sovereign state." *Flota Maritima Browning de Cuba S. A. v. SS. "Canadian Conqueror" et al. and Republic of Cuba*, 34 D.L.R. 2d 628 (Sup. Ct. Can., Taschereau, Locke, Fauteux, Abbott, Martland, Judson and Ritchie, JJ., June 11, 1962).

*Carriage by Air—applicability of Warsaw Convention—death during air crash on flight between Vancouver and Calgary—flight reservation made in Seattle—ticket bought in Vancouver*

The decision of Manson, J., in the British Columbia Supreme Court, reported in 55 A.J.I.L. 993 (1961), was affirmed by the British Columbia Court of Appeal. *Stratton v. Trans Canada Air Lines, et al.*, 32 D.L.R. 2d 736 (B.C.C.A., O'Halloran, Davey, Sheppard, Norris and Tysoe, JJ.A., Feb. 21, 1962). See 57 A.J.I.L. 137 (1963).

*Alien—deportation order—person entering Canada from the United States which he had entered ten years before from Hong Kong—deportation order specified destination as Hong Kong—Immigration Act, R.S.C. 1952, c. 325*

The alien came to the United States from Hong Kong. He had been born in Anwei in Continental China. After staying in the United States for ten years, he entered Canada. A deportation order had been issued against the alien, the validity of which was not in dispute. This deportation order required the alien to be deported to Hong Kong, although the alien was not a citizen of Hong Kong and did not wish to be returned to Hong Kong. The United States had indicated that it was not prepared to readmit the alien. It was held that, under the Immigration Act, deportation is defined as an order for the removal of a person from any place in Canada to the place whence he came to Canada, the country of his birth, or to such other country as may be approved by the Minister. After staying in the United States for ten years it cannot be said that the alien came to Canada *through* the United States. That would imply a continuous transit through that country in the course of a journey from without the borders of that country to Canada. The Minister must therefore first be requested by the transportation company which had brought the alien to Canada to issue such order deporting him to Hong Kong; that country must indicate its willingness to receive the alien and the alien must indicate his agreement to being sent to such country. The deportation order, though valid, cannot indicate Hong Kong as the place to which the alien must be deported.



*Chan v. McFarlane*, 34 D.L.R. 2d 179 (Ont. C. A., Roach and Kelly, J.J.A., Gibson, J. A., dissenting, June 13, 1962).

*Conflict of laws—bearer shares of Netherlands corporation—wartime decree canceling certificate and declaring property belonged to state as enemy property—recognition by law of Ontario, Canada*

Beleggings-Societeit N. V. (hereafter called Belso) was a corporation formed under the laws of The Netherlands. The majority of the shares were held by a Dr. Koppers, a German national, and the assets of the corporation consisted of investments. Dr. Koppers created a trust of the shares, to be governed by English law, the beneficiaries being Dr. Koppers, his wife and family, all of whom were German nationals. War being imminent, it was decided to transfer the assets of Belso to Canada. A corporation was formed, Ambrican Investment Limited, to whom the assets of Belso were transferred in return for shares in Ambrican. In 1940 the assets of Ambrican and Belso came under the control of the Canadian Custodian of Enemy Property, to whom the existence of Dr. Koppers' interest was disclosed. Dr. Koppers died in Germany in 1941. In 1944 the Government of The Netherlands passed Decrees E. 100 and E. 133, under which a "Council for the Restoration of Civil Rights" was set up and enemy property confiscated to compensate Netherlands nationals for losses suffered from Germans and Japanese. The decree setting up the Council provided, *inter alia*, for a Judicial Division. It was the duty of the Council to determine the ownership of property, with a right of appeal to the Judicial Division. In the absence of an appeal, the decision of the Council was final.

Under Netherlands law a trust is not recognized, but is considered merely a contract. As a result, Dr. Koppers was looked upon as the owner of the shares in Belso. His German national status led to the confiscation of the property of Belso by the Netherlands Government under Decree E. 133. It was contended that these decrees were invalid and were not to be recognized in Canada, where the assets of Belso and those of Ambrican were situated.

McRuer, C. J. H. C., held that the share certificate is in no sense analogous to the share in the company, that is, a fractional part of the capital. The laws of the corporation's domicile govern not only its creation and continuing existence, but also all matters of internal management, creation of share capital and related matters. Thus the situs of the shares is not necessarily the same as the situs of the share certificates, but is where the ownership of the shares can be effectively dealt with, *i.e.*, the territory of incorporation of the company, since that is where the court has jurisdiction over the company in accordance with the law of its domicile and has power to rectify the register (where necessary) and to enforce such order by personal decree against it. The fact that these shares were bearer shares does not affect this. The shares of Belso had their situs in The Netherlands; they were property within the purview of

Decrees E. 100 and E. 133. Thus, the decision of the Council that the Koppers Trust did not own shares in Belso was effective within The Netherlands, and as a result the certificates held abroad were no longer evidence of ownership of the shares at the seat of the company. The Government of The Netherlands had appointed managers to manage Belso. In doing so the Government acted within its powers, and such appointment, valid by the laws which created Belso, would be recognized in Canada.

It was argued that these decrees were of a penal or revenue nature, and being of a confiscatory character, ought not to be recognized because they are contrary to public policy. These contentions were rejected on the ground that the decrees are wartime decrees similar to those in force in Canada and other Allied countries, the effect of which has been freely recognized in several international treaties. They are not of a tax or revenue nature, nor immoral according to Canadian law, when Canada had similar laws passed for the same purposes. Referring to the Bretton Woods Agreement of July, 1944, the Paris Agreement on Reparations of December, 1945, the Brussels Agreement of December, 1947, and the Bonn Convention of May, 1952, the judge concluded that the confiscation of the assets of Belso would be recognized by a court in Canada. Canada was obliged to assist The Netherlands in resolving conflicting claims between Canada and The Netherlands in respect of German property, and to make German property available for reparation, no matter how cloaked or disguised. Any confiscation by the Custodian of Enemy Property was subject to the sovereign powers of The Netherlands over shares which had their situs in The Netherlands. To hold Decree E. 100 and Decree E. 133 invalid on grounds of public policy would deprive the Netherlands Government of substantial reparations, and would relieve the Government of the Federal German Republic from compensating the Koppers family for the loss they sustained by reason of the operation of these decrees: "I cannot resist saying that to so hold would be to convert the unruly horse of public policy into an unruly ass." The assets of Belso were thus to be delivered up to the managers of Belso appointed under the laws of The Netherlands. Plaintiffs appealed, but before argument the issue was settled out of court. *Brown, Gow, Wilson et al. v. Beleggings-Societeit N. V.*, 29 D.L.R. 2d 673 (1961); 34 D.L.R. 2d 480 (1962) (Ont. H. C., McRuer, C.J.H.C., June 29, 1961).

#### NOTES ON PRIVATE INTERNATIONAL LAW CASES

An Egyptian national resident in Egypt in 1940 took out 20-year endowment insurance policies with the Egyptian branch of defendant Canadian insurance company, two being payable in English pounds and the third in U.S. dollars. The policies did not specify the applicable law or place of payment. Plaintiff, who had become an Italian national and left Egypt, sued on the policies in 1961 in England. He recovered judgment, despite Egyptian administrative garnishment orders of 1960 and 1962 based on taxes allegedly owed Egypt by the insured, and the contention that, if Egyptian law governed the policies, payment in pounds or dollars would

violate the Egyptian foreign exchange controls (unless permitted by the Egyptian Government). The court held Ontario law, not Egyptian law, to be the "proper law of the contracts," and refused to recognize the garnishment orders both because Egypt lacked jurisdiction over the insured and because an English court would not enforce a foreign revenue claim. The garnishment orders, based on the insured's continuing Egyptian nationality, lacked such jurisdictional basis as to be recognized by an English court. *Rossano v. Manufacturers Life Ins. Co. Ltd.*, [1962] 3 W.L.R. 157; 2 All E.R. 214; 1 Ll.L.R. 187 (Q.B.Div., McNair, J., March 7, 1962).

In *Navigators and General Insurance Co. Ltd., v. Ringrose*, [1962] 1 All E.R. 97 (Court of Appeal, Nov. 16, 1961), an insurance policy on a dinghy "whilst within the United Kingdom ashore or afloat" was held not to apply to an accident when the vessel was approximately 28 miles from England en route to the Channel Islands; it was doubtful whether the latter were part of the United Kingdom, while certainly the locus on the high seas was not "within the United Kingdom."

A 1913 English marriage of an English woman domiciled in England with a Mohammedan Egyptian domiciled in Egypt, followed by a Mohammedan marriage in Egypt where the spouses lived, was held validly terminated in 1932 by a "*Talaknama*," a unilateral divorce according to Mohammedan law, pronounced by the husband in the presence of witnesses in Egypt. The wife, domiciled in Egypt and present at this Talak divorce, thus had capacity to marry in Egypt. *Russ. v. Russ*, [1962] 3 All E.R. 193 (Ct. Appeal, Willmer, Donovan and Davies, L.J.J., June 7, 1962).

In the case of a bequest to "issue" of a grandchild, one of whom had been born out of wedlock while the grandchild was domiciled in one of the States of Mexico, a Mexican court had determined that such child was the daughter of the grandchild and was entitled to use his name, was entitled to support and in all respects was to be treated like the legitimate daughter of the grandchild. The court held that her domicile of origin determines whether this daughter qualifies under the Ontario will as "issue." By that law the incidents attached to her were those which by the law of Ontario attach to legitimate issue. As such she was entitled to succeed. *Re MacDonald*, 34 D.L.R. 2d 14 (Ont. C.A., Porter, C.J.O., MacKay and McLennan, J.J.A., April 27, 1962).

Upholding a court-martial conviction of a British soldier stationed in Germany for driving without care and contrary to the English Road Traffic Act, 1960 (8 & 9 Eliz.2, c.16), see *Cox v. Army Council*, [1962] 2 W.L.R. 950; 1 All E.R. 880 (House of Lords, March 15, 1962). The conviction was proper under § 70 of the Army Act, 1955 (3 & 4 Eliz. 2, c.18), for commission of a "civil offence" (i.e. non-military), "punishable by the law of England or which if committed in England would be punishable by that law." Despite the difference of driving conditions and regulations in Germany from those in England, the offense was sufficiently similar for the statute to apply.

A British subject, citizen of the United Kingdom and colonies, was denied leave to appeal from a conviction by the courts of Fiji for failing to leave the Colony of Fiji when so ordered by the principal immigration officer of Fiji. The Privy Council rejected his contention that as a British subject he had the right to enter and reside in any part of British territory, including the colonies; rights of immigration in the colonies depended on colonial statutes. Even if the colonial statute violated an alleged right under international law to reside in the country of which a person is a citizen, colonial legislation contrary to international law would not be void. *Thornton v. The Police*, [1962] 3 All E.R. 88 (Privy Council, March 26, 1962).

## BOOK REVIEWS AND NOTES

*Droit International et Droit Interne.* Edited by Krystyna Marek. Répertoire des Décisions et des Documents de la Procédure Écrite et Orale de la Cour Permanente de Justice International et de la Cour Internationale de Justice. Series 1: *Cour Permanente de Justice Internationale 1922-1945*. Vol. 1. Published under the direction of Paul Guggenheim. Geneva: Librairie E. Droz, 1961. pp. xv, 1016. Index.

Professor Guggenheim has undertaken the monumental task of providing a new type of digest of the jurisprudence of the World Court. Whereas the existing digests are limited to the judgments and advisory opinions, the present volume inaugurates a series which will encompass, in addition, the written and oral pleadings or statements as well as other documents relating to the cases before the Court. Thus, a virtually untapped mine of international legal materials will be made available. The interdependence between the final product of the judicial procedure, a judgment or an opinion on the one hand, and the pleadings and documents on the other, is obvious, but even specialists have tended to ignore it for want of the necessary tools; there never was provided an index, let alone a digest of the legal arguments urged upon the Court and from which the Court generally, though perhaps not invariably, derived its conclusions of law and fact. Professor Guggenheim presents three reasons for paying attention to these materials: first, they contain a wealth of analyses of various aspects of international law which lose none of their relevance because they were cast in the form of pleadings; in their desire to convince the international judge the parties rely on most thoroughly grounded and rigorous lines of reasoning; secondly, they are models of the art of pleading before the Court and should be invaluable to the practitioner who may be presented with the rare opportunity of joining the "international bar"; and thirdly, they make it possible to relate the conclusions of the Court to their sources, and in the process to determine which arguments were retained or rejected, and the extent to which the Court pursued an independent line of reasoning.

The remaining stage—the deliberation of the Court—will and must remain inaccessible. However, careful study of the separate and dissenting opinions will provide an inkling of the nature and scope of the deliberations, of the points considered, retained and discarded.

The materials are arranged topically and the present volume is solely concerned with the relation between international law and municipal law. Judgments, advisory opinions, and pleadings are reproduced in the original French or English; documents in other languages have been translated into French. Each volume will contain an introductory note which will avoid taking sides in doctrinal disputes, a selected bibliography and a list of cases.

Dr. Marek in her introduction achieves a high degree of objectivity, although in what doctrinal dispute would it be more tempting to take sides than that regarding the relations between the two legal orders, the international and the domestic? Professor Guggenheim, however, makes a point which bears directly on this controversy and which is worth noting. Owing to the nature of the adversary proceedings, the party which alleges a violation of international law will categorically claim the primacy of international law over municipal law. This has never been contested by the other party, which merely denies the allegation. Thus, he says, the claim of the primacy of international law has never provoked "a dialogue" (p. xii).

Dr. Marek has arranged the materials in three parts: (1) the systematic relation between the two legal orders; (2) the international judge and municipal law; and (3) the domestic judge and international law. In the first part the materials indicate the tendency of the Court to affirm the dominant position of international law over municipal law in a variety of ways: the states have the obligation to adapt their laws to international conventions, they are obligated to ensure their application, regardless of the obstacles arising from domestic law, et cetera. The second part occupies the bulk of the volume, well over 600 pages. An essential precondition for concerning itself with municipal law is that the dispute itself must have an "international element." If this is found to be so, three distinct problems arise: one, the meaning of the terms "examine, interpret, or apply" that law; two, the limits which the Court sets for this examination, and three, what are the sources of the competence of the Court to concern itself with that law. Dr. Marek traces in the jurisprudence of the Court three main facets in connection with the first problem: Is municipal law in conformity with international law; does it constitute a preliminary question in relation to the dispute; does it furnish the rule for the case? The Court was most frequently concerned with the first aspect: the conformity of domestic law in its totality with international obligations. The non-conformity can be "active," that is, the existing domestic norm is violative of an international obligation, or "passive," that is, the state failed to enact a norm required by its obligation vis-à-vis another state. The Court, without using the term, invariably affirms the primacy of international law. The Court, respectful of the sovereignty of states, does not proceed to declare, in case of an "active non-conformity," the rule concerned as "null and void." It merely finds that it is inapplicable.

Rarely has the Court had the opportunity to examine the conformity of a rule of municipal law with that law itself. The Court has always displayed great prudence with regard to the internal sphere of states. When, however, as in the *Chorzów* case, such examination was a precondition for resolving an international dispute, the Court did not hesitate to take a firm position. The application of domestic law occurred even less frequently: in the *Serbian and Brazilian Loans* cases and in the case of *Treatment of Polish Nationals in Danzig*. In the two former cases both parties desired the Court to decide the dispute on the basis of domestic law, but in comply-

ing with the wish of the parties, the Court had "to interpret laboriously its Statute" (p. 14). In the third part, the application of international law by the national judge, there is only one case, *Jurisdiction of the Courts of Danzig*, and a few *obiter dicta* from the *Lotus* case.

How well the editor discharged her task of examining, evaluating, selecting, and systematically organizing an incredibly large mass of pleadings and documents, in addition to judgments, advisory opinions, separate and dissenting opinions, will be determined by the users of this volume. No matter what the verdict may be on individual points, there can be no doubt that she, as well as Professor Guggenheim, has placed at the disposal of international lawyers, both scholars and practitioners, a wealth of hitherto only incompletely known but extremely valuable materials. It is now possible to see and evaluate the work of the Court in depth. To say that this volume and its successors will become indispensable tools for research is saying the obvious. One cannot but admire the conception of this series and the industry and learning which went into the preparation of this volume.

LEO GROSS

*The Theory, Law and Policy of Soviet Treaties.* By Jan F. Triska and Robert M. Slusser. Stanford, Calif.: Stanford University Press, 1962. pp. xiv, 593. Index. \$10.00.

Can foreign offices negotiating treaties with the U.S.S.R. expect them to be performed? This question was set by the authors when they began their examination of all Soviet treaties. The first fruits of their labor was a complete index of Soviet treaties, appearing as *A Calendar of Soviet Treaties, 1917-1957*, previously reviewed in this JOURNAL.<sup>1</sup> This volume contains the conclusion they have reached. It is, in brief, that treaties in some instances, notably those in which there has been an agreement to cease Communist propaganda, are worthless, while in other fields they will be performed only as long as the U.S.S.R. gains obvious benefit or world public opinion forces conformity. From this finding the authors draw no conclusion that negotiation with the U.S.S.R. is fruitless. They advise only that those who negotiate understand the limitations of their Soviet counterparts and proceed with limited expectations. Perhaps over the years a step-by-step reduction in political antagonisms will result from repeated negotiation of treaties.

Accepting Soviet affinity for treaty-made law rather than customary law, the reader will find in this volume the heart of Soviet policy. The authors treat not only such substantive matters as non-aggression, neutrality, mutual assistance, peace, peaceful solution of disputes and the special problems presented by state trading, but also technical matters. Thus, there is full discussion of treaty form, interpretation, termination, and treaty partners. The study is exhaustive, covering examination not only of texts, but of Soviet doctrinal writings, and, of course, Soviet diplomatic

<sup>1</sup> 54 A.J.I.L. 718 (1960).

practice on which the estimate of Soviet reliability is placed. Comments of foreigners on Soviet practice are also included so that the authors have, in effect, provided the most complete textbook on Soviet attitudes on international law to appear since T. A. Taracouzio's study of 1935.<sup>2</sup> It remains now only for someone to treat as thoroughly Soviet practice of customary law.

A subject index to Soviet treaties, which was regrettably absent from the *Calendar* published previously, has been added to complete the needed tools for ready access to the Soviet treaties. The result is a volume which, when taken with the *Calendar*, will deserve a place in every foreign office and in other libraries as well.

JOHN N. HAZARD

*The Nature of International Society.* By C. A. W. Manning. London: G. Bell & Sons, Ltd., 1962. pp. xii, 220. Index. 30 s.

C. A. W. Manning, recently retired Montague Burton Professor of International Relations at the University of London, writes with wit and wisdom about international society. His book is a reflective essay on the political state of the world and an argument for the adoption of a global perspective identified beneath the rubric "social cosmology." Manning treats international law with respect, but as one of several dimensions of order and process that together compose what he calls "the game" of international politics. The analogy of the game, used with creative depth, is central to Manning's account of social, political, and legal order.

Although the author is manifestly erudite, *The Nature of International Society* is written without dependence upon the technical literature. This expresses Manning's insistence upon direct contact with his material. In a very real sense this variety of radical empiricism is akin to phenomenology, the philosophical method of understanding that has had such an influence on the Continent since its original exposition some decades ago by Edmund Husserl. Manning writes an account of what he sees when he looks at the social data of international relations without the benefit (or burden) of conventional categories of thought. This does produce a somewhat confusing and seemingly eccentric report of dominant modes of interaction and perception that influence the behavior of the leading actors in international affairs. However, the freshness of contact and the depth of insight more than compensate for these difficulties of comprehension.

Manning depicts group actors (nations, corporations, institutions), and stresses the reality of collective patterning of thought. The behavior of a nation cannot be reduced, in other words, to the behavior of individuals acting on its behalf. This attribution of independent status to collective entities, especially with respect to the emergence of thought patterns, is among the most interesting aspects of Manning's approach.

Despite the plea for social cosmology Manning finds "little prospect"

<sup>2</sup> The Soviet Union and International Law (New York: Macmillan Co., 1935). Reviewed in 29 A.J.I.L. 723 (1935).



for "the de-parochializing of collective thought" (p. 87). In fact, his view is quite deeply pessimistic: ". . . that the structure of international society is virtually unalterable, and that the possibility of war is a built-in feature of that structure, seems not to be universally perceived" (p. 71).

There is throughout a profound sense of the integral link between rules and processes in the achievement of formal order: "It is the relevant rule that produces the relevant process for producing the relevant result" (p. 45). Although there are some affinities to the work of H. L. A. Hart, Roberto Ago, and Thorsten Gihl, this line of approach produces a rather new way to look at the status of international law. Manning suggests that "the on-going global diplomatic process is indeed like a game, and like any other game, it has to have rules, and compliance with those rules" (p. 112). To ask about international sanctions is to be truly provincial; after all there are no police to secure compliance with the decisions of a referee on a football field. Does this bother anyone? Why not? An interesting orientation governs:

It is after all not in the nature of the law, but in the nature of the international society, that one must look for the answer to the question: Why in practice do states obey the law? (p. 113.)

Anyone who thinks that a simple view of the world can be achieved by a scrupulous avoidance of social science jargon should try his luck with Manning. His tangled syntax and rhetoric are part of the texture of his vision. Any smoothing over would be a betrayal. There are two extant ways to convey faithfully a sophisticated view of the link between international law and society: a systematic specification of variables (*e.g.*, McDougal) and an impressionistic account of what is seen (*e.g.*, Manning). Both ways are valuable, both difficult for the unwary.

This reviewer wishes to praise Manning's achievement most highly. He has thought hard and looked carefully. His book carries the reader along on a journey with all the perils and detours of breaking a trail through a wild expanse of jungle. It is, accordingly, recommended as adventure as well as illumination.

RICHARD A. FALK

*Lehrbuch des Völkerrechts.* Vol. II: *Kriegsrecht*. By Fritz Berber. Berlin and Munich: C. H. Beck'sche Verlagsbuchhandlung, 1962. pp. xv, 313. Index.

This second volume of Professor Berber's treatise on *International Law* is dedicated to the laws of war. It is a large volume, closely printed and closely reasoned. Since it is impossible to give a full description and evaluation within the framework of a book review, we must limit ourselves here to indicating the broad outline, the method of approach, the author's principal ideas, and the general impression received from the book. The volume is based upon extensive knowledge of the practice of states, of international law, and upon a tremendous amount of literature—the closely

printed pages of bibliography run from page 264 to page 281. The book attempts to deal with all the aspects and problems of the laws of war in ten chapters: the definition of war, legality of war, characteristics of the *jus in bello* in general, its temporal, territorial and personal limits, general problems of all types of war, particular problems of land, naval, aerial and economic warfare, the law of neutrality and the sanctions of the laws of war.

The method of approach is positivistic; the laws of war are conceived as a system of rules containing specific limitations or prohibitions; yet the historical development, the ethical foundations, are not neglected. A prominent place is also given to critical treatment where necessary. The author strongly emphasizes in the preface that his investigations will be strictly scientific, even if it is necessary to disagree with one or more current and controversial attitudes toward international policy—attitudes which, so to speak, overshadow, prejudice or block the adoption of the scientific approach. We find here, *inter alia*, criticisms of certain methods of warfare and war or postwar procedures of the Allies against defeated Germany in the first, and particularly in the second, World War. The author feels also that this attitude has influenced the development of the laws of war. He, of course, admits and condemns the gross violations of the laws of war committed by the Axis and especially Hitlerite Germany—and it must be added that the latter was in this case clearly and unequivocally responsible for the outbreak of the war by her illegal attack against Poland; but as these crimes were committed particularly in the fields of human rights and belligerent occupation, the attention of the whole world was focused on them; which explains the great progress which has been made, as far as the international protection of human rights is concerned, through the Geneva Conventions of 1949. The author has particular praise for Convention IV, in which he sees the greatest progress made by the laws of war since 1945. On the other hand, in those fields such as naval and aerial warfare, in which, according to the author, the Allies were most to blame, the attention of the world was not focused in the same way, which explains why no progress has been made in these highly important problems since 1945.

In all fundamental problems the author maintains the same position as this reviewer. Here may be included his condemnation of the voluntary and premeditated neglect of the laws of war by the League of Nations and by the United Nations since 1945 in a constant and systematic way; his conviction that the laws of war are still of the greatest importance under the United Nations Charter, that they are today in very bad shape and urgently need revision, that their continued neglect, together with growing technological progress in the methods of warfare, may lead to a collapse of the laws of war and a return to the most barbaric forms of warfare and threaten the survival of mankind; and finally, his vigorous emphasis on the necessity of the continued validity of the rule under which the laws of war apply, *durante bello*, equally to all the belligerents—the legal, the illegal, and the United Nations—in any international armed conflict, since

equality and reciprocity for all belligerents is the principal pillar upholding those laws.

One sometimes feels that certain problems or aspects need even more detailed treatment, such as those of naval and aerial warfare, the great problem of the extent to which the protection of the civilian population is still a living rule of law; this is true even of the law of belligerent occupation, although this problem is treated in great detail; this is also true of the question of neutrality, for the latter is particularly neglected, attacked, controversial and often declared a dead issue, particularly by wishful thinkers since 1920. The author points out that neutrality, notwithstanding all these attacks and neglect, has survived and serves an important purpose also under the United Nations Charter.

The number of problems, closely reasoned in detailed and searching analysis, is astonishing. On some points we take some exception, as, for example, in the author's definition of war: he comes to the conclusion that only such a status in the relations of states can be defined as "war in the sense of international law," under which normal international law—the so-called international law of peace—is suspended and is replaced by the *jus in bello*. While this writer cannot enter into details here, this definition has two consequences: that war in the sense of the definition can exist only between sovereign states, and that the laws of war become applicable only to war in the sense of this definition. Both consequences are hardly tenable under the present practice of states or under the law of the Geneva Conventions of 1949, which have greatly expanded the applicability of the laws of war to all international armed conflicts and to all cases of partial or total occupation of foreign territory, even where no resistance is made to such occupation. In the great majority of questions, however, we are in agreement.

Enough has been said to show the importance, completeness, richness and high interest of this book, which deserves close study. Without doubt, it constitutes a very valuable addition to the continuously growing contemporary literature on the laws of war.

JOSEF L. KUNZ

*International Claims: Their Preparation and Presentation.* By Richard B. Lillich<sup>1</sup> and Gordon A. Christenson.<sup>2</sup> Syracuse: Syracuse University Press, 1962. pp. xiv, 173. Index. \$7.50.

Competent comprehensive treatment of the technical aspects of international claims practice has been overdue. With this handbook the vacuum has been filled admirably. For the practitioner, be he a newcomer to the field of international claims or an old hand, this book is essential.

The authors have confined their undertaking to the technical problems that confront the United States practitioner in preparing and presenting international claims. The authors have not attempted to add to the already

<sup>1</sup> Director of International Legal Studies, Syracuse University.

<sup>2</sup> Attorney-Adviser (International), Office of the Legal Adviser, U. S. Department of State.

formidable body of legal literature which is concerned with the substantive rules of international law.<sup>3</sup> The work's principal value to the professional practitioner is concerned with the specifics of United States practice in this area.

Such practical focus, however, does not mean that the subject matter of this volume can in any way be extricated from the over-all context of public international law. The first objective of the practitioner is of course to persuade the State Department (or other appropriate agency) that his claim is sound in a substantive sense, and the authors readily refer to the familiar treatises on international law where appropriate. Yet for the first time attention is directed to the technique of proof and presentation, and expertise in this is a prerequisite to effective presentation of the substantive points.

The authors have refrained in this volume from exploiting the traditional fascination of the student for the solemn articulations of substantive principles of the law of nations. Instead, they have concentrated upon the equally important practical side of international law. The practical results effected by the practitioner are an impressive repudiation of the sometimes expressed notion that international law is an illusory world of legal philosophers. The practicing international lawyer is an essential participant in the development of effective international law. The authors, by addressing themselves to his problems, have supplemented the literature of international law, for both student and practitioner, in an important respect.

The alert student will also be aware that the practice of the United States, in accepting and sponsoring international claims, is itself a source of substantive concepts of international law, and he will therefore be interested in the authors' careful treatment of developing United States positions on specific points of substantive doctrine.<sup>4</sup> Thus, although initial emphasis must be given to the distinctly practical flavor of the authors' product, the importance of technique and procedure in international law as a whole should not be underrated.

The authors' scope is limited to one of several potential remedies for international injuries to United States citizens. Municipal courts in the United States have shown an increasing willingness to become involved with international issues.<sup>5</sup> Special statutory sanctions may be applicable;<sup>6</sup> or reimbursement under foreign aid legislation can sometimes be arranged in advance.<sup>7</sup> In this sense, the authors' topic is simply a facet of the broad field of international law affecting individuals, in which the practitioner

<sup>3</sup> Mr. Lillich has written a companion volume, "International Claims: Their Adjudication by National Commissions." This was reviewed in 56 A.J.I.L. 728-734 (1962).

<sup>4</sup> For example, the authors suggest that the United States may be taking the position that the requirement that local remedies be exhausted is obsolescent in certain circumstances (see pp. 97-98).

<sup>5</sup> See, e.g., *National City Bank v. Republic of China*, 348 U. S. 356 (1955), 49 A.J.I.L. 405 (1955); *Banco Nacional de Cuba v. Sabbatino*, 307 F. 2d 845 (2d Cir., 1962), 56 A.J.I.L. 1085 (1962).

<sup>6</sup> E.g., 22 U.S.C. 2370 (Supp. 1961).

<sup>7</sup> See *ibid.* §§ 2181-2184.

and student must be generally informed. The topics covered are eligibility of claimants, preparation of necessary proof of nationality, ownership, wrongful acts and damages, and presentation either to the Department of State or to a national or international commission. A discussion of ways of inducing settlement without the necessity of formal espousal of the claim by the Department contains a wealth of valuable practical advice.

Not only the practitioner but those in the claims division of the Legal Adviser's Office will be indebted to the authors. It will save the former from having to make, and the latter from having to answer, the requests for the sort of guidance that is now provided so ably by this work.

A touch of pathos in the preface at the usual place for acknowledgments foretells an approach that never ceases to be human. "We wish," the authors sigh, "we had had a faithful typist to whom we now could extend thanks for typing the final manuscript."

JOHN G. LAYLIN

*International Responsibility for Hostile Acts of Private Persons Against Foreign States.* By Manuel R. García-Mora. The Hague: Martinus Nijhoff, 1962. pp. xviii, 207. Index. Gld. 20.

Justly concerned over the menace to individual nations and to world peace and security represented by certain hostile acts of individuals injurious to foreign states, such as military expeditions, the recruitment and departure of volunteers, hostile propaganda, invasion by armed bands, and the counterfeiting of foreign currency, the author of this volume proposes three major remedies as means of dealing with these problems: first, the imposition of "absolute or objective liability" upon states held responsible; second, as an equally bold innovation, holding the individual offender responsible for a violation of international law; third, the establishment of an international criminal court for the trial of individual offenders.

These proposed solutions for some of the most crucial problems of international relations fairly bristle with difficulties. Turning to the first proposal, we doubt whether it is either wise or necessary. The doctrine of responsibility without fault, strongly advocated by Anzilotti, has been "abandoned" according to Lauterpacht;<sup>1</sup> and Borchard, admitting that the rule of assumption of risk has crept into some municipal systems, warns us that these rules "deal with a municipal system, not with the complicated and delicate international system. Among states, the debates at The Hague in 1930 showed practical unanimity against the adoption of the risk theory, possibly because it was so uncontrollable and impractical in application."<sup>2</sup> Is such a rule really necessary? In most cases of hostile acts against foreign states, it would seem that the *culpa* of the state is pretty clear. For instance, as the author himself states, in present conditions it would be extremely difficult for a state to plead successfully, before any impartial

<sup>1</sup> H. Lauterpacht, *Private Law Sources and Analogies of International Law* 141 (London, 1927).

<sup>2</sup> Book review in 28 A.J.I.L. 192 (1934).

tribunal, the absence of knowledge of an important expedition being prepared on its territory for action against a "friendly" foreign government. The main obstacles here are the practical ones: first, how to induce states to accept new obligations in the matter, as proposed by the author; second, if they do accept them, whether they would not avoid performance by specious arguments or perhaps by invoking the rule *clausula rebus sic stantibus*.

These difficulties are further elucidated by an examination of the problem of "volunteers" leaving a "neutral" state to take part in a foreign war. In this reviewer's view, the main trouble in this situation is not the absence of appropriate norms, but rather the misinterpretation and misapplication of those already existing. The author makes a great case of the alleged inadequacies of Article VI of Hague Convention V (1907), claiming that this rule is "obsolete." As proof he refers to the claim made by Vyshinsky before the United Nations that the several hundred thousand troops sent into Korea from Communist China were merely "volunteers." But none (other than Iron Curtain speakers) questioned the charge that the Hague rule had been violated. The fact that the General Assembly found Communist China guilty of aggression for a violation of the Charter, without mentioning directly the violation of neutral duties, is not of significance in this matter. Had these been veritable volunteers, there could have been no ground for a charge of aggression under the Charter.

The author's second proposal—to attach responsibility under international law to the individual offender engaging in a hostile action against a foreign state—is also bound to encounter trouble. Take, for example, one of his cases: the individual who engages in war propaganda against a foreign Power. The author states that at present the government guilty of such practices is responsible, but the individual is not. Incidentally, such acts by private persons are extremely rare, and surely not the ones most to be feared, but rather the acts of *governments*—vicious propaganda attacks, libelous, subversive and war-mongering, by a Krushchev, a Nasser or a Castro. But how define "war propaganda"? And would not any attempt to condemn the individual place, as Donnedieu de Vabres has said, "on the same level the vulgar culprit and the honest man who in a moment of patriotic exaltation forgets himself"?<sup>3</sup> While the author has ably analyzed the constitutional difficulties in Britain and the United States which make such restrictions on freedom of speech and press anathema to Anglo-Saxon representatives at international conferences on international communication, this did not deter him from making proposals *de lege ferenda* which have little or no chance of acceptance. That individual propaganda could be outlawed in the United States under the clear and present danger rule is highly speculative. The author is rather optimistic in surmising that "because of the concentration of power in the modern state popular revolutions are doomed to failure." (p. 84.) One recalls the cases of Communist China, Cuba and Algeria.

<sup>3</sup> Donnedieu de Vabres, "Pour Quels Délits Convient-il d'Admettre la Compétence Universelle?" *Revue Int. de Droit Pénal* 815, 322 (9th Year, 1932).

The final proposal, that for the establishment of an international criminal court for the trial of individuals, is ably presented, together with a searching and critical analysis of the 1951 United Nations draft statute for such a tribunal.<sup>4</sup> This draft is declared almost totally inadequate and quite unacceptable. But as to the chances for the acceptance of a satisfactory statute, the author can offer little hope other than through the development of a greater degree of political integration among the nations.

This is a well-written, scholarly study which throws much light on some of the most important problems of international law and relations. Delving into a much neglected field, this book fills a gap in the literature which no student of the law of nations should neglect.

JOHN B. WHITTON

*Foreign Relations of the United States. Diplomatic Papers. 1941, Vol. V: The Far East.* (Dept. of State Pub. 6336.) pp. v, 938. Index. \$4.00; 1943: *China.* (Dept. of State Pub. 6459.) pp. vi, 908. Index. \$4.00. Washington, D. C.: U. S. Government Printing Office, 1962.

"On August 9, 1957 the Secretary of State [John Foster Dulles] approved the recommendation of Mr. [Walter S.] Robertson, Assistant Secretary of State for Far Eastern Affairs, to postpone indefinitely publication of '*Foreign Relations* 1941, Volume V, the Far East' and of the 'China' series beginning with 1943," reads a note in the hearings on March 2, 1962 (p. 449) on Department of State appropriations in the House of Representatives subcommittee. The two volumes referred to were released that same month, without a ripple from the Far East or anywhere else.

The release of those volumes as compiled by the Historical Office vindicates its standards of publication and brings *Foreign Relations* publication substantially into normal chronological presentation, after long digressions. First, the war with Japan enjoined the compilation in two volumes, *Japan, 1931-1941* (Pubs. 2008, 2016), in 1943 of the documents over those years relating to the break in relations. The ousting of the Chinese Nationalists by the Communists in 1949 led to issuing *United States Relations with China, with Special Reference to the Period 1944-1949* (Pub. 3573). This volume, "based on the files of the Department of State" and known as the *China White Paper*, was criticized by Senators who demanded immediate publication of the record of relations with China. This injunction, violative of the Department's chronological rule of publication, affected *Foreign Relations*, 1941, Volume IV, *China*, and Volume V, *Far East*, in compilation, and a *China* series, 1942-1949, in 16 volumes. The 1942 volume in the *China* series was published in 1956 and *Foreign Relations*, 1941, Volume IV, in 1959.

*Foreign Relations*, 1941, Volume V, *The Far East*, is primarily devoted to the "Southward Advance of Japanese Expansionist Movement" and the "Undeclared War between Japan and China," which became declared

<sup>4</sup> U.N. Doc. A/AC.48/4, Annex I (Sept. 5, 1951); 46 A.J.I.L. Supp. 1 (1952).

war on December 9. Repatriation of Americans from the regions overrun by the Japanese presented nationality problems of some interest, in addition to the physical one of shipping accommodations. In 1941 Japanese troops were spread pretty widely over China, and United States relations with China were variously affected thereby. A café incident in Peiping between U. S. Marines and Japanese soldiers remained unsettled, and in other respects American diplomats complained to Japanese colleagues of the actions of their military. The United States discussed withdrawing the Marines from China so long that withdrawal was incomplete when war with Japan began. In addition to protecting lives and property of our own people from the Japanese hostilities, much of our activity was in the interest of China. Withstanding Japanese demands in the International Settlement at Shanghai and with relation to the Chinese customs and other revenues enlisted British protests also. Washington's patience was tried by its efforts to extend financial and material aid to Chungking in its struggle against Japan; from the President down, American officials were doing what they could to stabilize Chinese funds, supply its troops, support its morale, and the Chinese were quite reciprocative, the papers show.

But this volume is most interesting in its account of Japan's ventures in French Indochina and South Asia generally. In 1941 it was just threatening Netherlands East Indies, Singapore and British Malaya, all dependencies. Free Thailand was attacked and went over to Japan on December 8, the Washington Legation breaking on the issue with Bangkok. The personal element in the Thailand story is supposed to have justified the hold-up of the volume from publication.

Because the China volume was held up for five years it appears naturally as the first of the 1943 volumes of *Foreign Relations* in the regular chronology. Relations under 29 headings, most of which continue earlier accounts and were uncompleted in 1943, reflect no progress in settling the Chinese Communist problem, but record the solution of some Sino-American matters and the usual bitter-sweet combination that characterizes official China-United States relations. On the highest level, China was taken into the Four-Nation Declaration of October 30, 1943, which provided for the Dumbarton Oaks Conversations and the United Nations, and in November, Chiang Kai-Shek met Churchill and Roosevelt at Cairo. The United States gave up extraterritoriality and then made a Status of Forces reciprocal agreement with China. It repealed the 1880 exclusion law and admitted Chinese to citizenship.

Otherwise 1943 was the ordinary Chinese muddle, "the reactionary elements now in power," as Ambassador Gauss defined the government, being near collapse until the Kuomintang meeting in September, which produced a new organic law and renewed Chiang Kai-Shek's mandate. The policy of treating China as the stable "Power" in the Far East explained much of the effort to supply China's needs and cater to its wants, despite its failures to utilize its opportunities. The Kuomintang and the Communists kept a wary watch on one another, but got no closer together,



while our observers concluded that the Soviet Union was keeping clear of both sides.

Financial relations were typical of the difficulties. The stabilization agreement which had been in effect since April 1, 1941, was terminated at the end of 1943, after a long bout with inflationary conditions and the negotiation of a \$200,000,000 loan for gold to sell to the Chinese public. The year ended with a Chinese request for a billion-dollar loan. Another difficulty of this sort centered around an effort to get by reverse lend-lease Chinese currency for use of American soldiers on leave. After 75 pages of correspondence between various agencies in Washington and Chungking over a period of five weeks, a financial adviser to General Joseph W. Stilwell was appointed to obtain for U. S. Army forces in China "Chinese currency at rates better than the arbitrary official rate of exchange." That is about the pace of progress recorded in this volume.

DENYS P. MYERS

*Foreign Relations of the United States. Diplomatic Papers, 1942.* Vol. II: *Europe*. (Dept. of State Pub. 7357.) Washington, D. C.: U. S. Government Printing Office, 1962. pp. vi, 863. Index. \$3.25.

The diplomacy of this war year was largely concerned with procurement of materials and their allocation through the lend-lease system, together with provision of the facilities for the commerce and industry involved. In this volume these relations are politically complicated by being conducted with governments not masters of themselves or of their territories. The Belgian Government-in-exile could negotiate on Congo resources and the Greek Government-in-exile conducted a series of matters relating to the war effort.

Finland, co-belligerent with Germany since its attack on the Soviet Union, on that account was unable to maintain its customary cordial relations with the United States, whose Minister was withdrawn for "consultation" toward the end of 1942 and restrictions placed on the movements of Finnish consular and diplomatic personnel. Finland confined war to the Soviet Union, which reciprocated the declaration. The United States did not consider Finland's participation in the German invasion of the Soviet Union beyond the Finnish border of 1939 or Finland's adherence to the Anti-Comintern Pact as cause for declaration of war, as did the United Kingdom. It was different with Bulgaria, Hungary and Rumania, which declared war against the United States in December, 1941. The President first decided to disregard the gestures as puppet government reflexes; but they began acting like enemies and Turkey was asked to warn them to desist. The Turkish Government declined that invitation and the three governments turned down similar advice sent through Swiss channels. So the matter was referred to Congress and a state of war was declared as of June 5, 1942. In neither case does the correspondence throw any light on the legal value of a declaration of war other than its fixing of a date.

The volume is otherwise equally interesting and non-contributive to the "norms" of international law. That is to be expected, for five-sixths of the book is taken up with French affairs, which presented wartime dilemmas at every turn. The French Government, under the Armistices of June, 1940, ruled occupied France from Vichy under Marshal Pétain, whose Premier after April 18, 1942, Pierre Laval, no one trusted. Vichy had a legal or constitutional jurisdiction over unoccupied France and France Overseas which it could not exercise and which the German-Italian Axis could not control. The United States obtained from Pétain the undertaking that the Vichy Government would take a "position of neutrality" and not lend any military aid to one of the belligerents (message of February 24, 1942, p. 141), and proceeded throughout the world to enlist French territory and resources in its own war efforts, assuring the people of France (p. 152) of their "eventual resumption of complete independence and sovereignty."

The policy of the United States in maintaining the integrity of the French Empire kept it in a semi-hostile mood toward Vichy. American activities were directed toward keeping French resources, facilities and territory out of enemy use, the Vichy Government being subordinate to the enemy. The situation may not set a useful precedent or afford sound legal rules, but it offered numerous facets of friction. The Counselor of Embassy, Robert D. Murphy, was diverted to North Africa, arranged for supplies with Delegate Weygand in 1941, hampered French shipping service to German troops in Libya, prepared the way for the invasion on November 8, 1942, and the closer association with General Henri Giraud after severance of diplomatic relations with Vichy and the assassination of Admiral Jean Darlan. By June 29 a series of understandings with General de Gaulle had established the French National Committee (Free French) as an entity more reliably French than Vichy, but in 1942 the group was more self-assertive than its power warranted. In various circumstances arrangements on the spot were made concerning Martinique and the Caribbean area, Madagascar, French Equatorial and West Africa and some other areas, sometimes involving installations, at others commodities. Unoccupied France by the end of 1942 was of general use against the Axis, despite the Armistices of 1940.

DENYS P. MYERS

*The United States and Inter-American Security 1889-1960.* By J. Lloyd Meham. Austin: University of Texas Press, 1961. pp. xviii, 514. Index. \$7.50.

Attention is paid to various issues of international law in this comprehensive and chronological description of the development of a security system in the Western Hemisphere. Dr. Meham, Professor of Political Science at the University of Texas, has made a highly valuable and unique contribution. Years of painstaking research are reflected in his value judgments and the depth of his understanding of a highly complicated

subject. An early chapter on "The 'New' Pan Americanism" tells of the creation of the International Commission of Jurists in 1906. A later chapter, "The Good Neighbor," records the 1933 Montevideo Conference's success in reviving the moribund Commission and adding national groups in an effort to codify the international law of the Americas. This is followed by a chapter on "The Organization of American States" carrying the account forward to the Charter of the O.A.S. agreed upon at Bogotá in 1948, which created the Inter-American Council of Jurists, to be assisted by a Juridical Committee which meets for three months each year. A draft multilateral Treaty for Pacific Settlement, the recognition of *de facto* governments, the "right of revolution," the creation of an Inter-American Court for the Protection of the Rights of Man, and the international responsibility of states, are some of the topics attacked by the Juridical Committee with minimal results. No less than six agencies for the codification of American international law were abolished by the O.A.S. Council in 1950. Since April, 1951, the Department of International Law of the Pan American Union (until recently headed by Dr. Fenwick, an esteemed contributor to this JOURNAL) has frequently been called upon for legal studies.

Dr. Mecham recalls events too often forgotten: the invitation by the U.N. General Assembly in 1948 to the Secretary General of the O.A.S. to attend Assembly meetings; Molotov's unjustified attack on the Mexican statesman, Ezekiel Padilla, at San Francisco in 1945. He also raises questions concerning U. S. termination of Cuban sugar imports in view of Article 16 of the O.A.S. Charter forbidding the use "of coercive measures of an economic or political character." Non-ratification of the Pacific Settlement Treaty has left the Rio Treaty, by default, to be used for disputes within the Continent. This in turn has given rise to repeated specious calls for a Meeting of Consultation of Foreign Ministers which would not convene because the interim actions of the Council of the O.A.S. served to resolve the quarrels within the family.

Not the least important chapter is entitled "Integrating the Inter-American Security System Into the United Nations," in which Professor Mecham refers to the work of Messrs. Rockefeller and Vandenberg at the San Francisco Conference of 1945. There Article 51 of the Charter was adopted, recognizing the right of individual or collective self-defense until the U.N. Security Council might act. Articles 34, 36, and 54 of the U.N. Charter complete the "integration." Dr. Mecham views the jurisdiction of the inter-American system as further abridged, inasmuch as a local dispute could be referred to the U.N. Security Council before any attempt is made to settle it by the regional body.

Surprisingly, texts of the Rio Treaty and O.A.S. Charter are not reproduced in the book. There are valuable sections on the regional Peace Committee and Defense Board. Considerable space is devoted to political and economic relationships within the Hemisphere. The author realistically declares that "legalistic equality is by no means fictional in the inter-American system, but it is unquestioned that the preponderant power,

wealth, and influence of this country are reflected in the leadership it enjoys.”

WILLARD F. BARBER

*Dokumente zur Deutschlandpolitik*. Part III. Vol. I: *May 5, 1955 to December 31, 1955*. Issued by the Ministry for All-German Affairs. Edited by Ernst Deuerlein with the assistance of Hansjürgen Schierbaum. Frankfurt and Berlin: Alfred Metzner Verlag, 1961. pp. lxxii, 883. Index. DM. 39.

With this volume, the Ministry for All-German Affairs, in collaboration with the German Foreign Office, presents the first in a series of eventually seventeen volumes of documentary materials related to “the German problem.” That problem is the problem of re-unification; and the stated purpose of the new documentary collection is to provide an exhaustive compilation of all significant pronouncements dealing with it. By definition, the issue of German re-unification has at once domestic and international implications. Consequently, this first volume of the projected series contains materials within the context of internal and foreign politics, limited always to the central issue of re-unification. *Dokumente zur Deutschlandpolitik* will disappoint those who had expected a new *Grosse Politik*; the work is intended to supplement and enlarge upon a collection of papers and documents published by the Federal Republic in 1951 (English edition, 1954) concerning its efforts to re-establish German unity by means of all-German elections.

The projected documentary collection will follow a chronological arrangement, with the first part (four volumes) to cover the period from 1941 to June 4, 1945. The second part (five volumes) will include most of the ten years West Germany was under occupation, from June 5, 1945, to May 4, 1955. Part three, which opens the series with the present volume, also will have five volumes to account for the events between May 5, 1955, and November 9, 1958; and the fourth part (three volumes) is to extend the work from November 10, 1958, to the present. The materials collected include not only treaties, declarations, diplomatic notes, official statements, conference reports, communiqués and other official documents, but also speeches, interviews, letters, articles, commentaries and other papers of an unofficial character. The first item in the volume under review is the Allied Proclamation of June 5, 1955, ending the occupation status and restoring German sovereignty; the concluding item is a New Year’s message of the East German President, Wilhelm Pieck. In between, the volume makes available a wealth of materials otherwise difficult to find.

The over-all plan of the project is imposing. The editing of the first volume published shows craftsmanship and scholarship. It is apparent that the authenticity of every included item has been thoroughly checked. Foreign documents, especially those published in English, French or Russian, considered by the editors to be of special significance to the problem of German re-unification, are printed in the original language, supple-

mented with a German translation. To make the collection of documents more readily available for reference purposes, the location in which it was found is listed with each entry. If a translation of a German text into English or French is available, that reference is also listed. Generally, German official papers and documents are taken from the *Bundesgesetzblatt*, the *Bundestag* stenographic reports, or the (German-language edition) *Bulletin* of the Press and Information Office of the Federal Government. For American documents, the *Documents on American Foreign Relations* are thought to be more easily accessible than the *Department of State Bulletin* and are used by the editors as a principal source. They are supplemented by *Documents on International Affairs*, a work also used for British texts and as a source in which translations from German into English are easily located. For French materials and translations, *La Documentation Française* performs the same function.

A carefully arranged and complete index (83 pages) further enhances the usefulness of the volume. *Dokumente zur Deutschlandpolitik* will be well received by all those who follow German affairs.

HEINZ R. HINK

*Mélanges Sfériadès*. 2 vols. Athens: School of Political Sciences "Pantios," 1961. Vol. I: pp. xl, 448. Index; Vol. II: pp. viii, 396.

In honor of Professor Stylianos Sfériadès, its first President of the Administrative Council, "Pantios" brought together this collection of articles. Contributed especially for this purpose by many scholars of various countries, the majority of the studies deal with various subjects of international law, the remainder being devoted to domestic law, political science and philosophy.

Five of the multilingual monographs are in English, the initial one having as its main thesis the proposition that the necessities of war determine the laws of war and these necessities are nothing more than the assertion of wartime sovereignty. There follows a philosophical article, the scope of which is shown by its title: "Idealism: A Lawyer's Reflections on Plato," and another one which relates to the interaction and multiplicity of legal orders in the modern world. With respect to judicial protection of foreign investments, an author concludes that, under present political conditions, proposals for access to the International Court of Justice by private persons would be completely Utopian. The fifth article is concerned with the Zurich and London Agreements and the Cyprus Republic.

One of the two German articles deals with the history of the law of nationality and the other one with the history of the Bureau of the Permanent Court of Arbitration. The question whether the United Nations' method of collective security should be revised is the subject of one of two Italian discussions, while the other one concerns itself with the negotiation of international agreements of intergovernmental organizations.

The six Greek articles are devoted to the following subjects: common

civilization as the basis of European unity; the problem of superior orders in international criminal law; domestic jurisdiction under the United Nations Charter; "just" war according to the writings of the Byzantine Emperor, Leon the Wise; effect in Greece of foreign injunctions; and the 1958 Geneva Convention on Fishing and Conservation of the Living Resources of the High Seas.

A detailed discussion of the many articles of this collection would not be within the framework of a book review. Helpful as it might be to the reader to be apprised of the subject of the remaining 31 articles, which are in French, such an enumeration would also tend to make the review unduly long. They cover the fields indicated in the first paragraph above. General and theoretical discussions of legal and political problems are interspersed with articles on European communities and their bases, on state responsibility as a result of atomic incidents, on human rights, on history of international law and on various aspects of domestic law.

This collection is obviously not intended as a lawyer's contribution to law. It is a useful source of information, especially for the general student of international law. The authors contribute penetrating legal and political analyses to their respective subjects. On an over-all basis, the *Mélanges* may be regarded as outstanding.

JOHN MAKTOS

*Milletlerarası Münasebetler Türk Yılığ* [The Turkish Yearbook of International Relations]. Vol. I, 1960. Ankara: Sevinç Press, 1961. pp. viii, 220.

When Turkey won the famous *Lotus* case, her Minister of Justice adopted the name of the Turkish vessel as his family name. Such a singular reaction to a significant victory before the Permanent Court of International Justice, one might think, could well have kindled an abiding interest in international law and relations on the part of Turkish scholars. Certainly there was no dearth of materials for discussion. The new Turkish Republic faced intricate questions of law and policy with respect to the Straits, Turkish minorities abroad and non-Turkish minorities at home, state succession, frontiers, and re-integration into a system of protective alliances—to name just a few. While international studies were initially hampered by a lack of scholars, many Turks completed their legal studies abroad, especially in Switzerland, Germany, and France. More often than not, they chose dissertation topics from the fields of international and comparative law. Furthermore, a number of noted foreign scholars, such as Karl Strupp in the thirties and Robert R. Wilson and Herbert W. Briggs in the more recent past, have taught at Turkish universities. Turkey became increasingly involved in world politics and joined many regional and universal international organizations. It seems hard to believe that such extensive activities should not produce a significant amount of valuable literature on international law and politics.

Yet this is exactly what happened. It might be that foreign-trained young Turkish scholars had difficulties in re-assimilating—and quite pos-

sibly also in communicating with each other. Furthermore, there was, at least initially, a strong official suspicion of international law as such, so characteristic of some new non-Western nations today. The very attitude of the new Turkey towards Western civilization has always been somewhat ambiguous, encompassing both a fervent yearning for modern technology and a rejection of at least certain types of "Westernization," as indicated, for instance, by the removal of the capital from cosmopolitan Istanbul to the central Anatolian town of Ankara. Last, but certainly not least, the one-party regime which existed until 1946 seemingly stifled discussion of policy issues, and a catastrophically low level of literacy greatly restricted the circle of potential readers.

The book here under review, which is published by the Institute of International Relations at the University of Ankara, is a valiant attempt to break with this sterile past. The editors frankly acknowledge that, although "Turkey has increasingly taken an active rôle in international affairs," the "Turkish position . . . has not been reflected fully and adequately" (p. v). In order to remedy this situation, they have decided to publish a tri-lingual *Yearbook of International Relations*, with contributions in Turkish, English, and French. The present volume (the first of the series) contains six articles, a survey, a documentation, a chronology, and a bibliography.

In his lead-off article, Professor Kemal H. Karpaz, of Montana State University, discusses "Economics, Social Change and Politics in Turkey" (pp 1-12). His account of the social forces behind the overthrow of the Menderes Government in May, 1960, is yet another example of the commendable candor with which this Turkish scholar treats the modern political history of his country.<sup>1</sup> Next, Türkkaya Ataöv, of the University of Ankara, writes on "The 27th of May Revolution and Its Aftermath" (pp. 13-22), concluding with the sober observation:

No matter what the future political regime of Turkey may be, it seems that the struggle will eventually take place between the *status quo* supporters on the one hand and the "reformers" on the other, the victory of the conservatives more and more strengthening the radicalism of the reformers. (p. 22.)

Hamza Eroğlu, a People's Republican Party member of the Constituent Assembly and a former Deputy of the Grand National Assembly, discusses "The Bilateral Agreement of Cooperation between Turkey and the United States" (in Turkish, pp. 23-64). He points out that this agreement,<sup>2</sup> which was concluded on the initiative of the late John Foster Dulles in order to close the gap created by the Iraqi revolution, did not expressly stipulate any rights and obligations beyond those of NATO and was thus at least theoretically nugatory. Mr. Eroğlu maintains that the agree-

<sup>1</sup> See especially Karpaz, *Turkey's Politics. The Transition to a Multi-Party System* (1959).

<sup>2</sup> Agreement of Cooperation Between the Government of the United States and the Government of the Republic of Turkey, March 5, 1959, 10 U. S. Treaties (Pt. 1) 820.

ment, which purported to become effective upon signature by the contracting parties, was entered into in violation of the Turkish Constitution then in effect, which required the Grand National Assembly's consent to the conclusion of international agreements (Article 26). He specifically refutes the opinion of the then Turkish Foreign Minister that the Executive was competent by virtue of international law to conclude defense agreements and that, in any case, such a competence did in fact exist under internal Turkish law by virtue of a constitutional custom *contra legem*. As the bilateral agreement was later approved by the Grand National Assembly, an outside observer might think that this discussion was rather theoretical. However, Mr. Eroğlu, who vigorously raised the same objections in the Grand National Assembly in his capacity as a Deputy and a member of the Committee on Foreign Relations, shows that the Menderes Government might indeed have pursued a very practical objective with the conclusion of a seemingly nugatory agreement by extra-constitutional means. The then Turkish Government seems to have felt—erroneously, we trust—that the commitment of the United States to defend Turkey against aggression (Article I) covered the type of purportedly “indirect aggression” which had recently occurred in the Lebanon. If so, the agreement could have been used by the Menderes Government to obtain United States support for the suppression of the allegedly “subversive” People's Republican Party—in the light of subsequent events, indeed a startling possibility.

Hamza Eroğlu's contribution is thus not only highly informative with respect to the treaty-making power in Turkey, but also valuable because of the insights which it affords into the practical domestic policy aspects for the weaker partners of defense assistance agreements. By contrast, Professor İlhan Lütem's treatment of “The Colonial Question Before the XVth Session of the U. N. General Assembly” (in Turkish, pp. 65–91) is somewhat arid. This probably is due in part to the author's official position as a member of Turkey's Delegation to the United Nations. While Professor Lütem painstakingly summarizes the proceedings in the General Assembly and Turkey's part therein, this reviewer misses a comprehensive and realistic evaluation of the Turkish position towards colonialism and self-determination, and especially of attempts—highly resented by some Arab and African states—to fit this policy into the larger context of a military alliance system which significantly depends on the support of “colonial” Powers.

Professor Metin Tamkoç, of the Middle East Technical University in Ankara, writes on “The Question of the Recognition of the Republic of Turkey by the United States” (pp. 92–120). He shows how, in the immediate post-World War I era, domestic minority pressure politics in the United States delayed the recognition of the new Turkish state and prevented the ratification of the Treaty of Lausanne. The author, who is American-trained, demonstrates great competence in the treatment of United States sources, both published and unpublished.

The final contribution, by Professor İlhan Unat of the University of Ankara, is on “The Application of the Principle of Estoppel by the Turkish



Council of State in Nationality Litigation'' (in French, pp. 121-131). The highest Turkish administrative tribunal, it appears, has repeatedly annulled decisions of the Council of Ministers revoking the Turkish nationality of persons who had in fact been treated as Turkish nationals by organs of the government and had relied on such treatment.

The *Yearbook* also contains a compilation of the status of bilateral treaties to which Turkey is a party (pp. 133-180); the text of Turkish statutory provisions on the conflict of laws (in French, pp. 181-188, with foreign-language bibliography at 181 n.); a chronology of Turkey's international relations from January 1 to December 30 [sic], 1960 (pp. 189-210); and finally, a selected bibliography of Turkish books and periodical literature on international relations for 1960 (pp. 211-220). Here, a jarring note is sounded by a seemingly substantial irredentist literature aimed at the Turkic peoples of the Soviet Union (pp. 215-216).

In conclusion, this reviewer feels that *The Turkish Yearbook of International Relations* is not only a step in the right direction, but also a significant enrichment of the literature of international law and relations. The editors certainly deserve our congratulations, and every encouragement in the continuation of their venture. *Biriniz bin olsun!*

HANS W. BAADE

*Cartel and Monopoly in Modern Law.* 2 vols. (in German and English).

Karlsruhe: Verlag C. F. Müller, 1961. Vol. I: pp. xxx, 412; Vol. II: pp. x, 413-1016. DM. 110.

These two volumes represent the impressive fruits of a five-day International Conference on Restraints of Competition held in June, 1960, at Frankfurt-am-Main, under the direct auspices of the Institute for International and Foreign Trade Law, which has a dual domicile in Frankfurt and with Georgetown University in Washington, D. C. They contain the papers of some thirty American and European government officials, law professors, economists and, in two instances, practicing lawyers, in addition to final summations by the chairmen of the four working groups into which the conference participants were divided.

The conference had the strong support of the German Government and of the European Economic Community. Consequently, the published volumes feature addresses by Chairman Hallstein and Commissioner Von der Groeben of the European Economic Community; Dr. Erhard, the German Minister of Economics; and a summary report by Dr. Verloren van Themaat, the Chief of the Community's Directorate of Competition. Dr. Eberhard Gunther, the head of the German Cartel Authority, contributes two papers, one describing two and a half years of German experience under the Restraints of Competition Act of 1957, and the other, the historical record and the problems involved in applying public international law to the regulation of international restraints of competition. Professor Franz Böhm, a leader of the Christian Democratic Party and the grand old man of German economic liberalism and political morality, has an opening

address on democracy and economic power that states the political case for anti-trust in terms reminiscent of the views held in this country by Senator Kefauver and ex-Senator O'Mahoney.

The main purpose of the Frankfurt Conference was to throw light on anti-trust problems faced by the European Economic Community. However, the anti-trust aspects of the European Free Trade Association are discussed by Dr. Gammelgård of Denmark; and those of the European Coal and Steel Community, by Dr. Hamburger, who headed the anti-trust operations of this more limited Community, Professor Mestmacker of Saarbrücken, Dr. Van Hecke of Liège, and Professor Kronstein, one of the main spearheads of the conference.

Professor Kronstein's introductory paper, in addition to discussing the factors limiting the effectiveness of the anti-cartel provision of the Coal and Steel Community Treaty (Article 65), discusses the anti-trust provisions of the European Economic Community Treaty (Articles 85 and 86) in terms of the wider economic concept of the Common Market. The volumes also contain excellent papers by Professor Steindorff of Tübingen and Dr. Clement, Secretary of the French Commission Technique des Ententes, discussing the relative competence in anti-trust matters of the European Economic Community and the national cartel authorities; Dr. Rodière of Paris, on the specific prohibitions of Article 85(1) of the Rome Treaty and their private law consequences; Dr. Franceschelli of Milan, on the interpretative problems arising under Article 85(3), providing for exemption from the prohibitions of Article 85(1); and Dr. Schumacher, of the Common Market anti-trust staff, setting forth the various procedures for implementing Articles 85 and 86 of the treaty.

Students of comparative international law will be interested in the five papers in the second working group, which were devoted to problems of concentration. For this side of the Atlantic, then Federal Trade Commissioner Tait discusses the American law with respect to business mergers, and Professor Schwartz, of the University of Pennsylvania, the economic and legal issues involved in dealing with parallel action in oligopoly markets. On the European side, Professor del Marmol, of the University of Liège, contributes a well-organized paper on distribution methods used by dominant enterprises to restrain competition, and Dr. Raiser, of Tübingen, an interesting paper on the obligation to serve in monopoly situations. Dr. Raiser's paper should interest American scholars and practitioners concerned with the issue of "customer selection" and how far the principle of the *Colgate* case has survived in U. S. anti-trust law. Dr. Schmolders, of Cologne, discusses a subject too often overlooked in contemporary appraisals of anti-trust—the extent to which tax and fiscal policies may be guided by competitive considerations.

Private practitioners and professorial analysts of the substantive anti-trust law applicable to international transactions will find two comprehensive papers germane to their problems. One is by Mr. Rashid of the Justice Department, concerning the legal problems posed by import and export associations, including Webb-Pomerene associations, which is sup-

plemented by some remarks by Professor Kingman Brewster. The other is by the reviewer, outlining the bearing of the Sherman Act on international patent and trademark licenses and interchanges.

The problem of extraterritorial jurisdiction is dealt with by Professor Hug of Zurich, who contributes one of the most scholarly papers in this series. Professor Hug probes extensively into the treatise writers and the legislation of six countries which share the view of Judge Learned Hand, in the *Alcoa* case, that a country has the right under international law to regulate activities originating outside its boundaries that have an effect within those boundaries. In the course of thus underwriting what he calls the "principle of the effect" and what the Anglo-Saxon writers term the "objective territorial principle" of international law, Dr. Hug also makes out a strong case for the revival of the study of international administrative law, which has been neglected in the last few decades. Professor Hug's viewpoint on extraterritoriality is supported by Dr. Ivo Schwartz (now with the European Economic Community in Brussels), whose paper is addressed to comparable issues.

The fourth working group concerned itself with specific problems of evidence and procedure involved in anti-trust enforcement. Professor Barnes of Columbia University, formerly of the Federal Trade Commission staff, gave a very extensive paper on economic evidence as applied to the legal issues arising in Section 7 proceedings. Mr. Wilberforce, of the British Bar (now Mr. Justice Wilberforce), produced a brief paper on general problems of administrative and judicial anti-trust enforcement in the United States and the United Kingdom; as might be expected, he is appalled by the "oppressive" massiveness of U. S. anti-trust discovery procedures and dissents from the far-reaching jurisdiction exercised by U. S. courts over foreign persons. Dr. Rauschenbach, the Vice President of the German Cartel Authority, develops the German experience in enforcing the law against restraints of competition, and Dr. Lagrange of Paris discusses detailed problems of judicial review arising under the anti-trust provisions of the Coal and Steel Community Treaty and the anti-trust laws of The Netherlands and the Federal Republic of Germany.

While the interval since the holding of the conference has seen some anti-trust developments in the Common Market that might lead the authors of one or two papers to revise them, the volumes as a whole remain important additions to anti-trust literature, because of their general analysis of the principles and problems involved. The information and insights contained in most of the papers are still, for practical working purposes, authoritative. The careful organization of the conference insured that analysis would be devoted to topics of current and continuing practical significance.

The reviewer regrets that it was not possible to include in these proceedings an account of the stimulating discussions that took place in the internal meetings of the four working groups. However, some of their general substance is recaptured in the summary reports of Dr. van Themaat, Professor Corwin Edwards, Professor Ficker of Mainz and Bundesrichter

H. Hill, the respective chairmen of the working groups. Part of the length of these volumes is due to the fact that papers delivered originally in German and French were translated into English. Fortunately for the American reader, however, the *lingua franca* of current anti-trust discussions appears to be American, and the English-language papers were therefore not subject to reciprocal translation.

As a participant in the first conference of this type held in 1958 under the auspices of the University of Chicago and a most useful conference held this summer by Georgetown University on the problems of extra-territoriality, the reviewer hopes that the universities will continue this constructive exercise in the comparative understanding of anti-trust problems and issues. As indicated, these volumes are not only of utility to anti-trust specialists, both at the practitioner and academic level, but should also interest students of private and public international law and of comparative law.

SIGMUND TIMBERG

*The Dynamics of International Politics.* By Norman J. Padelford and George A. Lincoln. New York: Macmillan Co., 1962. pp. xvi, 634. Index. \$7.50.

Professors Padelford and Lincoln, who collaborated previously in a textbook on *International Politics*, have produced a new volume which should serve well both as basic reading for students and as a stimulating interpretative survey of the field for teachers of international law and relations.

The particular merits of this text may be summarized under the heading of up-to-dateness, not so much in the sense that it "covers" recent events, as in the more important sense that it both focuses upon the fundamental alterations of the international system that are in process and reflects the current variety of approaches to the scholarly analysis of international phenomena. The authors do a notable job of dealing with the problems and implications of new states, weapons, economic development programs, techniques of diplomacy, and multilateral institutions. They carry over the emphasis on change to their analysis of international law, indicating the impact of new developments in other fields upon the traditional legal system, and evaluating the possibilities of international law as an active factor in shaping the world of the future. Without committing themselves to the exclusive use of any of the available approaches, the authors demonstrate a flexible and pragmatic modernism by incorporating into their analysis such features as a comparative survey of governmental structures and political processes as they bear upon the international behavior of states, and perceptive commentary on the social dynamics of traditional and transitional societies. They have carefully woven the threads of comparative government, foreign policy, military strategy, economics, and sociology into the fabric of their analysis.

Like all other writers who attempt the difficult but important task of producing a comprehensive survey of a broad and complex field, Padelford

and Lincoln have found it impossible to avoid altogether the perils of oversimplification, superficiality, and factual error. Rather than single out miscellaneous mistakes and minor points of disagreement, this reviewer would take issue with the occasional tendency of the authors to idealize the policy and performance of the United States in contrast with that of the Soviet Union. This criticism is not intended to suggest that majestic objectivity is possible, or that American self-flagellation of the "plague on our house, too" variety is desirable. The problem is that the "cleaning up" of the American record tends to inhibit full understanding of our policy and our situation. Regarding Cuba, the authors tell us only that in 1960-61 the Cuban people "were led to believe," presumably by skillful leaders bent upon arousing them, "that the United States was hostile to their new regime" (p. 195), and that there occurred an "unsuccessful invasion of Cuba by refugees" (p. 549). The U-2 episode is cited only as showing that the law of the air has not been adapted to new developments (p. 484) and that the Soviet Union sometimes invokes international law to justify its actions (p. 472). The reader will not learn that the C.I.A. is or has been anything other than an agency for gathering and analyzing intelligence. The authors indicate that the United States is not a member of any large bloc in the U.N. General Assembly (p. 505), that the small states are increasingly able to dominate that body (p. 521), and that the Soviet Union is attempting to limit the effectiveness of the Assembly (p. 522). They do not stress the fact that the United States has exercised strong control over the Assembly, although they concede this in asserting that it is no longer true (p. 523). In playing down this fact, they decline to help the reader understand that Soviet attacks upon the United Nations represent a revolt against an agency which the Soviet Union believes has served as a tool of its enemies. The authors might legitimately choose either to condemn or to approve the operations of the C.I.A. or the use of the United Nations as a Western policy instrument, but they weaken their analysis by ignoring or neglecting these important elements in the story of international relations.

INTS L. CLAUDE, JR.

#### BRIEFER NOTICES

*Mer Rouge et Golfe d'Aqaba dans l'Evolution du Droit International.* By Edmond Rabbath. (Cairo: Société Egyptienne de Droit International, 1962. Brochure No. 16. pp. iv, 52.) This study by a member of the Law Faculty of the Lebanese University adduces little that is new on the subject, but it is a useful brief restatement of an Arab point of view. Special stress is laid on the long subjection of these waters to exclusive Moslem control, which made them closed seas in fact for centuries, and on the significance attaching to them in Islamic law and tradition because of their proximity to Mecca and Medina and their rôle as pilgrim routes. In the author's view this closed status ended for the Red Sea with the opening of the Suez Canal in 1869; but this was not the case with the Gulf of Aqaba, which retained its closed character under European as well as

Islamic rules, because of its geography and its standing as an historic bay. This status continued when independent Arab and Moslem states succeeded the Ottoman Empire on the Gulf, as in the analogous instance of the Gulf of Fonseca; but Israel, as an illegal interloper, is not entitled, in the author's opinion, to participate in this closed regime or to enjoy rights of navigation in the Gulf. The contrary view on the latter point, adopted at the 1958 Geneva Conference, is not discussed, nor in general are the arguments *pro* and *con* exhaustively dealt with. A few minor errors of fact also mar the presentation, but many will agree with the conclusion: that the controversy over Aqaba and Suez is essentially part of a larger political problem, and will continue to exist until the larger problem finds a solution not yet in sight.

RICHARD YOUNG

*Internationale Gerichte und Schiedsgerichte. Verträge—Satzungen—Verfahrensordnungen.* Edited by Hans-Joachim Hallier. (Cologne: Carl Heymanns Verlag, 1961. pp. xii, 497. Index. DM. 40.) With this volume the Max Planck Institute for Foreign Public and International Law inaugurates a new series of publications entitled *Documents for Research and Practice in Foreign Public and International Law*. The objective is to present the judicial and arbitral institutions to which access is granted individuals and private enterprises, and which were created after World War II or were modified as a result of it. Tribunals which are not open to individuals were included insofar as they are competent to give binding rulings concerning questions of jurisdiction and treaty interpretation addressed to arbitral tribunals which are accessible to individuals. The Hague Convention of 1907 for the Peaceful Settlement of International Disputes, as well as the Statute and the Rules of the International Court of Justice, are also reprinted because they furnished the model, and have become indispensable for that reason, for the construction of the instruments governing the functioning of other judicial and arbitral institutions. Instruments relating to the judicial and arbitral institutions for the Saar are included in the Appendix. Although they have ceased to function, they continue to be of substantial interest. Each instrument is preceded by a note indicating briefly its origin, parties, jurisprudence and a brief bibliography. The text is given in the original English and/or French and a German translation, official if one exists, or prepared by the editor. Instruments drawn up only in German are not translated into English or French. For the institutions included, the relevant parts of the basic treaties are reproduced in addition to their statutes and rules.

Many of the instruments are not easily accessible and some are hardly known outside of Europe. The Institute and the editor of this volume are to be congratulated for a splendid accomplishment. This collection should stimulate research into the application and extension of international judicial institutions to individuals.

LEO GROSS

*Fundamental Legal Documents of Communist China.* Edited by Albert P. Blaustein. (South Hackensack, N. J.: Fred B. Rothman & Co., 1962. pp. xxx, 603. \$14.00.) The law librarian at Rutgers University has prepared a pioneer volume of translations into English of Chinese Communist legal documents. Constitutions, the Communist Party's program and rules, agricultural, labor, penal and marriage legislation make up the bulk of the documents, and a brief bibliographical and historical essay introduces the material. No documents can in themselves present a legal

culture, for practice is needed, as are philosophical statements providing evidence of attitudes toward law. The Chinese publish no collections of court decisions, and other evidences of attitudes are also lacking. Thus, the collection is of a limited nature, but it provides the important start for which students of Communist attitudes toward law in China have been waiting. The influences of Soviet legislation are clearly drawn, and it is possible to conclude that Soviet influences have been great, at least as to form.

Those who use the volume will be much indebted to the compiler for his pioneering, but it must be remembered that other materials suggest that since 1958 there has been a revulsion against form and stability of law, and that Chinese concepts now vary considerably from those of Soviet lawyers, so that conclusions that all Communists are like peas in a pod with regard to law would be misleading.

JOHN N. HAZARD

*International Committee of the Red Cross. Annual Report 1961.* (Geneva: International Committee of the Red Cross, 1962. pp. 86. Sw. Fr. 5.) The centenary of the Red Cross is an appropriate time to remind the readers of this JOURNAL of the important rôle played by the International Committee of the Red Cross in the development of international law, over and above its drafting of treaties concerning the protection of war victims. The *Annual Reports* are important repositories of information about the contribution which this quasi-public international organization makes to the law of war and of peace. The current report deals, for example, with the operation of the Geneva Conventions of 1949 in civil wars (pp. 14-15), the application of the conventions to United Nations forces (pp. 47-49), payments to ex-prisoners of war in the Philippines in implementation of Article 16 of the Japanese Peace Treaty (pp. 28-29), the payment of compensation to the victims of pseudo-medical experiments (pp. 30-32), state succession to humanitarian treaties (pp. 45-46), and the applicability of the Geneva Conventions of 1949 to civil defense personnel (pp. 49-52). These matters had already been reported in the *International Review of the Red Cross*, but it is useful to have some account of them within the confines of the *Annual Report*.

R. R. BAXTER

*Legalität oder Illegalität der Anwendung von Atomwaffen.* By Eberhard Menzel. (Tübingen: J. C. B. Mohr (Paul Siebeck), 1960. pp. 87. DM. 4.50.) Professor Menzel believes that the existence of small nuclear weapons designed for tactical use on a limited scale has increased rather than diminished the possibility of thermonuclear war, and that the possession of nuclear arms by an increasing number of states has further worsened the situation. His study is an attempt to show that all nuclear weapons are illegal. The first three sections of the volume deal with general legal considerations, provisions of positive international law, and the doctrines of military necessity, reprisal and national survival. In the fourth section Menzel examines United States, British and West German military regulations for specific instructions prohibiting the use of nuclear arms; and in the last section the author's findings are re-arranged to give a country-by-country survey of the whole issue.

The author comes to the conclusion that the use of all thermonuclear weapons—tactical as well as strategical—is against international law. Atomic warfare violates the general principles of humanity, the duty to protect the civilian population and the right of future generations to be safeguarded against genetic mutations. In terms of positive international

law, Menzel thinks Article 23, paragraphs *a* and *e* of Hague Convention IV of 1907, the Geneva Protocol of 1925 on the use of asphyxiating gases and the Petersburg Declaration of 1868 should be applied to nuclear weapons, though he recognizes there is no *specific* treaty outlawing nuclear war. The employment of atomic weapons is never justified by military "necessity," and their use is too disproportionate to be permissible under the doctrine of reprisal. Only in case of atomic attack may the victimized state resort to an atomic counter-strike to preserve its national existence.

To the international lawyer, the special value of this short volume lies in the fact that, in addition to the author's own conclusions, it contains an extensive analysis and comparison of the international legal literature. Some of this literature has been at variance with Professor Menzel's point of view, especially in the United States, where scholars have been more reluctant to take a definite stand on the issue. Of special interest also is the discussion of military directives and field manuals, though regrettably that section does not include an analysis of appropriate provisions in Communist and neutral countries.

HEINZ R. HINK

*Report to the National Aeronautics and Space Administration on the Law of Outer Space.* By Leon Lipson and Nicholas deB. Katzenbach. (Chicago: American Bar Foundation, 1961. pp. xii, 179. Index.) The Project Reporters, Professors Leon Lipson of the Yale Law School and Nicholas deB. Katzenbach, then of the University of Chicago Law School and now Deputy Attorney General of the United States, have brought their keen insight, organizational skill and professional experience to the challenging task of critically evaluating alternative solutions to some of the major legal problems arising out of man's ascent into the cosmos.

The concise and lucid presentation of the frequently controversial opinions taken from a vast literature on space law is accompanied by a keen and searching "Analysis" (Part I) revealing a sense of sober reflection and guarded realism. The wide range of "general" topics includes some of the questions associated with the upward extent of sovereignty, the use and occupation of celestial and artificial bodies in space, the legal status of space and the meaning of its "peaceful" uses. Discussions of other "selected" legal issues center around the broad problems of radio-spectrum management, conservation of space, communications satellites, weather forecasting and control, damage caused by space operations, safety standards, repossession of space craft, repatriation of space personnel, observation satellites and co-ordination of space programs. The authors also touch upon some of the questions that are likely to arise in connection with the possible establishment of an international organization for space. While they make no recommendations as to its desirability or form, they emphasize that such an agency, by drawing upon the talents of highly skilled scientists, could play a significant rôle in recommending legal standards for national or international space programs and in conducting space operations under some type of arrangement.

The "Analysis" is followed in Part II of the book by about 900 "Abstracts" which are grouped in two sections (according to their relevance), under alphabetically arranged topics and sub-headings, and contain brief summaries of the points made in the literature under survey. The over-all usefulness of the book is further enhanced by two general indexes to the abstracts (Part III), an abstract-to-source and abstract-to-footnote table (Part IV) and bibliographies (Parts V and VI).

STEPHEN GOROVE



*Eichmann und Komplizen.* By Robert M. W. Kempner. (Zurich: Europa Verlag, 1961. pp. 452. Index.) Adolf Eichmann is dead. He was hanged just before midnight on May 31, 1962, seventeen years after the events occurred for which he paid the supreme penalty. Two years ago Premier Ben-Gurion said: "The purpose is not to hang Eichmann, but to get on the historical record the full story of the catastrophe which befell European Jewry under the Nazis."

As in the case of the trial of the major war criminals at Nuremberg, there must now pass a period of reappraisal of this historic trial. Was it necessary? Was it just? Was it legal? In this process of reappraisal an invaluable guide is the book, *Eichmann and Accomplices*, written by Dr. Robert M. W. Kempner. This comprehensive work was published in the German language before the trial. It could well have served as a trial memorandum. After reviewing briefly Eichmann's flight from justice, his background, and his civil service career, the book discusses the evidence on the extermination of European Jewry which had been largely adduced at the Nuremberg trials. Dr. Kempner tells this story fully and ties into it the activities of Eichmann as head of the special office of the Gestapo charged with assembling Jews for delivery to concentration camps and extermination centers. Dr. Kempner's book is an important contribution to the record of the "Final Solution of the Jewish Question" by the Nazis under Adolf Hitler and Heinrich Himmler. Whether the participation of Adolf Eichmann in the events which made that record are of such significance in themselves as to have warranted the excessive publicity of his trial, may be doubted, but that Adolf Eichmann was one of those whose deeds compiled that record can never be questioned after one reads *Eichmann and Accomplices*.

Dr. Kempner is publishing a Hebrew edition of his book which will contain additional materials brought to light in the course of the trial of Eichmann, including the judgment against Eichmann. This revised edition will constitute a permanent record of this incredible episode of modern history.

WHITNEY R. HARRIS

*Immunità e Privilegi dei Funzionari delle Organizzazioni Internazionali.* By Alessandro Tommasi di Vignano. (Padua: Cedam, 1961. pp. 93. Index. L. 800.) International organizations have proliferated in the years subsequent to the second World War, and their respective staffs have grown apace. Consequently, questions relating to the privileges and immunities of international civil servants stationed in foreign countries have been presented in ever increasing numbers at the theoretical, administrative and judicial levels of the various host countries.

The author has limited his examination of the subject to a survey of the special status of the functionaries of European organizations (*e.g.*, the European Coal and Steel Community, the European Economic Commission, Euratom.) He has concerned himself with the *ratio* for the privileges and immunities they are accorded; he has attempted to draw and justify distinctions between functionaries and agents; he has identified and analyzed the several privileges and immunities; and, finally, has attempted to determine whether certain customary norms may be said to have already developed.

Although Dr. Di Vignano has wisely limited the scope of his survey and has been liberal in the use of footnotes, the reader may be somewhat disappointed by his failure more deeply to delve in his fascinating subject. One question that leaps to the mind of this reviewer, for instance, and which is alas largely unanswered, is what, if any, effect may there be on the rights and privileges of diplomatic and consular personnel by reason

of the development of a parallel body of rules covering international civil servants?

All in all, this must be termed an introductory study, containing useful leads to source materials and serving to indicate present and possible future divergences in European theory and practice. It would be premature, at this juncture, to expect a definitive opus on the subject.

GEORGE PAVIA

*Die Rechtsstellung der Vatikanstadt.* By Rainer Raffel. (Schriften zur Rechtslehre und Politik, Vol. 31. Edited by Ernst von Hippel. Bonn: H. Bouvier & Co., Verlag, 1961. pp. viii, 175. DM. 17.50.) As the title indicates, the author examines the legal status of the Vatican primarily in light of the Lateran Treaties of 1929, which settled the "Roman Question." The conclusion is reached that the *Città del Vaticano*, although a state, is not a sovereign state, a view which has not gained uniform acceptance among writers on international law. Indeed, the literature has sketchily or inadequately dealt with the position of the Vatican, particularly in relation to the Holy See. Nor has Raffel analyzed this issue as fully as seems desirable. Thus, inadequate treatment is given to the international status of the Holy See between 1870 and 1929, and for the subsequent period the relationship between the Holy See and the Vatican is termed a union *sui generis*. This *sui generis* terminology calls to mind the manner in which entities other than independent states were described when sovereign states were regarded as the sole subjects of international law. Concepts such as those of a real or personal union are dismissed lightly. Yet the position of the Pope as head of the Vatican and of the Holy See reminds one of the German monarchs who were both Kings of Prussia and Emperors of Germany. A similar objection may be raised with regard to the manner in which the treaty power is set forth. Here no proper distinction is drawn between the Concordats which the Holy See may conclude under international law and the treaties which the Holy See may conclude on behalf of the *Città del Vaticano* and in its own capacity.

The internal administration of the Vatican and the relationship vis-à-vis Italy form the basis of two subsequent chapters. In the latter, the difficulties encountered with Fascist Italy, especially during the war, are recounted, yet one searches in vain for an account of the 1944 Caruso incident, a true *cause célèbre*. The situation which prevails under the Republic is, of course, of more import and interest, all the more so because of Article 7 of the *Costituzione Italiana*. In this chapter the author also argues for the unity of the *trattato* and *concordato*, describes the status of the Vatican in case of the abrogation of the Lateran Accord, and presents the debates, which occurred during the constitutional convention, on possible inconsistencies between certain stipulations of the Concordat and of the Constitution. But no specific mention is made of the relationship between Article 34 of the former and Article 29 of the latter, provisions which relate to marriage and which already presented difficulties in 1929. The author makes it quite clear, however, that, in case the two instruments should conflict, the *Patti Lateranensi* would predominate.

GUENTER WEISSBERG

*Portugal's Stand in Africa.* By Adriano Moreira. (New York: University Publishers, 1962. pp. x, 265. \$3.95.) This is a tract by Portugal's current Minister for Overseas Territories, former member of Portuguese Delegations to the United Nations, and professor of colonial studies. The book is a collection of lectures and "pep talks" delivered to various Portu-

guese audiences at various times, tied together by a fervent desire to correct American misunderstanding and oversimplification of Portugal's position. We learn from it that both Communism and neutralism are antithetical to the Portuguese way of life, which, of course, is characterized by the organic national unity of all Portuguese territories and peoples. While France and Britain have already capitulated to the forces of neutralism, little Portugal, moderate, humble, but brave, continues to resist the deluge.

Moreira's treatment of the powers of the United Nations under Chapter XI of the Charter is immediately germane. Not unexpectedly he argues that administering states alone have the right to decide what is or is not a non-self-governing territory with respect to the obligations of Article 73 (e). Hence all contrary actions of the General Assembly are illegal, even if the *travaux préparatoires* for the Charter give some support to subsequent resolutions hugely expanding the scope of Chapter XI. Further, he argues that constitutional and security reasons can be validly invoked to justify the withholding of information for territories which would fall under Article 73 under any doctrine which grants the validity of the "Belgian Thesis"<sup>1</sup> and denies the validity of the neutralist-endorsed "salt water fallacy."<sup>2</sup> How can this Portuguese interpretation of the Charter be made to prevail? Simply and effectively, Moreira suggests, by denying that the General Assembly can ever find categories of questions which are "not important," thus keeping inviolate the two-thirds majority rule on Article 73.

ERNST B. HAAS

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<sup>1</sup> Concerning the "Belgian thesis," according to which Ch. XI of the Charter should apply to all groups and territories, regardless of where they are situated, which have not yet attained self-government, see Kunz, "Chapter XI of the United Nations Charter in Action," 48 A.J.I.L. 103-110, at 108 (1954).

<sup>2</sup> In U. N. discussions, the words "salt water fallacy" have frequently been used to characterize the prevailing thought that Ch. XI should apply only to territories separated by oceans from the metropolitan countries, and not to contiguous territories, even though such territories do not enjoy self-government and may, in fact, be governed as if they were colonies.

\* Mention here neither assures nor precludes later review.

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ELEANOR H. FINCH



## OFFICIAL DOCUMENTS

### GOVERNMENT OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND—GOVERNMENT OF THE KINGDOM OF NORWAY

#### FISHERY AGREEMENT

*Signed at Oslo, November 17, 1960; entered into force on March 3, 1961*<sup>1</sup>

The Government of the United Kingdom of Great Britain and Northern Ireland (hereinafter referred to as "the United Kingdom Government") and the Government of the Kingdom of Norway (hereinafter referred to as "the Norwegian Government");

Taking into account the proposal on the breadth of the territorial sea and fishery limits which was put forward jointly by the Governments of the United States of America and Canada at the Second United Nations Conference on the Law of the Sea in 1960 and which obtained 54 votes;

Affirming their belief that an Agreement to stabilize fishery relations between the two countries should be based on the aforesaid proposal, and

<sup>1</sup> Great Britain, Treaty Series, No. 25 (1961), Cmnd. 1352. Ratifications were exchanged on March 3, 1961. This agreement is one of several recently concluded by Great Britain with respect to British fisheries in the territorial seas claimed by foreign states.

In an exchange of notes signed at Copenhagen on April 27, 1959, modifying the Convention of June 24, 1901, as later amended, concerning the Regulation of Fishing around the Faroe Islands (Great Britain, Treaty Series, No. 55 (1959), Cmnd. 776); Great Britain and Denmark agreed that British fishermen might be excluded from the area defined by a line drawn generally six miles from low-water mark along the coast of the Faroe Islands, but that they might continue, by reason of the fisheries historically exercised, to fish in the waters lying between that line and a line drawn twelve miles from low-water mark along the coast of the Islands. The lines were laid out on an annexed map. The parties agreed that the Agreement would be without prejudice to their views on the delimitation of territorial waters. Concerning this agreement and its background, see Lauterpacht, *Contemporary Practice of the United Kingdom in the Field of International Law—Survey and Comment*, 8 Int. and Comp. Law Q. 171 (1959), and 9 *ibid.* 277 (1960).

The fisheries dispute between Great Britain and Iceland arising out of the latter country's claim to a territorial sea belt of twelve miles measured from straight base lines was resolved by an exchange of notes signed at Reykjavik on March 11, 1961 (Great Britain, Treaty Series, No. 17 (1961), Cmnd. 1328), whereby Great Britain agreed that it would "no longer object to a twelve-mile fishery zone around Iceland" and Iceland agreed to allow British fishing vessels to fish for a period of three years in certain portions of the outer six miles of the twelve-mile fishery zone at certain specified times.

should not contemplate the exclusion of fishing vessels from any area beyond the limits of the fishery zone referred to in that proposal;

Desiring to stabilize fishery relations between the United Kingdom and Norway;

Have agreed as follows:

#### ARTICLE I

For the purpose of this Agreement:—

- (a) the term “mile” means a nautical mile (1,852 metres) reckoned at sixty to one degree of latitude;
- (b) the term “territory” means, in relation to the United Kingdom, the territory of the United Kingdom of Great Britain and Northern Ireland, including the Isle of Man; and in relation to Norway, the territory of the Kingdom of Norway;
- (c) the term “vessel” means any vessel or boat employed in fishing.

#### ARTICLE II

As from a date of which the Norwegian Government shall give due notice to the United Kingdom Government, the latter Government shall not object to the exclusion, by the competent authorities of the Norwegian Government, of vessels registered in the territory of the United Kingdom from fishing in an area contiguous to the territorial sea of Norway extending to a limit of 6 miles from the base line from which that territorial sea is measured.

#### ARTICLE III

During the period between the date referred to in Article II of this Agreement and the thirty-first day of October, 1970, the Norwegian Government shall not object to vessels registered in the territory of the United Kingdom continuing to fish in the zone between the limits of 6 and 12 miles from the base line from which the territorial sea of Norway is measured.

#### ARTICLE IV

After the thirty-first day of October, 1970, the United Kingdom Government shall not object to the exclusion by the competent authorities of the Norwegian Government, of vessels registered in the territory of the United Kingdom from fishing within the limit of 12 miles from the base line from which the territorial sea of Norway is measured.

#### ARTICLE V

If at any time before the thirty-first day of October, 1970, the Norwegian Government considers that there has been a fundamental change in the character of the fishing carried on in the zone referred to in Article III of this Agreement by vessels registered in the territory of the United

Kingdom, the Norwegian Government may raise the matter with the United Kingdom Government, and the two Governments shall together review the position.

#### ARTICLE VI

Except in the case of arrangements between the Norwegian Government and the Government of any other Scandinavian country in respect of the Skagerrak, the Norwegian Government shall accord to vessels registered in the territory of the United Kingdom treatment no less favourable than that accorded to the vessels of other foreign countries.

#### ARTICLE VII

As from the date referred to in Article II of this Agreement, the Contracting Parties shall apply to vessels registered in their respective territories the provisions of the Annexes to this Agreement<sup>2</sup> which shall be an integral part of the Agreement.

#### ARTICLE VIII

Nothing in this Agreement shall be deemed to prejudice the views held by either Contracting Party as to the delimitation and limitation in international law of territorial waters or of exclusive jurisdiction in fishery matters.

#### ARTICLE IX

This Agreement is subject to ratification. The exchange of the instruments of ratification shall take place as soon as possible in London and the Agreement shall enter into force on the date on which the instruments of ratification are exchanged.

In witness whereof the undersigned, being duly authorized thereto by their respective Governments, have signed the present Agreement.

Done in duplicate at Oslo, this seventeenth day of November, 1960, in the English and Norwegian languages, both texts being equally authoritative.

For the United Kingdom Government: For the Norwegian Government:

W. J. M. PATERSON

HALVARD LANGE

<sup>2</sup> The Annexes, not reproduced here, consist of "Rules for the Regulation of the Fisheries" and "Reserved Line and Gill Net Fishing Areas."

REPUBLIC OF INDONESIA-KINGDOM OF  
THE NETHERLANDS

AGREEMENT CONCERNING WEST NEW GUINEA (WEST IRIAN)

*Signed at the Headquarters of the United Nations, August 15, 1962;  
entered into force on September 21, 1962<sup>1</sup>*

The Republic of Indonesia and the Kingdom of the Netherlands,  
Having in mind the interests and welfare of the people of the territory  
of West New Guinea (West Irian) hereinafter referred to as "the  
territory,"

Desirous of settling their dispute regarding the territory,  
Now, therefore, agree as follows:

*Ratification of agreement and resolution of the  
General Assembly of the United Nations*

ARTICLE I

After the present agreement between Indonesia and the Netherlands has  
been signed and ratified by both Contracting Parties, Indonesia and the  
Netherlands will jointly sponsor a draft resolution in the United Nations

<sup>1</sup> Annex to Note by the Secretary General, Aug. 20, 1962, U. N. Doc. No. A/5170  
(1962). The related understandings set forth in U. N. Doc. No. A/5170 at pp. 10-21  
have been omitted.

In the accompanying explanatory memorandum, the Secretary General stated:

"1. The General Assembly considered the dispute between Indonesia and the  
Netherlands regarding the territory of West New Guinea (West Irian) at its ninth,  
tenth, eleventh, twelfth and sixteenth sessions. The Assembly has shown its concern over  
this dispute, but no solution has resulted from past efforts to resolve it.

"2. In recent months, following appeals by the Acting Secretary-General, Indonesia  
and the Netherlands have been engaged in negotiations seeking to resolve their dispute.  
They have been assisted by Ambassador Ellsworth Bunker who, at the request of the  
Acting Secretary-General, has been acting as a mediator. Ambassador Bunker put  
forward certain proposals, on the basis of which an agreement has been reached. The  
Acting Secretary-General has been kept fully informed of the progress of negotiations  
and the results achieved. The final negotiations took place at United Nations Head-  
quarters under his chairmanship.

"3. The Agreement between the Republic of Indonesia and the Kingdom of the  
Netherlands concerning West New Guinea (West Irian) was signed at United Nations  
Headquarters, on 15 August 1962, by representatives of Indonesia and the Netherlands.  
It is subject to ratification prior to the consideration of the item relating to it by the  
General Assembly. It will come into force upon the date of the adoption by the General  
Assembly of a resolution taking note of the Agreement and authorizing the Secretary-  
General to carry out the tasks entrusted to him therein."

On Sept. 20, 1962, the Secretary General informed the General Assembly that instru-  
ments of ratification of the above Agreement had been exchanged at United Nations  
Headquarters by the Republic of Indonesia and the Kingdom of The Netherlands. Note  
by the Secretary General, U. N. Doc. A/5170/Add. 1 (1962). By Res. 1752 (XVII)  
of Sept. 21, 1962, the General Assembly acknowledged the rôle conferred upon the  
Secretary General in the Agreement and authorized him to carry out the tasks entrusted  
to him therein. U. N. Doc. A/RES/1752 (XVII) (1962).

under the terms of which the General Assembly of the United Nations takes note of the present Agreement, acknowledges the role conferred upon the Secretary-General of the United Nations therein, and authorizes him to carry out the tasks entrusted to him therein.

*Transfer of administration*

ARTICLE II

After the adoption of the resolution referred to in Article I, the Netherlands will transfer administration of the territory to a United Nations Temporary Executive Authority (UNTEA) established by and under the jurisdiction of the Secretary-General upon the arrival of the United Nations Administrator appointed in accordance with Article IV. The UNTEA will in turn transfer the administration to Indonesia in accordance with Article XII.

*United Nations Administration*

ARTICLE III

In order to facilitate the transfer of administration to the UNTEA after the adoption of the resolution by the General Assembly, the Netherlands will invite the Secretary-General to send a representative to consult briefly with the Netherlands Governor of the territory prior to the latter's departure. The Netherlands Governor will depart prior to the arrival of the United Nations Administrator.

ARTICLE IV

A United Nations Administrator, acceptable to Indonesia and the Netherlands, will be appointed by the Secretary-General.

ARTICLE V

The United Nations Administrator, as chief executive officer of the UNTEA, will have full authority under the direction of the Secretary-General to administer the territory for the period of the UNTEA administration in accordance with the terms of the present Agreement.

ARTICLE VI

1. The United Nations flag will be flown during the period of United Nations administration.
2. With regard to the flying of the Indonesian and Netherlands flags, it is agreed that this matter will be determined by agreement between the Secretary-General and the respective Governments.

ARTICLE VII

The Secretary-General will provide the UNTEA with such security forces as the United Nations Administrator deems necessary; such forces will primarily supplement existing Papuan (West Irianese) police in the

task of maintaining law and order. The Papuan Volunteer Corps, which on the arrival of the United Nations Administrator will cease being part of the Netherlands armed forces, and the Indonesian armed forces in the territory will be under the authority of, and at the disposal of, the Secretary-General for the same purpose. The United Nations Administrator will, to the extent feasible, use the Papuan (West Irianese) police as a United Nations security force to maintain law and order and, at his discretion, use Indonesian armed forces. The Netherlands armed forces will be repatriated as rapidly as possible and while still in the territory will be under the authority of the UNTEA.

#### ARTICLE VIII

The United Nations Administrator will send periodic reports to the Secretary-General on the principal aspects of the implementation of the present Agreement. The Secretary-General will submit full reports to Indonesia and the Netherlands and may submit, at his discretion, reports to the General Assembly or to all United Nations Members.

#### *First phase of the UNTEA administration*

#### ARTICLE IX

The United Nations Administrator will replace as rapidly as possible top Netherlands officials as defined in Annex A<sup>2</sup> with non-Netherlands, non-Indonesian officials during the first phase of the UNTEA administration which will be completed on 1 May 1963. The United Nations Administrator will be authorized to employ on a temporary basis all Netherlands officials other than top Netherlands officials defined in Annex A, who wish to serve the UNTEA, in accordance with such terms and conditions as the Secretary-General may specify. As many Papuans (West Irianese) as possible will be brought into administrative and technical positions. To fill the remaining required posts, the UNTEA will have authority to employ personnel provided by Indonesia. Salary rates prevailing in the territory will be maintained.

#### ARTICLE X

Immediately after the transfer of administration to the UNTEA, the UNTEA will widely publicize and explain the terms of the present Agreement, and will inform the population concerning the transfer of administration to Indonesia and the provisions for the act of self-determination as set out in the present Agreement.

#### ARTICLE XI

To the extent that they are consistent with the letter and spirit of the present Agreement, existing laws and regulations will remain in effect. The UNTEA will have the power to promulgate new laws and regulations or amend them within the spirit and framework of the present Agreement.

<sup>2</sup> Not reproduced here.

The representative councils will be consulted prior to the issuance of new laws and regulations or the amendment of existing laws.

*Second phase*

ARTICLE XII

The United Nations Administrator will have discretion to transfer all or part of the administration to Indonesia at any time after the first phase of the UNTEA administration. The UNTEA's authority will cease at the moment of transfer of full administrative control to Indonesia.

ARTICLE XIII

United Nations security forces will be replaced by Indonesian security forces after the first phase of the UNTEA administration. All United Nations security forces will be withdrawn upon the transfer of administration to Indonesia.

*Indonesian administration and self-determination*

ARTICLE XIV

After the transfer of full administrative responsibility to Indonesia, Indonesian national laws and regulations will in principle be applicable in the territory, it being understood that they be consistent with the rights and freedoms guaranteed to the inhabitants under the terms of the present Agreement. New laws and regulations or amendments to the existing ones can be enacted within the spirit of the present Agreement. The representative councils will be consulted as appropriate.

ARTICLE XV

After the transfer of full administrative responsibility to Indonesia, the primary task of Indonesia will be further intensification of the education of the people, of the combating of illiteracy, and of the advancement of their social, cultural and economic development. Efforts also will be made in accordance with present Indonesian practice to accelerate the participation of the people in local government through periodic elections. Any aspects relating to the act of free choice will be governed by the terms of this Agreement.

ARTICLE XVI

At the time of the transfer of full administrative responsibility to Indonesia a number of United Nations experts, as deemed adequate by the Secretary-General after consultation with Indonesia, will be designated to remain wherever their duties require their presence. Their duties will, prior to the arrival of the United Nations Representative, who will participate at the appropriate time in the arrangements for self-determination, be limited to advising on and assisting in preparations for carrying out the provisions for self-determination except in so far as Indonesia and the Secretary-General may agree upon their performing other expert functions.

They will be responsible to the Secretary-General for the carrying out of their duties.

#### ARTICLE XVII

Indonesia will invite the Secretary-General to appoint a Representative who, together with a staff made up, *inter alia*, of experts referred to in Article XVI, will carry out the Secretary-General's responsibilities to advise, assist and participate in arrangements which are the responsibility of Indonesia for the act of free choice. The Secretary-General will, at the proper time, appoint the United Nations Representative in order that he and his staff may assume their duties in the territory one year prior to the date of self-determination. Such additional staff as the United Nations Representative might feel necessary will be determined by the Secretary-General after consultations with Indonesia. The United Nations Representative and his staff will have the same freedom of movement as provided for the personnel referred to in Article XVI.

#### ARTICLE XVIII

Indonesia will make arrangements, with the assistance and participation of the United Nations Representative and his staff, to give the people of the territory the opportunity to exercise freedom of choice. Such arrangements will include:

(a) Consultations (Musjawarah) with the representative councils on procedures and appropriate methods to be followed for ascertaining the freely expressed will of the population.

(b) The determination of the actual date of the exercise of free choice within the period established by the present Agreement.

(c) Formulation of the questions in such a way as to permit the inhabitants to decide (a) whether they wish to remain with Indonesia; or (b) whether they wish to sever their ties with Indonesia.

(d) The eligibility of all adults, male and female, not foreign nationals to participate in the act of self-determination to be carried out in accordance with international practice, who are resident at the time of the signing of the present Agreement and at the time of the act of self-determination, including those residents who departed after 1945 and who return to the territory to resume residence after the termination of Netherlands administration.

#### ARTICLE XIX

The United Nations Representative will report to the Secretary-General on the arrangements arrived at for freedom of choice.

#### ARTICLE XX

The act of self-determination will be completed before the end of 1969.

#### ARTICLE XXI

1. After the exercise of the right of self-determination, Indonesia and the United Nations Representative will submit final reports to the Secretary-



General who will report to the General Assembly on the conduct of the act of self-determination and the results thereof.

2. The Parties to the present Agreement will recognize and abide by the results of the act of self-determination.

### *Rights of the inhabitants*

#### ARTICLE XXII

1. The UNTEA and Indonesia will guarantee fully the rights, including the rights of free speech, freedom of movement and of assembly, of the inhabitants of the area. These rights will include the existing rights of the inhabitants of the territory at the time of the transfer of administration to the UNTEA.

2. The UNTEA will take over existing Netherlands commitments in respect of concessions and property rights.

3. After Indonesia has taken over the administration it will honour those commitments which are not inconsistent with the interests and economic development of the people of the territory. A joint Indonesian-Netherlands commission will be set up after the transfer of administration to Indonesia to study the nature of the above-mentioned concessions and property rights.

4. During the period of the UNTEA administration there will be freedom of movement for civilians of Indonesian and Netherlands nationalities to and from the territory.

#### ARTICLE XXIII

Vacancies in the representative councils caused by the departure of Netherlands nationals, or for other reasons, will be filled as appropriate consistent with existing legislation by elections, or by appointment by the UNTEA. The representative councils will be consulted prior to the appointment of new representatives.

### *Financial matters*

#### ARTICLE XXIV

1. Deficits in the budget of the territory during the UNTEA administration will be shared equally by Indonesia and the Netherlands.

2. Indonesia and the Netherlands will be consulted by the Secretary-General in the preparation of the UNTEA budget and other financial matters relating to United Nations responsibilities under the present Agreement; however, the Secretary-General will have the final decision.

3. The Parties to the present Agreement will reimburse the Secretary-General for all costs incurred by the United Nations under the present Agreement and will make available suitable funds in advance for the discharge of the Secretary-General's responsibilities. The Parties to the present Agreement will share on an equal basis the costs of such reimbursements and advances.

*Previous treaties and Agreement*

## ARTICLE XXV

The present Agreement will take precedence over any previous agreement on the territory. Previous treaties and agreements regarding the territory may therefore be terminated or adjusted as necessary to conform to the terms of the present Agreement.

*Privileges and immunities*

## ARTICLE XXVI

For the purposes of the present Agreement, Indonesia and the Netherlands will apply to United Nations property, funds, assets and officials the provisions of the Convention on the Privileges and Immunities of the United Nations. In particular, the United Nations Administrator, appointed pursuant to Article IV, and the United Nations Representative, appointed pursuant to Article XVII, will enjoy the privileges and immunities specified in Section 19 of the Convention on the Privileges and Immunities of the United Nations.

*Ratification*

## ARTICLE XXVII

1. The present Agreement will be ratified in accordance with the constitutional procedures of the Contracting Parties.
2. The instruments of ratification will be exchanged as soon as possible at the Headquarters of the United Nations by the accredited representatives of the Contracting Parties.
3. The Secretary-General will draw up a *procès-verbal* of the exchange of the instruments of ratification and will furnish a certified copy thereof to each Contracting Party.

*Entry into force*

## ARTICLE XXVIII

1. The present Agreement will enter into force upon the date of the adoption by the General Assembly of the resolution referred to in Article I of the present Agreement.
2. Upon the entry into force of the present Agreement, the Secretary-General of the United Nations will register it in accordance with Article 102 of the Charter.

*Authentic text*

## ARTICLE XXIX

The authentic text of the present Agreement is drawn up in the English language. Translations in the Indonesian and Netherlands languages will be exchanged between the Contracting Parties.

IN WITNESS WHEREOF the undersigned plenipotentiaries, being duly authorized for that purpose by their respective Governments, have signed the present Agreement.

Done at the Headquarters of the United Nations, New York, on this fifteenth day of August 1962, in three identical copies, of which one shall be deposited with the Secretary-General and one shall be furnished to the Government of each of the Contracting Parties.

(Signed) Subandrio  
For the Republic of Indonesia

(Signed) J. H. van Roijen  
For the Kingdom of the Netherlands

(Signed) C. Schurmann  
For the Kingdom of the Netherlands

## THE PERMANENT COURT OF ARBITRATION

### RULES OF ARBITRATION AND CONCILIATION FOR SETTLEMENT OF INTERNATIONAL DISPUTES BETWEEN TWO PARTIES OF WHICH ONLY ONE IS A STATE<sup>1</sup>

In case of international disputes between two parties of which only one is a State, the International Bureau of the Permanent Court of Arbitration is authorized to place its premises and organization at the disposal of the parties desirous of having recourse to either the arbitration procedure, or the conciliation procedure, or the conciliation procedure followed, in case of non-conciliation, by the arbitration procedure.

Application to the Bureau shall be made by an arrangement between the parties on the basis of the following provisions.

#### SECTION I

##### ARBITRATION

##### A. GENERAL DISPOSITIONS

##### *Article 1*

In case of arbitration in an international dispute between two parties of which only one is a State, the International Bureau of the Permanent Court of Arbitration, hereinafter called "the Bureau," is authorized to place its premises and organization at the disposal of the parties for the purposes of the arbitration, in accordance with Article 47 of the Convention for the Pacific Settlement of International Disputes of 18th October, 1907<sup>2</sup> (Article 26 of the Convention of 29th July, 1899).<sup>3</sup>

<sup>1</sup> Elaborated by the International Bureau of the Permanent Court of Arbitration in February, 1962. The Rules were drawn up in both English and in French. The above text is reproduced from a mimeographed text furnished to the JOURNAL through the courtesy of the Secretary General of the Permanent Court of Arbitration. Concerning the background of these Rules, see Circular Note of the Secretary General, March 3, 1960, 54 A.J.I.L. 933, 937 (1960).

<sup>2</sup> 2 A.J.I.L. Supp. 43, 62 (1908).

<sup>3</sup> 1 *ibid.* 107, 118 (1907).

*Article 2*

The State concerned must be a Contracting Power of one of the Conventions mentioned in Article 1.

*Article 3*

If both parties are agreed on settling the dispute by arbitration in accordance with Article 1, either of them may address a request to the Bureau to that end. The request may also be submitted by both parties together.

The request, in triplicate, shall contain the names of the parties, a summary statement of the dispute, the subject-matter of the claim and the text of the submission or arbitral clause, and may also state the composition of the Tribunal.

The Bureau shall, where appropriate, send a copy of the request to the other party.

*Article 4*

The arbitral Tribunal, which shall be the judge of its own competence, shall have the power to interpret the instruments on which that competence is based.

*Article 5*

Unless agreed upon to the contrary by the parties, the Tribunal shall be composed of three arbitrators. If the parties cannot agree on the choice of the arbitrators, either of them may apply to the Bureau in order to solicit its co-operation in that behalf.

In that case the Bureau shall submit to both parties an identical list containing the names of persons whose number must be twice that of the arbitrators to be appointed by the Bureau.

The parties shall return that list, indicating the names of those they would be willing to accept and enumerating them in sequence of their preference.

On the basis of these lists the Bureau shall constitute the Tribunal, selecting persons whom both parties have deemed acceptable.

In case no agreement between the parties is reached, the Bureau shall appoint the President amongst the chosen members.

If there are not enough persons acceptable to both parties or if one or more of the persons invited do not accept the appointment, the Bureau shall continue its efforts to arrive at the constitution of the Tribunal in agreement with the parties.

*Article 6*

If no agreement is reached, as mentioned in the last paragraph of Article 5, the Secretary General of the Permanent Court of Arbitration shall proceed to appoint the arbitrators in cases where the parties have expressly entrusted this task to him.

The parties may authorize the Secretary General to proceed likewise in

cases where the Tribunal has not been constituted within the time fixed by the parties in concert.

The number of arbitrators must be uneven.

#### *Article 7*

The arbitration shall take place in the Peace Palace at The Hague, unless the parties decide otherwise in agreement with the Bureau.

#### *Article 8*

The amount of the expenses incurred by the Bureau in respect of the arbitration, as fixed by the Bureau, shall be charged to the parties.

#### *Article 9*

Each party undertakes to pay, at the beginning of the arbitration, an amount fixed by the Bureau to defray the costs of the Bureau.

### B. RULES OF PROCEDURE

#### *Article 10*

Unless agreed upon to the contrary by the parties, the rules of procedure contained in the following articles shall be applicable.

#### *Article 11*

The respondent may introduce a counter-claim against the claimant, provided that this counter-claim be directly connected with the subject-matter of the request.

The Tribunal, constituted in order to decide on the principal claim, shall likewise decide on the counter-claim.

#### *Article 12*

Once the Tribunal has been constituted, its composition shall remain unchanged until the award has been pronounced.

As long as the proceedings before the Tribunal have not yet begun, each party may replace an arbitrator appointed by it, and the parties may agree on replacing the arbitrators who have been appointed by mutual consent or by the Bureau.

The proceedings shall be deemed to have begun when the President of the Tribunal or the sole Arbitrator has made the first procedural order.

#### *Article 13*

Should a vacancy occur, before or after the beginning of the proceedings, on account of either the death or the incapacity or the resignation of an arbitrator, the vacancy shall be filled in accordance with the procedure prescribed for the original appointment.

*Article 14*

When a vacancy has been filled after the proceedings have begun, they shall continue from the point they had reached at the time the vacancy occurred. The newly appointed Arbitrator may, however, require that the oral proceedings shall be recommenced from the beginning if they have already been started.

*Article 15*

The Tribunal shall determine whether written pleadings shall be delivered before the oral hearings take place. If the Tribunal prescribes written proceedings, the President shall fix the number of statements to be submitted by the parties, as well as the time-limits for submitting these statements. The Bureau shall give notice thereof to the parties, who shall send their statements to the Bureau; the latter shall transmit them to the other party and prepare the file for the arbitration.

The President shall determine the time and place of the first hearing. The Bureau shall give notice thereof to the parties in good time. The same shall apply to further hearings, of the need for which the Tribunal shall be the sole judge.

*Article 16*

If the respondent fails to file his answer within the time-limit determined by the President, the President shall nevertheless fix the place and time for the hearing. If the respondent, being duly summoned, fails to enter an appearance, the Tribunal may give judgment in favour of the claimant, provided it is satisfied that his claims are well-founded in fact and in law. The Tribunal may also order another hearing if it deems this advisable.

If the claimant fails to enter an appearance, the Tribunal may either dismiss the claim or, in its discretion, fix a date for another hearing.

*Article 17*

Each party may be represented or assisted by counsel. It shall notify the other party of its intention in that behalf at the earliest possible time. Submission by counsel of the request shall take the place of such notice.

The Tribunal shall decide what other persons besides the parties and their counsel may attend the hearing.

*Article 18*

If the Tribunal deems it useful, it may visit the *locus in quo*; the parties may be present.

*Article 19*

The Tribunal shall determine the procedure and the duration of the proceedings. It shall be free to designate the party on which the burden of proof lies and likewise to evaluate the evidence produced.

*Article 20*

The claimant may withdraw his request as long as the respondent has not filed a written answer or, if no written pleadings are exchanged, at any time before the Tribunal has fixed the date for the hearing.

*Article 21*

The Tribunal shall be competent to complete the rules of procedure.

*Article 22*

If the compromise has not specified the language to be employed, this shall be decided by the Tribunal.

*Article 23*

The hearings shall be conducted by the President. They shall be public only if the Tribunal so decides with the consent of the parties.

A record shall be kept of each hearing, which shall be signed by the President and by a registrar or secretary; only records so signed shall be authentic.

*Article 24*

The Tribunal or, in urgent cases, its President shall have the power to prescribe provisional or conservatory measures, if they consider that the circumstances so demand.

If one of the parties cannot agree to the measures prescribed by the President, it may ask for a decision by the Tribunal. Pending such decision, the measures shall remain in force.

*Article 25*

When, subject to the control of the Tribunal, the parties have completed the presentation of their case, the hearings shall be declared closed.

However, so long as the award has not been rendered, the Tribunal shall have the power to reopen the hearings after their closure on the ground that new evidence is forthcoming of such a nature as to have a decisive influence on its award, or if, on closer examination, it desires to be clarified on certain specific points.

*Article 26*

The award shall normally be rendered within the period fixed by the parties, but the Tribunal may decide to extend the said period if it would otherwise be unable to render the award.

*Article 27*

The deliberations of the Tribunal shall remain secret.

*Article 28*

The arbitral award shall be drawn up in writing and dated on the day on which it is rendered. It shall contain the names of the arbitrators and shall be signed by the president and by the members of the Tribunal. Should one or more of the arbitrators refuse to sign, the award shall mention this. Refusal of the minority to sign shall not invalidate the award.

The award shall not mention the dissenting opinion of the minority.

The award shall be deemed to have been rendered when it has been read out at a public session, the agents of the parties being present or duly summoned to appear.

The award shall immediately be communicated to the parties.

The Tribunal may decide that there shall not be a public session at which the award will be read. In that case the award must be considered [as] having been rendered on the day mentioned therein.

*Article 29*

The award shall state the reasons on which it is based for every point on which it rules, unless the parties agree otherwise.

*Article 30*

The Tribunal shall decide on the basis of respect for law, unless an agreement between the parties provides for it to rule *ex aequo et bono*.

*Article 31*

Once rendered, the award shall be binding upon the parties. It shall be carried out in good faith immediately, unless the Tribunal has fixed a time-limit for the whole or part of its execution.

*Article 32*

After having consulted the Secretary General of the Permanent Court of Arbitration, the Tribunal shall fix the amount of the indemnities to be paid to the arbitrators, including travelling and lodging expenses, and their fees.

The amount of the fees shall be mentioned in the award.

*Article 33*

The apportionment of the costs of arbitration, as referred to in Article 8 and in the first paragraph of Article 32, shall be determined by decision of the Tribunal.

Each party shall bear its own costs in respect of legal, technical or administrative assistance.

*Article 34*

All decisions of the Tribunal shall be taken by a majority vote.



## SECTION II

## CONCILIATION

## A. GENERAL DISPOSITIONS

*Article 1*

In case of conciliation in an international dispute between two parties of which only one is a State, the International Bureau of the Permanent Court of Arbitration, hereinafter called "the Bureau," is authorized to place its premises and organization at the disposal of the parties for the purposes of a Conciliation Commission on the same terms as those laid down for arbitration in the Rules of Arbitration.

*Article 2*

The State concerned must be a Contracting Power of one of the Conventions mentioned in Article 1 of the Rules of Arbitration.

*Article 3*

If both parties are agreed that the dispute be submitted to a Conciliation Commission in accordance with Article 1, either of them may address a request to the Bureau to that end. The request may also be submitted by both parties together.

The request, in triplicate, shall contain a summary statement of the dispute.

The Bureau shall, where appropriate, send a copy of the request to the other party.

*Article 4*

Unless agreed upon to the contrary by the parties, the Commission shall be composed of three members.

If the parties cannot agree on the constitution of the Commission, either of them may apply to the Bureau in order to solicit its co-operation in that behalf.

In that case the Bureau shall submit to both parties an identical list containing the names of persons, whose number must be twice that of the members of the Commission to be appointed by the Bureau.

The parties shall return that list, indicating the names of those they would be willing to accept and enumerating them in sequence of their preference.

The Bureau shall constitute the Commission on the basis of these lists, selecting persons acceptable to the parties.

In case no agreement between the parties is reached, the Bureau shall appoint the President amongst the chosen members.

If there are not enough persons acceptable to both parties, or if one or more of the persons invited do not accept the appointment, the Bureau shall continue its efforts to arrive at the constitution of a Commission acceptable to the parties.

*Article 5*

The Secretary General shall be authorized to proceed to the designation of the members of the Commission if, within 6 months from the date of receipt of the request at the Bureau (as mentioned in Article 3), the Commission has not yet been constituted.

*Article 6*

The Commission shall meet in the Peace Palace, unless the parties decide otherwise in agreement with the Bureau.

*Article 7*

The amount of the expenses incurred by the Bureau in respect of the conciliation shall be charged to the parties. They shall be fixed by the Bureau.

*Article 8*

Each party undertakes to pay, at the beginning of the conciliation, an amount fixed by the Bureau to defray the costs.

*Article 9*

The task of the Commission shall be to elucidate the questions in dispute, to collect with that object all useful information by means of enquiry or otherwise, and to endeavour to bring the parties to an agreement. It may, after examining the case, inform the parties of the terms of settlement which seem suitable to it. The parties undertake to study with the utmost good will the recommendations submitted to them by the Commission.

*Article 10*

The parties undertake to facilitate the work of the Commission, and particularly to furnish it to the greatest possible extent with all relevant documents and information.

## B. RULES OF PROCEDURE

*Article 11*

The following rules of procedure shall be applicable in whole or in part, unless agreed upon otherwise by the parties.

*Article 12*

The Conciliation Commission shall lay down its own procedure, which must provide for both parties being heard. In regard to enquiries, the Commission, unless it decides unanimously to the contrary, shall act in accordance with the provisions of Part III of the Hague Convention of 18th October, 1907, for the Pacific Settlement of International Disputes.

The parties shall be represented before the Commission by agents, whose task shall be to act as intermediaries between them and the Commission; they may, moreover, be assisted by counsel and experts nominated by them for that purpose and may request that all persons whose evidence appears to them desirable shall be heard.

The Commission, for its part, shall be entitled to request oral explanations from the agents, counsel and experts of the parties, as well as from all persons it may think desirable to summon.

The President shall fix the time and place of the meetings.

#### *Article 13*

At the end of its enquiry the Conciliation Commission shall inform the agents, orally or in writing, of the terms of a draft arrangement which it deems fit to recommend for being accepted by the parties, inviting them to declare their intentions within a fixed time-limit. It shall point out to the agents, orally or in writing, the arguments which seem to work in favour of that acceptance.

#### *Article 14*

If the parties accept the proposed arrangement, an official report will be drawn up which reproduces its terms and which will be signed by the President and the secretary. A copy signed by the President and the secretary will be delivered to the parties.

#### *Article 15*

If the parties or one of them do not accept the arrangement and the Commission deems it superfluous to try to obtain the agreement of the parties on different terms, an official report shall be drawn up on the conditions as mentioned above which, without reproducing the terms of the proposed arrangement, shall state that it has not been possible to conciliate the parties.

#### *Article 16*

The Commission shall sit in private; the commissaries and the agents shall refrain from any divulgence of either documents, produced or received, or statements, made or heard, or any writing, in respect of the course of the proceedings, unless the Commission has agreed thereto.

#### *Article 17*

With the exception of the elements of proof possibly resulting from either survey reports, or constats [verifications] made on the sites or interrogatories of witnesses, minutes of which the agents will have received, the obligation to respect the secrecy of the proceedings and deliberations shall subsist for the parties as well as for the members of the Commission after the close of the proceedings and shall even extend to the terms of the settlement in case the Commission has been able to conciliate the

parties, unless these agree in authorizing the publication of the documents of the proceedings, in whole or in part.

#### *Article 18*

With the exception of the official reports aimed at [envisaged] in the beginning of Article 17, nothing of what has taken place before the Conciliation Commission shall invalidate the rights of the parties in arbitral or judicial proceedings.

#### *Article 19*

After consulting the Secretary General of the Permanent Court of Arbitration, the Commission shall fix the amount of the indemnities to be paid to the members of the Commission, including cost of travelling and lodging, and their fees.

The amount of the fees shall be mentioned in the arrangement.

#### *Article 20*

Each party shall bear an equal share of the general expenses occasioned by the working of the Commission.

The apportionment of the costs of conciliation, as referred to in Articles 7 and 19, shall be determined by the Commission.

Each party shall bear its own costs in respect of legal, technical or administrative assistance.

#### *Article 21*

All decisions of the Commission shall be taken by a majority vote.

### SECTION III

#### CONCILIATION AND ARBITRATION

##### *Article 1*

The parties in dispute, mentioned in Sections I and II of this set of rules, may agree to submit the dispute firstly to the conciliation procedure and, where the Conciliation Commission has found that the parties cannot be reconciled, then to the arbitration procedure.

##### *Article 2*

In the case referred to in Article 1, the conciliation and the arbitration shall take place in accordance with the rules laid down in Sections I and II respectively.

##### *Article 3*

The members of the Conciliation Commission may not be members of the arbitral Tribunal.

## SUBMISSION CLAUSE

The parties desirous of having recourse to the services of the Bureau can put a clause in their contracts in question, which might contain the following wording:

"The parties agree to submit any dispute derived from the present contract or from those resulting therefrom to a procedure of

a. arbitration

b. conciliation

c. conciliation, followed, in case of non-conciliation by arbitration.

"For this purpose the parties shall apply to the services of the Bureau

"of the Permanent Court of Arbitration at The Hague. They shall

"accept the "Set of Rules on arbitration and conciliation in international

"disputes between two parties of which only one is a State", elaborated

"by the Bureau on ..... ;

"however, they will be free to replace the rules of procedure by other

"ones on which they should have agreed (alternatively: by the disposi-

"tions contained in the Annex to this contract)

The parties shall at the moment of the conclusion of the contract choose between clauses a, b and c, according to the nature of the case. If they wish so, the parties can, where they think this appropriate, in the arbitration clause, entrust to the Bureau the competence provided for in Article 6 of the Set of Arbitration Rules.

## ELUCIDATION

## OF THE

## MODEL SET OF RULES FOR ARBITRATION AND CONCILIATION

The Bureau of the Permanent Court of Arbitration is authorized, under the rules regarding this Court, to put its organization and premises at the disposal of States Members, desirous of settling a dispute, even if the other party is not a State. Notably are concerned disputes between a State, on the one part, and an important private company or "concern," on the other part.

With a view to settling disputes between States and private companies or persons, the Bureau of the Permanent Court of Arbitration has elaborated a model Set of Rules of procedure. This Set of Rules opens the way for arbitration or conciliation, and even offers the possibility of first having recourse to conciliation and afterwards, if that fails, to arbitration. The parties are free to follow the way which is convenient to them; the insertion of a simple clause in their agreement at the moment of its conclusion can mention these possibilities or one of them.

The Set of Rules has the character of a model. The parties are at liberty, if they deem this desirable, to fix other rules of procedure. These model rules have been based on a certain number of general stipulations which are customary in practice.

The Bureau can help the parties, if they wish so, in choosing the arbi-

trators or conciliators, by sending to each party a list containing at least twice the required number of persons who, in the opinion of the Bureau, possess the qualities required for this task. The parties are not obliged to conform to the suggestions of the Bureau. It might happen that the parties cannot agree on any of the persons suggested by the Bureau.

If a conciliation is concerned, the Bureau will be authorized—unless the parties, in common consent, would have refused to grant that competence to it—to proceed to the designation of the members of the Commission. That case is provided for by Article 5 of the model Rules of Conciliation.

If an arbitration is concerned, the Bureau will continue its efforts until an agreement between the parties is reached or until it is definitely established that such an agreement cannot be reached. Only if the parties have entrusted to the Bureau the special competence provided for in Article 6 of the model Rules of Arbitration, the Bureau itself will proceed to designate the arbitrators. The difference existing between conciliation and arbitration justifies the existence of two texts.

Neither the parties, nor the Bureau are obliged, in their choice or proposals, to only adhere to the list of members of the Permanent Court of Arbitration.

As regards the expenses, a distinction should be made between the fees of the conciliators and arbitrators and the purely administrative costs (costs of the Bureau). The fees of the conciliators and arbitrators are charged to the parties; Articles 32 and 33 of Section I as well as 19 and 20 of Section II contain dispositions regarding thereto. The Bureau puts its localities [premises] and permanent staff at the disposal of the parties; only the extra expenses, possibly to be paid by the Bureau resulting from engagement of extra-personnel, interpreters, stenographers or from overtime hours would be incumbent on the parties, each of them having to pay half thereof. In arbitration as well as in conciliation the model rules impose upon each party payment of its own costs for legal, technical and administrative assistance.

These elucidations do not aim at giving an extensive description of the model rules or a detailed justification of the proposed regulations. They are only intended to give a concise exposition of the general tendency of the rules. For all useful purposes it is pointed out that recourse to the Permanent Court of Arbitration is reserved to States adhering to either the Convention of 1899 or that of 1907. Only by virtue of the dispositions of said Conventions the Bureau has the competence to offer its services in this matter. Up till now 60 States adhere to the Permanent Court of Arbitration, but an increase of this number is to be anticipated in the near future.

From 1960 onwards invitations to adhere to these conventions have been sent by the Depositary State, the Government of the Netherlands, to all the States Members of the United Nations. No time limit has been fixed with regard to that adhesion so that a State can accept that invitation at the moment it would think opportune, for instance, if it wishes to have a dispute settled according to the procedure provided for in the conventions.

Thus it can be said that, in practice, these model rules are at the disposal of all States which are Members of the United Nations.

The Bureau will favourably receive any suggestions made to it aiming at alterations in the model set of rules, made with a view to furthering their purpose, namely promotion of a pacific settlement of disputes between Governments and private companies.

## UNITED STATES

### PROCLAMATION 3504<sup>1</sup>

#### INTERDICTION OF THE DELIVERY OF OFFENSIVE WEAPONS TO CUBA

By the President of the United States of America  
A Proclamation

WHEREAS the peace of the world and the security of the United States and of all American States are endangered by reason of the establishment by the Sino-Soviet powers of an offensive military capability in Cuba, including bases for ballistic missiles with a potential range covering most of North and South America;

WHEREAS by a Joint Resolution passed by the Congress of the United States and approved on October 3, 1962, it was declared that the United States is determined to prevent by whatever means may be necessary, including the use of arms, the Marxist-Leninist regime in Cuba from extending, by force or the threat of force, its aggressive or subversive activities to any part of this hemisphere, and to prevent in Cuba the creation or use of an externally supported military capability endangering the security of the United States; and

WHEREAS the Organ of Consultation of the American Republics meeting in Washington on October 23, 1962, recommended that the Member States, in accordance with Articles 6 and 8 of the Inter-American Treaty of Reciprocal Assistance, take all measures, individually and collectively, including the use of armed force, which they may deem necessary to ensure that the Government of Cuba cannot continue to receive from the Sino-Soviet powers military material and related supplies which may threaten the peace and security of the Continent and to prevent the missiles in Cuba with offensive capability from ever becoming an active threat to the peace and security of the Continent:

Now, THEREFORE, I, JOHN F. KENNEDY, President of the United States of America, acting under and by virtue of the authority conferred upon me by the Constitution and statutes of the United States, in accordance with the aforementioned resolutions of the United States Congress and of the Organ of Consultation of the American Republics, and to defend the

<sup>1</sup> 27 Fed. Reg. 10401 (1962), 47 Dept. of State Bulletin 717 (1962). The President proclaimed that he had, effective Nov. 20, 1962, terminated the authority conferred on the Secretary of Defense by Proclamation 3504 and had revoked the orders to U. S. forces contained therein. Proclamation 3507, Nov. 21, 1962, 27 Fed. Reg. 11525 (1962), 47 Dept. of State Bulletin 918 (1962).

security of the United States, do hereby proclaim that the forces under my command are ordered, beginning at 2:00 P.M. Greenwich time October 24, 1962, to interdict, subject to the instructions herein contained, the delivery of offensive weapons and associated materiel to Cuba.

For the purposes of this Proclamation, the following are declared to be prohibited materiel:

Surface-to-surface missiles; bomber aircraft; bombs, air-to-surface rockets and guided missiles; warheads for any of the above weapons; mechanical or electronic equipment to support or operate the above items; and any other classes of materiel hereafter designated by the Secretary of Defense for the purpose of effectuating this Proclamation.

To enforce this order, the Secretary of Defense shall take appropriate measures to prevent the delivery of prohibited materiel to Cuba, employing the land, sea and air forces of the United States in cooperation with any forces that may be made available by other American States.

The Secretary of Defense may make such regulations and issue such directives as he deems necessary to ensure the effectiveness of this order, including the designation, within a reasonable distance of Cuba, of prohibited or restricted zones and of prescribed routes.

Any vessel or craft which may be proceeding toward Cuba may be intercepted and may be directed to identify itself, its cargo, equipment and stores and its ports of call, to stop, to lie to, to submit to visit and search, or to proceed as directed. Any vessel or craft which fails or refuses to respond to or comply with directions shall be subject to being taken into custody. Any vessel or craft which it is believed is en route to Cuba and may be carrying prohibited materiel or may itself constitute such materiel shall, wherever possible, be directed to proceed to another destination of its own choice and shall be taken into custody if it fails or refuses to obey such directions. All vessels or craft taken into custody shall be sent into a port of the United States for appropriate disposition.

In carrying out this order, force shall not be used except in case of failure or refusal to comply with directions, or with regulations or directives of the Secretary of Defense issued hereunder, after reasonable efforts have been made to communicate them to the vessel or craft, or in case of self-defense. In any case, force shall be used only to the extent necessary.

IN WITNESS WHEREOF, I have hereunto set my hand and caused the seal of the United States of America to be affixed.

Done in the City of Washington this twenty-third day of October in the year of our Lord, nineteen hundred and sixty-two, and of the [SEAL] Independence of the United States of America the one hundred and eighty-seventh.

JOHN FITZGERALD KENNEDY

7:06 p.m.,

October 23rd 1962

By the President:

DEAN RUSK,

*Secretary of State.*



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## DEFENSIVE QUARANTINE AND THE LAW

BY LEONARD C. MEERKEB

*Deputy Legal Adviser, Department of State*

Law in the twentieth century, no more than modern science, can be expected to stand still, especially in the developing area of international relations. We see change going on everywhere. Change is the product of new circumstances and the response to new conditions in the international environment.

It cannot be surprising that no settled law was ready at hand to deal with the situation created by the clandestine Soviet introduction of strategic missiles into Cuba in 1962. That situation was unprecedented. It required intensive study and exhaustive consideration of possible courses of action to remove the threat apprehended from the Soviet actions. Varying processes of analysis could be pursued and a number of theories could be relied on to attack or to sustain the legal validity of the defensive quarantine adopted by the United States in October, 1962. Rather than explore or seek to evaluate arguments in this wide range, the present report will confine itself to a description of the basis in international law upon which the United States Government has rested the measures which it took.

In the days after the missiles were discovered in Cuba and before the proclamation of defensive quarantine was issued, officials of the Government were well aware of the novelty and difficulty of the question presented. They were concerned that any actions to be taken by the United States should rest on the soundest foundation in law and should appear in that light to all the world, including the Government of the Soviet Union.

### *Traditional International Law*

The quarantine was designed to prevent the further introduction of strategic missiles into Cuba. Because it had this purpose of interdiction and because naval vessels would be used to carry it out, the press and other commentators were quick to analogize the quarantine to the concept of "blockade" in international law. To the extent that traditional "blockade" implies and requires a state of belligerency or war, the United States did not seek to justify the quarantine as a blockade. There was no assertion of a state of war or belligerency.

Such conditions would not form the sole basis for measures such as the defensive quarantine. Another concept in traditional international law is that of "peaceful blockade." Whatever the views that may be held as to the availability of such a doctrine, the United States did not rest its case on that ground.

The available and relevant sources of law applicable to the situation of Soviet strategic missiles in Cuba did not stop with the international law of the nineteenth century or that in existence at the beginning of World War II. New legal structures had been built in the aftermath of the war. Two are of special importance here: the Inter-American Treaty of Reciprocal Assistance and the Charter of the United Nations. Let us look first at the Rio Treaty of 1947.<sup>1</sup>

### *The Rio Treaty*

The Rio Treaty was concluded by all of the American Republics in order "to assure peace, through adequate means, to provide for effective reciprocal assistance to meet armed attacks against any American State, and . . . to deal with threats of aggression against any of them." The treaty provides for collective action, not only in the case of armed attack, which is covered by Article 3, but also:

If the inviolability or the integrity of the territory or the sovereignty or political independence of any American State should be affected by an aggression which is not an armed attack . . . or by any other fact or situation that might endanger the peace of America . . . (Article 6.)

In such cases, the Organ of Consultation, consisting of the Foreign Ministers of the Member States, or representatives specifically designated for the purpose, is to

meet immediately in order to agree on the measures which must be taken in case of aggression to assist the victim of the aggression or, in any case, the measures which should be taken for the common defense and for the maintenance of the peace and security of the Continent. (Article 6.)

The Organ of Consultation acts "by a vote of two-thirds of the Signatory States which have ratified the Treaty." (Article 17.)

The treaty is equally explicit as to the measures which may be taken by the Organ of Consultation in any situation covered by Article 6. These measures are listed in Article 8 and specifically include "use of armed force." Article 20 further specifies that decisions to take any of the measures listed in Article 8 shall be binding, except that "no State shall be required to use armed force without its consent."

As early as 1960, the Seventh Meeting of Foreign Ministers of the Organization of American States condemned "the intervention or the threat of intervention . . . by an extracontinental power in the affairs of the American republics. . . ." At the Eighth Meeting, in 1962, the Foreign Ministers declared<sup>2</sup> that "the continental unity and the democratic institutions of the hemisphere are now in danger." The source of that danger was identified as "the subversive offensive of communist gov-

<sup>1</sup> 62 Stat. 1681; T.I.A.S., No. 1838; 43 A.J.I.L. Supp. 53 (1949).

<sup>2</sup> See 43 Dept. of State Bulletin 407 (1960); see also 56 A.J.I.L. 470 (1962).

<sup>3</sup> 46 Dept. of State Bulletin 278 (1962); 56 A.J.I.L. 604 (1962).

ernments." Among the "outstanding facts in this intensified offensive" was "the existence of a Marxist-Leninist government in Cuba which is publicly aligned with the doctrine and foreign policy of the communist powers."

At the Eighth Meeting, at Punta del Este, the Foreign Ministers, acting as Organ of Consultation under the Rio Treaty, took the first collective measures designed to deal with the threat.<sup>4</sup> It prohibited all trade in arms with Cuba, and excluded the present government of that country from participation in the organs and organizations of the inter-American system. On October 2 and 3, 1962, the Foreign Ministers of the American States met again, this time informally. They reiterated that "the Soviet Union's intervention in Cuba threatens the unity of the Americas and of its democratic institutions," and that this called "for the adoption of special measures, both individual and collective."<sup>5</sup>

Against this background, the Council of the Organization of American States met on October 23 and constituted itself as the Provisional Organ of Consultation in accordance with Article 12 of the Rio Treaty.<sup>6</sup> The Organ considered the evidence before it of the secret introduction of Soviet strategic missiles into Cuba. The Organ concluded that it was confronted with a situation that might endanger the peace of America within the meaning of Article 6. Having made this judgment, the Organ invoked its authority to take one or more of the measures listed in Article 8 of the Rio Treaty.

The resolution which the Organ adopted recommended

that the member states, in accordance with Articles 6 and 8 of the Inter-American Treaty of Reciprocal Assistance, take all measures, individually and collectively, including the use of armed force, which they may deem necessary to ensure that the Government of Cuba cannot continue to receive from the Sino-Soviet powers military material and related supplies which may threaten the peace and security of the Continent and to prevent the missiles in Cuba with offensive capability from ever becoming an active threat to the peace and security of the Continent.

The United States Proclamation<sup>7</sup> of a defensive quarantine was based on the action of the O. A. S. under the Rio Treaty. It was the conclusion of the United States Government that this treaty and the resolution of October 23, 1962, clearly authorized the defensive quarantine of Cuba. Here it is relevant to note that the Rio Treaty bound all of the American Republics, including Cuba. Indeed, it continues to do so today. There was thus a consensual basis in treaty, as between the United States and Cuba, for the defensive quarantine.

The contention has sometimes been made that, while the quarantine of Cuba may have been lawful as between the United States and Cuba, it

<sup>4</sup> See 46 Dept. of State Bulletin 267-283 (1962); 56 A.J.I.L. 606-613 (1962).

<sup>5</sup> See 47 Dept. of State Bulletin 598-600 (1962).

<sup>6</sup> *Ibid.* 720.

<sup>7</sup> Proclamation 3504 (effective Oct. 24, 1962), 27 Fed. Reg. 10401; 47 Dept. of State Bulletin 717 (1962); 57 A.J.I.L. 512 (1963).

could not be legally effective as regards countries outside the American Republics, such as the U.S.S.R. To begin with, this contention involves an anomaly not readily to be accepted. It would have us conclude that the quarantine—an application of least force to the situation of clandestine strategic missiles in Cuba—was illegal in its application to Soviet shipping on the high seas (because the U.S.S.R. was not bound by the Rio Treaty), while an air strike or invasion confined to the territory of Cuba would have been legally sanctioned.

But is such an assertion of illegality really sustainable as a proposition of international law? The Rio Treaty created a regional organization to maintain regional peace and security. If its purposes and activities are in conformity with the relevant provisions of the United Nations Charter, extra-hemispheric countries such as the U.S.S.R. are not in a position to attack the organization's activities within the region.

### *The Charter of the United Nations*

The United Nations Charter<sup>8</sup> specifically recognizes regional organizations and assigns to them an important place in carrying out the purposes of the United Nations. Article 52(1) states that

Nothing in the present Charter precludes the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action, provided that such arrangements or agencies and their activities are consistent with the Purposes and Principles of the United Nations.

Article 54 provides that "The Security Council shall at all times be kept fully informed of activities undertaken or in contemplation under regional arrangements or by regional agencies for the maintenance of international peace and security." In accordance with this provision, the Organ of Consultation directed that the Security Council should be informed of the contents of the resolution of October 23.<sup>9</sup>

The framers of the Charter met in San Francisco in 1945 after the basic outlines of the most significant regional arrangement, the inter-American system, were already established. The meeting was held subsequent to the Conference of the American Republics at which the Act of Chapultepec<sup>10</sup> was approved. This Act recommended the execution of a treaty to establish a regional arrangement, and specifically provided that the "use of armed force to prevent or repel aggression" constituted "regional action which might appropriately be taken by the regional arrangements." The debates at the San Francisco Conference concerning regional organizations were held against this background, and the inter-American system provided the principal context for the discussions.

When Article 52 was debated at the San Francisco Conference, the Chairman of the committee charged with considering regional arrange-

<sup>8</sup> Reprinted in 39 A.J.I.L. Supp. 190 (1945).

<sup>9</sup> 47 Dept. of State Bulletin 723 (1962).

<sup>10</sup> 12 *ibid.* 339 (1945); 39 A.J.I.L. Supp. 108 (1945).



ments, speaking as the delegate of Colombia, made the following statement concerning the relationship between the inter-American system and Chapter VIII of the Charter:

The Act of Chapultepec provides for the collective defense of the hemisphere and establishes that if an American nation is attacked all the rest consider themselves attacked. Consequently, such action as they may take to repel aggression, authorized by the article which was discussed in the subcommittee yesterday, is legitimate for all of them. Such action would be in accord with the Charter, by the approval of the article, and a regional arrangement may take action, provided it does not have improper purposes as, for example, joint aggression against another state. From this, it may be deduced that the approval of this article implies that the Act of Chapultepec is not in contravention of the Charter.<sup>11</sup>

No delegate disputed this statement.

When the Rio Treaty was concluded in 1947, not only the purposes but even the very language of the Act of Chapultepec was incorporated into the new treaty. Thus the purposes and activities of the regional arrangement which the treaty created are properly considered in the light of the San Francisco discussion of the inter-American system. Measured by the standards set forth in Chapter VIII of the United Nations Charter, the defensive quarantine of Cuba should be considered valid and lawful.

#### *Relationship of the Quarantine to Security Council Action*

In considering the lawfulness of the defensive quarantine of Cuba under the United Nations Charter, it is necessary also to consider some other provisions. One of these is Article 53, paragraph 1, which reads in part:

The Security Council shall, where appropriate, utilize such regional arrangements or agencies for enforcement action under its authority. But no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council . . .

It is evident with this, as with other Charter provisions dealing with the rôle of the Security Council, that it rested on the premise of a Council effectively exercising on behalf of the Members of the United Nations "primary responsibility for the maintenance of international peace and security."

The unfolding of history has shown a lack of agreement among the Council's permanent Members such that the Council has been disabled from performing its functions as originally intended. This has, of necessity, thrown an unexpected responsibility onto other mechanisms provided in the Charter. A dozen years ago the General Assembly's adoption of the Uniting for Peace Resolution<sup>12</sup> signaled a stage in the constitutional development of the United Nations. The Cuban quarantine of 1962 marked an assumption of increased responsibility by a regional organiza-

<sup>11</sup> 12 U.N.C.I.O. Docs. 680.

<sup>12</sup> U. N. Doc. A/1481; 45 A.J.I.L. Supp. 1 (1951):

tion. Accompanying a decline in the affirmative authority of the Security Council, it should not be surprising to find also some contraction in the Council's negative authority to preclude action by other bodies.

When the Rio Treaty Organ of Consultation met last October, was there a requirement that the Security Council must expressly authorize the measures recommended by the regional organ before American Republics could lawfully carry them out? This question has several elements: (a) Was *prior* authorization by the Council necessary? (b) Did the Organ of Consultation recommendation constitute "enforcement action" within the meaning of Article 53? (c) Must "authorization" be *express*?

*Prior authorization.* It should not be assumed that "authorization of the Security Council" automatically and necessarily means *prior* authorization. On this point it is illuminating to recall a 1960 precedent. In September of that year the Security Council had met, on Soviet request, to consider diplomatic and economic measures voted against the Dominican Republic by the Foreign Ministers of the American Republics meeting at San José the preceding month.<sup>13</sup> The U.S.S.R. asked the Council to approve these measures after they had been taken. The Soviet theory quite evidently was that the Council could appropriately give its "authorization" after the fact.

*Meaning of "enforcement action."* The 1960 precedent is interesting from another point of view. The upshot of the Security Council debate then was that the Council rejected the Soviet contention that the measures in question constituted "enforcement action" requiring "authorization." Similarly, early in 1962, the Council rejected contentions that the measures decided on at Punta del Este regarding Cuba required any authorization by the Council.

In addition to the earlier Council precedents, there was also to be considered the usage of the term elsewhere in the Charter, and a recent advisory opinion of the International Court of Justice. The term "enforcement action" appears at several places in the Charter. In addition to Article 53, there is, for example, Article 2, paragraph 5, which obligates Members of the United Nations to "refrain from giving assistance to any state against which the United Nations is taking preventive or enforcement action." And Article 5 provides that

A Member of the United Nations against which preventive or enforcement action has been taken by the Security Council may be suspended from the exercise of the rights and privileges of membership by the General Assembly upon the recommendation of the Security Council.

The "preventive" and "enforcement" action mentioned in these articles refers to action which the Council is authorized to take under Articles 40, 41, and 42. Article 40 provides for taking of "preventive action" in the

<sup>13</sup> See U. N. Security Council, Official Records, 898rd Meeting, pp. 2 ff. (Sept. 8, 1960).

form of provisional measures. Such measures are orders of the Council with which Member States are bound to comply. Articles 41 and 42 empower the Council to enforce its decisions by calling upon United Nations Members to apply certain measures or by taking action directly through air, sea, or land forces which are at the disposal of the Security Council. Again, in acting under Articles 41 and 42, the Security Council does more than recommend to Members steps which they might take to meet a threat to peace and security. Rather it decides upon measures and issues orders of enforcement which Member States are obligated under the Charter to carry out.

Council actions under Articles 40, 41, and 42 are to be distinguished from recommendations made by the Council under Article 39 or by the General Assembly in the discharge of its responsibilities as set forth in Chapter IV of the Charter.<sup>14</sup> This distinction between a Security Council measure which is obligatory and constitutes "action," on the one hand, and a measure which is recommended either by the Council or by the General Assembly, on the other, has been supported by the Advisory Opinion of the International Court of Justice on Certain Expenses of the United Nations (July 20, 1962).<sup>15</sup> The Court held that the measures taken by the General Assembly and the Security Council in Suez and the Congo were not enforcement action, in part, because they were only recommendatory as to participating states.<sup>16</sup>

Thus, in the context of United Nations bodies, it may be persuasively argued that "enforcement action" does not include action by a United Nations body which is not obligatory on all the Members. As used in Article 53(1), "enforcement action" refers to action by a regional organization rather than to action by an organ of the United Nations, but the words are properly given the same meaning in this context. As understood by the United States, "enforcement action" means obligatory action

<sup>14</sup> In the exercise of its powers under Arts. 10 and 11, the General Assembly has in the past recommended the use of armed force. These actions were taken despite the contention made long ago that such measures constituted "action" which could be taken only by the Security Council. Since the Assembly's powers are only recommendatory in the field of peace and security, the exercise of these powers by the Assembly could not be considered either "preventive" or "enforcement" action.

<sup>15</sup> [1962] I.C.J. Rep. 151; digested in 56 A.J.I.L. 1053 (1962).

<sup>16</sup> Specifically, the Court stated:

"The word 'action' must mean such action as is solely within the province of the Security Council. It cannot refer to recommendations which the Security Council might make, as for instance under Article 38, because the General Assembly under Article 11 has a comparable power. The 'action' which is solely within the province of the Security Council is that which is indicated by the title of Chapter VII of the Charter, namely 'Action with respect to threats to the peace, breaches of the peace, and acts of aggression'. If the word 'action' in Article 11, paragraph 2, were interpreted to mean that the General Assembly could make recommendations only of a general character affecting peace and security in the abstract, and not in relation to specific cases, the paragraph would not have provided that the General Assembly may make recommendations on questions brought before it by States or by the Security Council. Accordingly, the last sentence of Article 11, paragraph 2, has no application where the necessary action is not enforcement action."

involving the use of armed force. Thus, "enforcement action," as the phrase appears in Article 53(1), should not be taken to comprehend action of a regional organization which is only recommendatory to the members of the organization.

As was pointed out earlier, the O. A. S. resolution authorizing the quarantine was agreed upon pursuant to Article 6 of the Rio Treaty. As a recommendation of the "use of armed force" it was specifically authorized by Article 8 of that treaty. And it is, by the express terms of Article 20, the one measure which, when agreed upon by the Organ of Consultation, Member States are not obligated to carry out. Since states signatories of the Rio Treaty were not obligated to carry out the resolution recommending quarantine, it should not be held to constitute "enforcement action" under Article 53(1) requiring Security Council authorization.

*Must "authorization" be express?* Just as some commentators have readily assumed that the Security Council must give *prior* authorization, some have also assumed that the authorization must be *express*. In the light of the paralysis of the Council through abuse of the veto and in the light of the consequent constitutional evolution of the United Nations, this assumption cannot be made with assurance.

The United States, immediately following President Kennedy's address of October 22,<sup>17</sup> placed the Cuban situation before the Security Council and asked for an urgent meeting of the Council.<sup>18</sup> The Council met even before the Organ of Consultation under the Rio Treaty adopted its resolution of October 23 and before the proclamation of defensive quarantine was issued or carried into effect. The Council did not see fit to take any action in derogation of the quarantine. Although a resolution condemning the quarantine was laid before the Council by the Soviet Union, the Council subsequently, by general consent, refrained from acting upon it and instead chose to promote the course of a negotiated settlement, with the assistance of the Secretary General.

If in the past the abstention or even the absence of a permanent Member from the Council has been held sufficient to supply "the concurring votes of the permanent Members" for the purpose of adopting a Security Council resolution, might it not equally be thought that the Council's course of action last October, when confronted by the quarantine of Cuba, could constitute such authorization as the Charter might require if Article 53 should be considered applicable? The Council let the quarantine continue, rather than supplant it. While the quarantine continued, and with knowledge of it, the Council encouraged the parties to pursue the course of negotiation between the United States and the Soviet Union. Thus, if it were thought that authorization was necessary (which was not the view of the United States), such authorization may be said to have been granted by the course which the Council adopted.

<sup>17</sup> 47 Dept. of State Bulletin 715 (1962).

<sup>18</sup> *Ibid.* 723 ff.

*Charter Limitation on the "Threat or Use of Force"*

Before leaving the Charter of the United Nations it is relevant also to consider Article 2, paragraph 4, which provides:

All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

It was recognized that the defensive quarantine was dependent, ultimately, upon the use of naval forces for its effectiveness. Accordingly, there was acknowledged to be a threat, and potentially a use, of armed force. However, it did not follow that this must contravene Article 2, paragraph 4.

In considering the obligations imposed on Members by that article, it should be noted that not all threats or uses of force are prohibited; only those which are inconsistent with the purposes of the United Nations are covered by Article 2, paragraph 4. The presence of the word "other" in the concluding clause of the paragraph makes this clear. Even assuming that the measures taken could be considered to impinge upon the territorial integrity or political independence of some state or states, they would not be contrary to Article 2, paragraph 4, as long as they were not inconsistent with the purposes of the United Nations. The defensive quarantine, as indicated earlier, was considered to be in accordance with Chapter VIII of the Charter.

It is clear that collective action for peace and security which the Security Council may take under Chapter VII does not contravene Article 2, paragraph 4. It is also clear that individual or collective self-defense against armed attack, in accordance with Article 51, does not violate the Charter. Here it may be noted that the United States, in adopting the defensive quarantine of Cuba, did not seek to justify it as a measure required to meet an "armed attack" within the meaning of Article 51. Nor did the United States seek to sustain its action on the ground that Article 51 is not an all-inclusive statement of the right of self-defense and that the quarantine was a measure of self-defense open to any country to take individually for its own defense in a case other than "armed attack." Indeed, as shown by President Kennedy's television address of October 22 and by other statements of the Government, reliance was not placed on either contention, and the United States took no position on either of these issues.

The quarantine was based on a collective judgment and recommendation of the American Republics made under the Rio Treaty. It was considered not to contravene Article 2, paragraph 4, because it was a measure adopted by a regional organization in conformity with the provisions of Chapter VIII of the Charter. The purposes of the Organization and its activities were considered to be consistent with the purposes and principles of the United Nations as provided in Article 52. This being the case, the quarantine would no more violate Article 2, paragraph 4, than measures voted by the Council under Chapter VII, by the General Assembly under Articles

10 and 11, or taken by United Nations Members in conformity with Article 51.

Finally, in relation to the Charter limitation on threat or use of force, it should be noted that the quarantine itself was a carefully limited measure proportionate to the threat and designed solely to prevent any further build-up of strategic missile bases in Cuba.

### *Conclusion*

From the point of view of the lawyer, one may conclude from this history that the steps taken by the United States in instituting the quarantine were in the tradition of the common law. No new doctrines of wide application were enunciated. One single situation was considered on its individual facts, and the limited action decided upon rested on the narrowest and clearest grounds. It is by such a process of accretion that the law of nations, like the common law, is built.

MARITIME QUARANTINE: THE NAVAL INTERDICTION OF  
OFFENSIVE WEAPONS AND ASSOCIATED  
MATÉRIEL TO CUBA, 1962 \*

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It has often been said that international law is a living institution in a living society. If there remains today any doubt as to the validity of this observation, we suggest the confirmatory evidence of the 1962 maritime interdiction of Soviet shipments of offensive weapons and associated matériel to Cuba.

This analysis is based on several central and related questions. Who, as regards the Soviet 1962 challenge to the United States and the rest of the Hemisphere, did what? That is, who engaged in the international decisional process, and who implemented relevant decisions? Where were such decisions taken? Where were they implemented? On what legal grounds? Was the conduct of the Hemispheric nations legally permissible under the circumstances? What, if any, legal implications are to be drawn from the emphasis given certain legal principles and the relative lack of emphasis accorded other such principles. Finally, are any lessons to be gained from the whole experience?

At the outset it is necessary to note that the United States Proclamation entitled "Interdiction of the Delivery of Offensive Weapons to Cuba,"<sup>1</sup> the resolution adopted by the Council of the Organization of American States, meeting provisionally as an Organ of Consultation,<sup>2</sup> the discussions conducted at the United Nations,<sup>3</sup> and the bilateral discussions carried on between the United States and the Soviet Union<sup>4</sup> were subject to the totality of international law. The Charters of the United Nations and of the Organization of American States, important as they are, do not purport to cover the entire field of international law and did not supply

\* The views expressed herein are those of the individual authors and do not necessarily represent the position of the Department of the Navy or of the U. S. Government.

<sup>1</sup> 47 Dept. of State Bulletin 717 (1962); 57 A.J.I.L. 512 (1963).

<sup>2</sup> 47 Dept. of State Bulletin 722-723 (1962). The resolution cited Arts. 6 and 8 of the Inter-American Treaty of Reciprocal Assistance, 1947 (The Rio Pact; The Rio Treaty), 21 U. N. Treaty Series 93 *et seq.* (1948), 43 A.J.I.L. Supp. 53 (1949); see discussion below, pp. 537-539. <sup>3</sup> 9 U. N. Review 6-17, 77-84 (November, 1962).

<sup>4</sup> The New York Times, Oct. 27, 1962, to Nov. 20, 1962.

all of the principles applicable to the maritime quarantine. General principles of customary international law were directly applicable, as well as the more specific rules codified by convention.<sup>5</sup>

The quarantine action also has to be weighed in its factual environment. Perhaps the most significant element here was the rapid and covert effort of the Soviet Union to install, on a permanent basis, a major offensive missile threat, capable of nuclear mass destruction, within the Hemisphere and in close proximity to the United States, thereby—particularly so far as the United States was concerned—seeking to achieve a flagrant and deliberate modification of the existing world power structure. Patently, this was an effort so significantly destructive of the *status quo* that it could only have had the most serious consequences for Hemispheric and world views of international peace, international security, and national self-defense—individual and collective.

It must be recalled that the Soviet effort at a substantial distortion of the existing power structure was superimposed upon an already uneasy equilibrium depending upon a highly tentative balance of terror for its success. The facts contributing to this situation are well known. It may be useful, nevertheless, to recall that they encompassed the previously demonstrated Soviet policy of peaceful co-existence designed to soften nations prior to subjugation, as well as the attempted establishment of a nuclear umbrella for extensive subversive efforts in Latin America. Moreover, there was the clearly-documented Soviet record of disruptive activities at the United Nations, including a propensity to veto constructive proposals in the Security Council.<sup>6</sup>

It was in this environment that the Soviet Union—seemingly with casual disregard of the consequences—voluntarily embarked upon the risky experiment of establishing a series of offensive missile sites in Cuba during the late summer and fall of 1962. Concurrently, the Soviets, as is well known, initiated the construction of air bases in Cuba and caused jet bombers with nuclear bomb-carrying capability to be positioned on that unhappy island. Public notification of this condition was made by President Kennedy on October 22, 1962, when he said:

This urgent transformation of Cuba into an important strategic base—by the presence of these large, long-range, and clearly offensive weapons of sudden mass destruction—constitutes an explicit threat to the peace and security of all the Americas, in flagrant and deliberate defiance of the Rio Pact of 1947, the traditions of this nation and hemisphere, the Joint Resolution of the 87th Congress, the Charter of the United Nations, and my own public warnings to the Soviets on September 4 and 13.<sup>7</sup>

<sup>5</sup> For example, the now operative Convention on the High Seas, 52 A.J.I.L. 842 (1958).

<sup>6</sup> A firm indictment of past Soviet conduct was delivered by Ambassador Stevenson at the Security Council Meeting of Oct. 23, 1962. 47 Dept. of State Bulletin 725-733 (1962).

<sup>7</sup> 47 Dept. of State Bulletin at 715. For a chronological listing of critical events, see Mallison, "Limited Naval Blockade or Quarantine-Interdiction: National and Collective Defense Claims Valid under International Law," 31 George Washington University Law Review 339-343, 353, footnote 90 (1962).



The challenge initiated by the Soviets was answered, as might have been forecast, by a series of relevant, well-considered, and highly persuasive actions. These actions were those of the United States and her Latin American neighbors of the Organization of American States.<sup>8</sup> In part, they were the product of the resolution of October 23. They were also the product of United States decisions taken prior to the effective date of the interdiction Proclamation.<sup>9</sup>

President Kennedy, in his statement on October 22, 1962, designated the forthcoming responsive action a "strict quarantine." He said "a strict quarantine on all offensive military equipment under shipment to Cuba is being initiated." He also announced that "interdicted shipping will . . . be turned back. This quarantine will be extended, if needed, to other types of cargo and carriers."<sup>10</sup> That the term was carefully selected is reflected in the belief by the President that a blockade is "an act of war."<sup>11</sup> It was also hoped that the limited coercive force foreseen in a quarantine would, when combined with even less coercive acts, produce the needed results. In this manner the international decisional process was provided with an opportunity to construct a new rule derivable from pre-existing and well-known legal principles, namely, maritime quarantine is a collective peaceful process involving limited coercive measures interdicting the unreasonable movement of certain types of offensive military weapons and associated matériel by one state into the territory of another.

Following the President's quarantine address of October 22, the resolution of the Organization of American States was adopted on the afternoon of October 23. Thereupon the Executive Proclamation was signed at 7:06 P.M. The latter announced that the quarantine would go into effect at 2:00 P.M., Greenwich time, on the following day. It has been suggested that the delay was intended to provide notice to shipping destined to Cuban ports. As is now known, the delay enabled instructions to reach Soviet and other vessels carrying Soviet cargoes to Cuban ports, and many were promptly diverted away from the maritime interception areas.<sup>12</sup>

Meanwhile, on October 22, 1962, Ambassador Stevenson had delivered

<sup>8</sup> The primary concern of these states in the affected areas is not open to doubt. Compare Aron, "International Law—Reality and Fiction," 47 *The New Republic* 14 (Dec. 1, 1962).

<sup>9</sup> It is a fact, however, that for some time prior to the President's interdiction Proclamation, units of the U. S. Navy and Air Force were engaged in normal training operations in and over Hemispheric waters in areas usually employed for such purposes.

<sup>10</sup> 47 *Dept. of State Bulletin* at 716-718.

<sup>11</sup> "Text of President's News Conference on Foreign and Domestic Affairs," *The New York Times* (Western ed.), March 7, 1963. See also Chayes, "The Legal Case for U. S. Action on Cuba," 47 *Dept. of State Bulletin* 768 (1962), and "Law and the Quarantine of Cuba," 41 *Foreign Affairs* 552 (1963).

<sup>12</sup> On Oct. 27, 1962, the Secretary of Defense promulgated prohibited and restrictive zones and prescribed routes. Prohibited matériel had been specified in the Quarantine Proclamation. The interception area encompassed about 3.5 million square miles. See *The New York Times* of Nov. 6, 1962, for approximate boundaries. See also *Dept. of State Press Release No. 645*, Oct. 27, 1962, which released the text of a Department of State message transmitted to the Acting Secretary General of the United Nations and is here quoted in part:

a letter to the President of the Security Council, Mr. Zorin, seeking an urgent meeting "to deal with the dangerous threat to the peace and security of the world . . ." <sup>13</sup> resulting from the build-up of Soviet offensive weapons in Cuba. During the American presentation to the Security Council in the early evening of October 23, 1962, Ambassador Stevenson was able to read the complete operative text of the O.A.S. resolution, which had been adopted in Washington only moments before.

Thus, during the period of October 22-24, 1962, important steps were taken, and in this chronological sequence. The United States on the 22nd announced its plan for a quarantine. On the 23rd the O.A.S. resolved to take all measures deemed necessary to terminate the threat to the peace and security of the Continent resulting from the offensive build-up in Cuba. This was immediately conveyed to the United Nations. The President, almost simultaneously, issued the Quarantine Proclamation. On the 24th the quarantine, initially under sole United States implementation, went into effect.

World-wide opinions were soon expressed. Prime Minister MacMillan told the House of Commons on October 25 that the Soviet activity in Cuba was a "new threat to security" and stated:

As regards the area of Cuba. The measures announced in the President's proclamation are designed to meet a situation which is without precedent. Moreover it cannot be said that these measures are extreme.

Indeed, they are studiously moderate in that the President has only proclaimed certain limited types of war material, not even all armaments, to be prohibited.<sup>14</sup>

At the same time "President de Gaulle . . . [pledged] the 'understanding' and support of the French Government to United States policy toward Cuba."<sup>15</sup> It was also reported that unanimous backing of the quarantine existed in NATO at an early moment.<sup>16</sup>

Initial Soviet reaction was to describe the maritime quarantine as "in effect" "a naval blockade," "piracy"; and it was concluded by the Soviets that the United States had engaged in "unprecedented aggressive actions by alleging that a threat to the national security of the United States emanates from Cuba."<sup>17</sup> Soviet satellites quickly joined in the

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"My Government has instructed me to inform you that the 'interception area' referred to in your letter of October 25 to the President of the United States and in his reply of October 26, comprises (a) the area included within a circle with its center at Havana and a radius of 500 nautical miles and (b) the area included within a circle with its center at Cape Maisi (Maisi), located at the eastern tip of the Island of Cuba, and a radius of 500 nautical miles."

<sup>13</sup> 47 Dept. of State Bulletin 724 (1962). <sup>14</sup> The New York Times, Oct. 26, 1962.

<sup>15</sup> Christian Science Monitor, Oct. 25, 1962.

<sup>16</sup> *Ibid.*

<sup>17</sup> The New York Times, Oct. 24, 1962. The Soviet verbal response must be measured against the fact that it did withdraw some national and chartered ships from the quarantine area, and cargoes of these ships did not reach Cuba. It is generally believed that only such Soviet cargoes as were not on the prohibited list actually reached Cuba.

condemnation, but world opinion generally supported the quarantine action. The members of the O.A.S. remained firm in their intent to enforce the maritime interdiction, and naval vessels from Argentina, the Dominican Republic, and Venezuela co-operated with United States forces in operational activities.

Operational details included the broadcast of special warnings at regular intervals by the United States Navy. These advised that reaction to the quarantine might make Windward Passage, Yucatan Channel and Florida Straits dangerous waters.<sup>18</sup> On October 25, the Department of Defense established submarine procedures for the quarantine area. This entailed notice that the United States naval vessels would require unidentified submerged submarines in the quarantine area to surface for identification. In order to accomplish this objective, the Department announced that the Navy would "drop four or five harmless explosive sound signals, which may be accompanied by the international code signal 'I.D.K.C.A.,' meaning 'rise to the surface.'"<sup>19</sup> The announcement also provided that "Submerged submarines, on hearing this signal, should surface on an easterly course . . . Signals and procedures are harmless and are to guarantee the safety of submerged submarines at sea in emergencies."<sup>20</sup>

Simultaneously, additional measures were being undertaken to prevent the Soviet build-up of offensive weapons and associated matériel in Cuba. Publicity was given on October 24 to the fact that United States officials were considering the use of a clearance certification system, and on October 27, the United States announced a Clearcert plan, whereby shippers might obtain advance permission to send cargoes through the quarantine area.<sup>21</sup> This was designed to augment the effectiveness of the operational aspects of the quarantine, and may be regarded as an integral part of it. The clear purpose of this measure was to minimize interference with non-offensive shipping and at the same time to continue to inhibit the shipment into Cuba of matériel contributing to the offensive missile and nuclear weapons capabilities of the Soviets in the Hemisphere.<sup>22</sup>

Concurrently, additional pressures were developing against world-wide shipping. Commercial deterrents in the form of the unavailability of insurance coverage quickly became a reality. American insurance companies ceased handling policies for the Cuban trade with the declaration of the quarantine.<sup>23</sup> Major maritime insurers the world over pursued the same policy. It should be noted also that, following President Kennedy's public addresses on the 4th and 13th of September, a number of nations had imposed national restrictions upon the carriage of military matériel to Cuba. The United States unquestionably possessed a full arsenal of economic arguments which might have been persuasive, if com-

<sup>18</sup> The New York Times, Oct. 25, 1962. See also Appendix I below.

<sup>19</sup> The New York Times, Oct. 26, 1962; Par. No. 5982, Notice to Mariners No. 45, 1962. See also Appendix I below.

<sup>20</sup> *Ibid.*

<sup>21</sup> The New York Times, Oct. 25, 1962, and Dept. of State Press Release No. 644, Oct. 27, 1962, set forth as Appendices I and II below.

<sup>22</sup> See pp. 541-543, below.

<sup>23</sup> The New York Times, Oct. 25, 1962.

mercial shippers had not engaged in voluntary measures. Soviet shipments by air were handicapped by reason of the refusal of states to grant applications for landing and refueling. For example, in the latter part of October, it was reported that the Government of Trinidad and Tobago had twice refused Soviet requests for permission for a Soviet Ilyushin-18 to land en route from Moscow to Havana.<sup>24</sup>

The principal credit for the operational success of the quarantine may be allocated to United States military forces. Following the Presidential Proclamation, vessels of third-party states were trailed, inspected by approach, and boarded.<sup>25</sup> Submarines of the Soviet Union in the mid-Atlantic and South Atlantic Ocean were located, tracked, surfaced, and photographed.<sup>26</sup> Other vessels apparently destined for Cuban ports altered course and proceeded elsewhere.<sup>27</sup> No vessels were reported to have been either forcefully seized or diverted by orders of quarantine force units. No direct military force was reported to have been used. Fifty-five merchant ships were reported to have been allowed to proceed through the quarantine barrier between October 24 and the last day of the quarantine, November 20.<sup>28</sup>

Before addressing ourselves to the question "On what legal grounds?" it will be well to emphasize the fact that the quarantine, as put into effect, was a collective claim for a temporary and special use of limited areas of the high seas and superjacent airspace to prohibit the flow of offensive weapons and associated matériel to Cuba. This limited claim was offered to the world community as a means of countering the Soviet claim represented by its interventional conduct in Cuba. Fortunately, opposing claims of this importance are infrequently put forward under such grave

<sup>24</sup> *Ibid.*, Oct. 30, 1962.

<sup>25</sup> On Oct. 25, 1962, the Soviet tanker *Bucharest* was intercepted. Her cargo was checked visually from alongside by a unit of the quarantine force and she was allowed to proceed to Cuba. The Lebanese vessel *Marcula*, under Soviet charter, en route to Cuba was boarded by units of the U. S. Navy on Oct. 26, 1962. Apparently no items of the prohibited list appeared in the cargo and the vessel was cleared to proceed. The release also reported the sighting, etc., of some "190 different foreign surface and underwater craft" by Naval Air Reserve units alone. "Actions of Military Services in Cuban Crisis Outlined," U. S. Dept. of Defense News Release No. 1942-62, Nov. 29, 1962, pp. 1-7.

<sup>26</sup> *Ibid.* at p. 6. Admiral George W. Anderson, U.S.N., Chief of Naval Operations, is quoted as stating on Nov. 9: "The presence of many Russian submarines in Caribbean and Atlantic waters provided perhaps the finest opportunity since World War II for the U. S. Naval anti-submarine-warfare forces to exercise at their trade, to perfect their skills and manifest their capability to detect and follow submarines of another nation. In tomorrow's newspapers, I'm sure you will see photographs of some of the submarines that came to the surface after the persistent surveillance of United States ships and United States aircraft." The Washington Post, Nov. 10, 1962, p. A-7, carries a photograph of what is identified as a surfaced Soviet submarine.

<sup>27</sup> Secretary McNamara stated that on Oct. 22, 1962, eighteen Soviet cargo ships were en route to Cuba, that sixteen of these ships turned back after the establishment of the quarantine, and that they were followed back to the Baltic Sea and the Mediterranean. See note 8 above.

<sup>28</sup> Note 25 above, at 5. See also The New York Times, Nov. 21, 1962.

circumstances by proponents so well equipped with powers of mass destruction.<sup>29</sup>

### THE MARITIME QUARANTINE RULE

Out of the initiation of such a senseless crisis by the Soviets, in the painful birth pains of an international political conflict, supplemented by limited coercive measures, a lusty new legal rule was created. The rule is a reasonable development from pre-existing and well-known legal principles. It may be predicted that the rule will enjoy not only continued acceptance, but will be recognized over time as a highly desirable addition to existing rules relating to the reasonable employment of naval and other military forces. Specifically, the rule provides an additional and unique option within the continuum of "Force in Peace." It allows for an option of restrained coercion and for an avoidance of the drastic procedures and consequences built around the traditional concept of "blockade," while at the same time permitting access to procedures and practices divorced from the traditionally limited concept of "pacific blockade."<sup>30</sup> On practical grounds alone the legal concept of quarantine will merit community acceptance, since it is constructed on the solid foundation of restrained coercion and mutuality of benefit and interest.

Thus, it will be seen that it is our view that the maritime interdictory conduct engaged in during the quarantine constituted a specific legal claim based upon accepted legal principles. The claim, being derived from and constituting a refinement of legal principles, under the stated circumstances was clothed with all the attributes of legality. The interdictory conduct was legally permissible.

Legal analysis of the quarantine action suggests varying points of view. One point of view has been that the quarantine was based on the customary principle of international law, as confirmed and affirmed in Article 51 of the Charter of the United Nations, that a state may engage in self-defense in provocative circumstances. Those who take this view of customary law, and of Article 51 as related to the principle, stress the inherent right of a nation to engage in self-defense. They hold that the quarantine (either as an individual or collective action) was perfectly legal. Other commentators, however, consider that the language of Article 51<sup>31</sup> is restrictive,<sup>32</sup> and that defensive action cannot legally be taken until an

<sup>29</sup> The extraordinarily grave situation existing during the last ten days of October will not soon be forgotten.

<sup>30</sup> See the excellent discussion on modern concepts of blockade and its utility by Rear Adm. Robert D. Powers, Jr., U.S.N., "Blockade: For Winning Without Killing,"

84 United States Naval Institute Proceedings 61-66 (1958).

<sup>31</sup> Art. 51 provides in part: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security. . . ."

<sup>32</sup> Wright has called for a literal construction of "armed attack." Columbia Law School News 2 (Nov. 7, 1962). See also below, p. 560.

initial armed attack has been instituted by an aggressor against a peaceful nation in repose.<sup>83</sup>

Pursuant to the restrictive construction of Article 51 by some writers, some questions have been raised as to the legality of the quarantine within the frame of "self-defense." In this connection, it should be understood by now that an excessively narrow view as to the meaning of "armed attack" is quite out of keeping with the dynamic quality of law and with the tempo of our twentieth-century social complex.<sup>84</sup> Scientific and technological considerations alone make it impossible to accept this view of "armed attack." Hence, both general customary international law and the rule of Article 51 are adequate foundations upon which the legal permissibility of the quarantine action might have been based.

Legal permissibility of the maritime quarantine is supportable on still another basis—principally by the language contained in Article 2 (4) of the Charter, which provides that all Member nations "shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state or in any other manner inconsistent with the Purposes of the United Nations." In essence, each Member state, having undertaken to "maintain international peace and security," as provided in Article 1 (1), is obliged to conform to this commitment.<sup>85</sup> Article 2 (3) requires of each Member that it not endanger "international peace and security" in the resolution of international disputes. Further, under Article 1 (2) each nation has the duty "to strengthen universal peace." Thus, Articles 1 and 2, in setting out the "Purposes and Principles" of the Charter, make abundant reference to the duty of states to conform to the principles of international "peace and security." Additionally, there is the law of the 1947 Rio Pact.<sup>86</sup>

Before embarking upon an analysis of these theses, it may be helpful to note that the authors, as stated at the outset, feel that the true problem

<sup>83</sup> This point of view has been described by Berle as the "Principle of Passivity" and has been rejected. Lissitzyn has called it the "Sitting Duck" concept and also has rejected it. Columbia Law School News 1, 3. Elihu Root, in addressing the American Society of International Law, said in 1914 that each sovereign state has the right "to protect itself by preventing a condition of affairs in which it will be too late to protect itself." 1914 Proceedings, American Society of International Law 12; 8 A.J.I.L. 482 (1914).

<sup>84</sup> For a penetrating analysis, see McDougal and Feliciano, *Law and Minimum World Public Order* 121-260 (New Haven and London: Yale University Press, 1961). This view is also supported by H. C. Dillard, R. C. Pugh and W. G. Friedmann in *Columbia Law School News* (Nov. 7, 1962).

<sup>85</sup> Pursuant to Art. 2 (6) even non-Members must conform to "the maintenance of international peace and security." For the background of Art. 2 (4), see Davis, "First Commission: General Provisions," in *The United Nations Charter: Development and Text* (International Conciliation, No. 413, Sept., 1945); 6 United Nations Conference on International Organization 80-82, 696-705 (1945); Russell and Muther, *A History of the United Nations Charter*, Chs. V-IX, XI, XXIV, and pp. 455-457, 473-476, 655-657, 672-675, 1067 (1958).

<sup>86</sup> For a careful analysis of Ch. VIII, Arts. 52-54 of the U. N. Charter, see McDevitt, "The UN Charter and the Cuban Quarantine," 17 JAG Journal 71 (April-May, 1963).

is not posed in the debate over "Purposes and Principles" *versus* "broad (or narrow) view of Article 51" *versus* general customary international law *versus* Rio Pact. It is our view that, under specific circumstances, a valid case may be built for all of these points of view. Thus, the true contribution of the quarantine experience must be that there are alternative bases to support responsive action in dealing with such a problem, and that these alternatives are not even restricted to those set forth above, but must also include all of the pertinent principles and rules of international law, no matter where found. At the same time, the authors believe that the United Nations Charter concepts (peace and security *versus* broad self-defense) are not opposites which are mutually exclusive of each other, but rather alternatives, and, as such, may be subject to concurrent application.

#### SELF-DEFENSE

The term "self-defense" by its very nature emphasizes individual as opposed to collective or universal defense, although quite obviously the successful defense of one state may benefit the whole community. The principle of general customary international law which acknowledges the right of individual self-defense is well accepted. This right flows from the broader right of national existence and independence. It may be claimed and used when there is reasonable cause to believe that the national existence is imperiled or proximately endangered by the implementation of a known and dangerous course of action. Aggressive intent, constituting a threat to security, can be established by an objective appraisal of the conduct on the part of another or other nations. } x

That self-defense is an inherent national right is not doubted. It has been referred to as an "inalienable right"<sup>37</sup> which is "confirmed in the United Nations Charter."<sup>38</sup> Claims as to its use in the present world structure admittedly may be individual or collective.

That the doctrine may be subject to abuse is illustrated by 1962 Cuban claims and assertions respecting alleged intentions and conduct of the United States.<sup>39</sup> Since individual claims and assertions of applicability of the doctrine of self-defense may in fact be unreasonable, the Charter of the United Nations, including Article 51, has placed emphasis on the desirability of using this principle in an orderly and collective way. This is based on the general premise that collective action is less likely to be based on improper motivation and is less likely to result in abuses of the doctrine than in the case of individual action. Hence a proper respect for the orderly needs of the world community argues strongly for the

<sup>37</sup> Deputy Secretary of Defense Gilpatric, Dept. of Defense Press Release No. 1426-62, Sept. 5, 1962, p. 3.

<sup>38</sup> *Ibid.*

<sup>39</sup> The New York Times, Oct. 24, 1962. Secretary of State Rusk acknowledged that Cuba had engaged in "loud protestations of arming for self-defense . . ." while permitting Soviet military forces to establish a foothold on the Island. 47 Dept. of State Bulletin 720 (1962). Germany in 1939 asserted it was obliged to defend itself in the face of Polish aggression. History, unfortunately, provides too many examples of such baseless contentions.

collective management of self-defense goals and procedures wherever possible. Although the more universal the management, the better the opportunity for control of possible abuse, less than universal collective security arrangements are proper organs to achieve this result. The unique availability to the free world of numerous security agreements is a substantial factor in stabilizing the world community.

With this analysis in mind, we wish now to turn to the view, current in some quarters, that the maritime quarantine was based on the doctrine of self-defense.

Reasons for placing the "Soviet aggressive intervention in this hemisphere"<sup>40</sup> in the context of self-defense may be found in the official expressions of several high officials. President Kennedy, in his address of October 22, stated that in acting "in the defense of our own security and of the entire Western Hemisphere . . ."<sup>41</sup> he had

directed that the following *initial* steps be taken immediately:

*First:* To halt this offensive buildup, a strict quarantine on all offensive military equipment under shipment to Cuba is being initiated.<sup>42</sup>

This language clearly suggests that the President of the United States had reached the conclusion that, as of that moment, the United States had a then present legal right to do so. The Presidential Proclamation, on the other hand, ordered the initiation of interdictory measures in order "to defend the security of the United States."<sup>43</sup> It also made reference to Soviet activities which constituted a threat to "the peace and security of this Continent." The Proclamation also, in requiring a minimal use of force by the armed forces, permitted them to use direct force "in case of self-defense."<sup>44</sup> However, it appears that here the term is employed in the practical or operational sense.

On the other hand, the O.A.S. resolution of October 23 used the term "self-defense" when it incorporated the language of a part of Resolution II passed at the Eighth Meeting of Consultation of the Ministers of Foreign Affairs of the American Republics at Punta del Este in January, 1962. The incorporated provision made reference to a resolution urging "member states to take those steps that they may consider appropriate for their individual and collective self-defense . . ." The same paragraph also made reference to the doctrine of peace and security, and urged the American Republics

to cooperate, as may be necessary or desirable, to strengthen their capacity to counteract threats or acts of aggression, subversion, or other dangers to peace and security resulting from the continued intervention in this hemisphere of Sino-Soviet powers . . .<sup>45</sup>

Ambassador Stevenson, in a press conference on October 23, stated that the Soviets had, through their build-up in Cuba, confirmed "the urgent necessity of the measures we were forced to take in our own defense, in

<sup>40</sup> Busk, *loc. cit.* 721.

<sup>42</sup> *Ibid.*

<sup>44</sup> *Ibid.*

<sup>41</sup> 47 Dept. of State Bulletin at 716.

<sup>43</sup> *Ibid.* 717.

<sup>45</sup> *Ibid.* 722.



defense of the hemisphere, and in defense of other allies of the United States and unaligned powers alike."<sup>46</sup> On the 25th he held another press conference and stated:

The peril arises not because the nations of the Western Hemisphere have joined together to take necessary action in their self-defense but because the Soviet Union has extended its nuclear threat into the Western Hemisphere.<sup>47</sup>

The State Department Legal Adviser on November 3, 1962, in addressing himself to the subject, "The Legal Case for U. S. Action on Cuba," stated:

The quarantine action was designed to deal with an imminent threat to our security. But the President in his speech did not invoke Article 51 or the right of self-defense.<sup>48</sup>

In a later article he wrote: "But neither the President in his speech nor the O.A.S. in its resolution invoked Article 51."<sup>49</sup>

At his press conference of November 20, 1962, the President, in response to a question relating to unilateral action by the United States affecting Cuba, replied in a hypothetical vein:

the United States has the means . . . as a sovereign power to defend itself. And, of course, exercises that power; has in the past; and would in the future. But we, of course, keep to ourselves and hold to ourselves, under the United States Constitution, and under the laws of international law, the right to defend our security. On our own, if necessary—though we, as I say, hope to always move in concert with our allies, but on our own, if that situation was necessary to protect our survival or integrity or other vital interests.<sup>50</sup>

One observer, after a review of the quarantine experience, with particular reference to the above-quoted Presidential address and Presidential Proclamation, has concluded: "The actions of the President of the United States . . . constitute unequivocal invocation of the claim to national self-defense."<sup>51</sup> Taking into account the O.A.S. resolution of October 23, 1962, he contends: "The United States participated in an inter-American claim to collective self-defense as well as continuing to exercise and assert its claim to national self-defense."<sup>52</sup> In this vein he argues that the criteria which may be used in testing the validity of inter-American collective self-defense claims may be the same as those employed respecting unilateral self-defense claims.<sup>53</sup> It is his final conclusion that the 1962 maritime quarantine was valid under international law because of national

<sup>46</sup> *Ibid.* 734.

<sup>47</sup> *Ibid.* 735.

<sup>48</sup> Chayes, 47 Dept. of State Bulletin 764 (1962).

<sup>49</sup> Chayes, "Law and the Quarantine of Cuba," 41 Foreign Affairs 554 (1963).

<sup>50</sup> The New York Times, Nov. 21, 1962. To the same effect was Secretary Rusk's statement before the Senate Committees on Foreign Relations and Armed Services, 87th Cong., 2nd Sess., "Situation in Cuba" 83 (1962). He said on Sept. 17, 1962: "No great nation can ever abandon its elementary right of unilateral action if that becomes necessary for its own security."

<sup>51</sup> Mallison, *loc. cit.* note 7 above, at 353.

<sup>52</sup> *Ibid.* 364.

<sup>53</sup> *Ibid.* 378.

and collective self-defense rights;<sup>54</sup> however, attention also was called to the relationship between Article 51 and Chapter I of the Charter.<sup>55</sup>

Another commentator has approached the subject somewhat differently. Unlike Mallison, who urged that the United States could legally base the quarantine actions on an interpretation of Article 51 of the United Nations Charter (although, according to the Legal Adviser of the State Department, this was not the legal position in fact put forward by the United States), Seligman has concluded that the United States participation in the O.A.S. responsive action was not violative of its Charter obligations nor of international law, because it "was not an act of aggression prohibited by the obligations we have entered into when we signed the U. N. Charter."<sup>56</sup> His analysis goes principally to the point that Article 2 (4) does not inhibit all use of force, and that the traditional self-defense-type use of force is permissible under Article 51, particularly where neither the territorial integrity nor the political independence of the state against which the force is employed is prejudiced. Under the circumstances the quarantine was not an "unprovoked act of aggression," but rather "an act of genuine self-defense though anticipatory."<sup>57</sup> On the basis of these statements it would appear that Seligman in fact relies heavily on the general customary international law of self-defense to support the legality of the action.

Seligman also comments on the State Department position that the legal basis for the quarantine was not self-defense but a right to maintain international peace and security through regional organizations, pursuant to Article 52 (1) of the U. N. Charter. He terms of doubtful validity the position that Article 52 (1)

gives to regional organizations the right to use force collectively for the removal of threats to the peace in their region in a situation where an individual state would not have the right to use force.<sup>58</sup>

This again raises the question whether self-defense, which is the only basis discussed by Seligman, is the only legal ground upon which the quarantine may be supported. He concludes that the quarantine was an act of self-defense, and that the threat to the peace and security of the Continent was evidence upon which the interdictory action might be based.<sup>59</sup>

Having put forward views contending that Article 51 is broad enough to support the quarantine action, and, further, that the general customary law of self-defense likewise supports the action, the question still remains: Do provisions of multilateral treaties (United Nations Charter and Rio Pact) calling for the maintenance of international peace and security create an international right to require compliance as well as a national duty to conform? More specifically: May a state or group of states (O.A.S.) enforce such duties without reliance on the doctrine of self-defense?

<sup>54</sup> *Ibid.* 393-394.

<sup>55</sup> *Ibid.* 363.

<sup>56</sup> 49 A.B.A.J. 143 (1963).

<sup>57</sup> *Ibid.* 142-143.

<sup>58</sup> *Ibid.* 144; compare Dillard, *loc. cit.* note 34, at 3.

<sup>59</sup> *Loc. cit.* note 56 above, at 143-145.

## MAINTENANCE OF INTERNATIONAL PEACE AND SECURITY

Does it necessarily flow from the existence of the right of self-defense that the right to engage in action protective of national welfare and well-being depends exclusively upon the doctrine of self-defense? Is it not also possible that the right of a state to protect itself may flow equally from the common duty to maintain international peace and security (as an affirmative responsibility of states) provided for in both Chapter I of the United Nations Charter<sup>60</sup> and in the 1947 Inter-American Treaty of Reciprocal Assistance?<sup>61</sup>

Under the 1947 Rio Treaty it was provided, in Article 6:

If the inviolability or the integrity of the territory or the sovereignty or political independence of any American State should be affected by an aggression which is not an armed attack or by an extra-continental or intra-continental conflict, or by any other fact or situation that might endanger the peace of America, the Organ of Consultation shall meet immediately in order to agree on the measures which must be taken in case of aggression to assist the victim of the aggression or, in any case, the measures which should be taken for the common defense and for the maintenance of the peace and security of the Continent.<sup>62</sup>

Article 8 authorized coercive action including, among others, the "partial or complete interruption of economic relations or of . . . sea, air . . . communications; and use of armed force."<sup>63</sup>

There is, it is submitted, a sound legal basis for the quarantine action in the right of a collectivity of states to uphold affirmatively, pursuant to a regional agreement within the compass of the United Nations Charter, international peace and security. It is further submitted that this right is quite independent of the right to take measures of self-defense, whether done individually or collectively, and whether done on the basis of the general customary rule of self-defense or under Article 51 of the U. N. Charter. Since the Cuban maritime quarantine measures were accomplished through collective processes, it is not at this time necessary to consider whether a single state need look to the right and duty concept of maintaining international peace and security as the legal basis for a similar but unilateral coercive action.<sup>64</sup>

The provisions of Chapter I of the Charter impose a duty to respect

<sup>60</sup> See p. 532 above.

<sup>61</sup> 21 U. N. Treaty Series 93 *et seq.* (1948); reprinted in 43 A.J.I.L. Supp. 53 (1949). The latter, it should be noted, was signed at an Inter-American Conference for the "Maintenance of Continental Peace and Security," 17 Dept. of State Bulletin 565 (1947).

<sup>62</sup> *Ibid.*

<sup>63</sup> *Ibid.*

<sup>64</sup> Because of the significant values to be protected through community as opposed to individual applications of force, *e.g.*, "The Charter reflects the judgment of the world community that collective action is to be preferred to the unrestricted use of force by individual nations . . .," Chayes concludes that "States living under the regime of that Charter can no longer find justification for the use of force in their mere unilateral declaration." Chayes, 41 Foreign Affairs 553-554; compare pp. 540-541 below.

international peace and security. Article 6 of the Rio Pact recognizes the importance of peace and security, and thereby buttresses an almost universally recognized duty with the specific Hemispheric recognition of this concept. The Rio Pact provides that when there exists any "fact or situation that might endanger the peace of America" the signatories "shall meet immediately in order to agree on the measures . . . which should be taken . . . for the maintenance of the peace and security of the Continent." The willingness of states to undertake the enforcement of international peace and security is the mark of conscience and a developed standard of values. The values are as real at the regional level as they are in a world-wide forum. Moreover, the same facts may bring into operation both the legal right to engage in collective maintenance of peace and security and the legal right of a state or states to embark upon measures of self-defense.

In view of the threat to the United States and the other Members of the O.A.S., "Our quarantine was imposed in accordance with the recommendation of the Organization of American States acting under the Rio Treaty of 1947."<sup>65</sup> It was imposed because a "situation existed which endangered the peace of America." Further, "The quarantine action was designed to deal with an imminent threat to our security"; and, "Self-defense . . . is not the only justifiable use of force under the charter."<sup>66</sup> The Soviet action constituted a "threat to the peace in the hemisphere."<sup>67</sup> "The U. N., through the Council and the Secretary-General, is, as a result, actively engaged in the effort to develop a permanent solution to the threat to the peace represented by the Soviet nuclear capability in Cuba."<sup>68</sup> Chayes concluded that referral of the problem to the Organization of American States with its authority to maintain the international peace and security of the Hemisphere, rather than to the United Nations based on an Article 51 claim, or on the separate right of self-defense under general customary international law, provided the sound legal basis upon which the quarantine was implemented.

Writing in the April, 1963, issue of *Foreign Affairs*, Chayes has repeated the basic thesis that

The quarantine action was authorized under the Rio Treaty of 1947, whose primary purpose was to organize law-abiding states for collective action against threats to the peace.<sup>69</sup>

In pointing out that the operative language of the O.A.S. resolution is contained in the President's Proclamation, he has called attention to the Soviet conduct as "a threat to the security of the United States and the Western Hemisphere";<sup>70</sup> and stated that both the United Nations and the Organization of American States were "designed for preserving the peace," that their Charters authorize them to "act collectively against

<sup>65</sup> Chayes, 47 Dept. of State Bulletin 764 (1962).

<sup>66</sup> *Ibid.*

<sup>68</sup> *Ibid.*

<sup>70</sup> *Ibid.* 550.

<sup>67</sup> *Ibid.* 765.

<sup>69</sup> *Loc. cit.* 555.

aggression and threats to the peace,"<sup>71</sup> that the quarantine "was defensive in character and was directed against a threat to the peace,"<sup>72</sup> and that "a threat to the peace of any nation is a threat to the peace of all nations, and maintenance of peace has therefore become a collective responsibility."<sup>73</sup> After again referring to the relationship of the quarantine action to Article 51 of the Charter ("But neither the President in his speech nor the O.A.S. in its resolution invoked Article 51"),<sup>74</sup> he established the category into which the quarantine action falls, namely, an "action by regional organizations to preserve the peace."<sup>75</sup> Coming, as these observations and conclusions do, from the highest legal officer of the Department of State, they signify a position based upon the separate individual duty of states to observe international peace and security and the collective right of states organized in a regional organization to maintain through the use of coercive measures their individual and collective rights to a condition of international peace and security. The quarantine action, in this light, was the affirmative maintenance of conditions set out in both Chapter I of the U. N. Charter and the Rio Pact, namely, international peace and security.

#### APPLICABILITY OF THE CONVENTION ON THE HIGH SEAS<sup>76</sup>

Maritime measures instituted during the 1962 Cuban crisis to implement the interdiction Proclamation were a restriction on the free use of the seas by the ships and craft of all states. There was, then, a situation of competing claims—the claim on the one hand of the right of free use of the seas and, on the other, of the right of a state or states reasonably to restrict the claim of right of free use on the basis of maintaining international peace and security or engaging in proper self-defense.

The United States and the nineteen other American states which authorized this responsive action under the Rio Treaty are parties to the Convention on the High Seas, which purports to codify customary principles of international law applicable to the use of the high seas.<sup>77</sup> Article 2 of the convention provides that "Freedom of the high seas is exercised under the provisions laid down by these articles and by the other rules of international law." It also provides that the freedom of the high seas expressed in the article, "and others which are recognized by the general principles of international law, shall be exercised by all states with reasonable regard to the interests of other states in their exercise of the freedom of the high seas." This means that reasonableness of a particular use or

<sup>71</sup> *Ibid.* 553.

<sup>72</sup> *Ibid.* 554.

<sup>73</sup> *Ibid.* 553.

<sup>74</sup> *Ibid.* 554. Compare this statement with his earlier statement appearing at note 48 above.

<sup>75</sup> *Ibid.* 554.

<sup>76</sup> U. N. Doc. A.CONF. 13/L.53; 52 A.J.I.L. 842 (1958).

<sup>77</sup> Franklin, U. S. Naval War College International Law Studies 1959-60, p. 175 (Washington: U. S. Govt. Printing Office, 1961), analyzes that convention as a "codification of international law relating to the high seas and that the provisions are 'generally declaratory of established principles of international law.'"

uses of the high seas is an essential element of the broader determination of permissibility.<sup>78</sup>

In the area of peace, security, and self-defense, one finds numerous examples of community acceptance of the proposition that a general customary principle of international law may effectively limit application of other customary principles of international law under appropriate circumstances. As we have suggested, this is merely a process of mutual accommodation working to achieve rational and acceptable results where competing values are at stake. It is not necessarily the carving of an exception to principles so limited, but rather an example of one principle outweighing or governing another in a particular factual environment. In addition to demonstrating the existence of law as a living institution, substantial meaning is thus given to the phrase "other rules of international law" appearing in Article 2 of the convention. We conclude that the Convention on the High Seas does not serve as a proscription against a reasonable restriction on the free use of the seas by all states where this restriction is grounded on a valid peace, security, or self-defense basis and the responsive action is necessary and proportional to the threat.

#### PROPORTIONALITY

The doctrine of proportionality<sup>79</sup> was thoroughly implemented and adhered to by the states initiating and implementing the quarantine action.<sup>80</sup> Proportionality may be understood in two senses. First, it may suggest that national claims, in the sense of goals or objectives, should be proportional to the existing threat to national interests. Second, it may require that the offended state or states should use only such proportional means as are necessary to induce the offending state or states to withdraw from their offending course of conduct. In the first sense, the O.A.S. collective action sought to neutralize the broad Soviet effort to overthrow the existing power balance in the Western Hemisphere. It did not, for example, seek to create a totally new and threatening power situation along the territorial boundaries of the Soviet Union. In the second sense, the maritime quarantine activities were restricted to areas of the high seas radiating out from Cuba a limited distance, and the interdictory activities were limited to offensive weapons and associated matériel. The Presidential Proclamation provided:

In carrying out this order, force shall not be used except in case of failure or refusal to comply with directions, or with regulations or directives of the Secretary of Defense issued hereunder, after reason-

<sup>78</sup> Franklin, *op. cit.* at 157, suggests that "the essence of this provision is that each user of the high seas must accommodate every other user in order to have the least possible interference among all users."

<sup>79</sup> *The Caroline* (1837), 2 Moore, Digest of International Law 409, § 217.

<sup>80</sup> Approval of the application of the doctrine during the Cuban build-up has been general. See comments in *Columbia Law School News*, Nov. 7, 1962, by Wright, p. 2; Lissitzyn, p. 3; Dillard, p. 3; Meeker, "Role of Law in Political Aspects of World Affairs," 48 Dept. of State Bulletin 87 (1963); and see note 88 below.

able efforts have been made to communicate them to the vessel or craft, or in case of self-defense. In any case, force shall be used only to the extent necessary.<sup>81</sup>

Just as general American policy is being directed toward the possibility of the use of limited and controlled force in war, so also it is reasonable to limit and continually control force short of war. The maritime quarantine, in the context of proportionality, resulted in detailed executive control over appropriately limited force. This was described by Deputy Assistant Secretary of Defense Enthoven on February 10, 1963, in these words:

Each military move was, in effect, a carefully formulated message from the President to Khrushchev, intended to convince him that the United States would use military force to the extent necessary to achieve removal of the offensive weapons. But each move was also intended to convince him that he could withdraw without armed conflict, if he would withdraw.<sup>82</sup>

Secretary Rusk has described the American attitude toward the doctrine of proportionality in these words:

We must tailor our response, individually and collectively, to the degree and direction of the threat, be firm in our convictions and resolute and united in our actions.<sup>83</sup>

The United States sought a policy with respect to the Cuban crisis "which would accomplish our purposes with the appropriate and necessary use of force and with necessary opportunity to remove this grave threat by means other than general war."<sup>84</sup> Thus, it will be seen that force, like the rainbow, has its own spectrum. Sometimes its delicate blendings are so gradual as to discountenance the unwary, yet the multi-optioned spectrum is always present. The rationality of the doctrine is supported by its military utility and its moral acceptability.

#### PERMISSIBILITY OF A CLEARANCE CERTIFICATION SYSTEM AS AN ADJUNCT TO MARITIME QUARANTINE

As we have indicated, on October 27, 1962, the Department of State announced the institution of a clearance system "to assist vessels which transit the waters in the vicinity of Cuba and vessels destined for Cuban ports." It constituted a sophisticated system of shipping control. Two types of certificates were to be utilized. For vessels departing foreign ports and only transiting waters in the vicinity of Cuba, provision was made for filing a "Notice of Transit" with the American consulate at the last port of departure; for those with a Cuban destination and carrying no offensive weapons or other prohibited matériel, a Clearance Certificate (CLEARCERT) could be obtained. With respect to vessels departing

<sup>81</sup> 47 Dept. of State Bulletin 717 (1962).

<sup>82</sup> "U. S. Defense Policy for the 1960's," Dept. of Defense News Release, Feb. 10, 1963, p. 5. Compare Mallison, *loc. cit.* 344-364, 382; Seligman, *loc. cit.* 143.

<sup>83</sup> 47 Dept. of State Bulletin 721; compare Chayes, 41 Foreign Affairs 551-552.

<sup>84</sup> Rusk, *loc. cit.*

American ports either destined for a Cuban port or merely transiting waters in the vicinity of Cuba, a Clearance Certificate was obtainable from United States customs authorities. The announced purpose of the clearance system was "to avoid unnecessary delays and other difficulties arising out of the stoppage, inspection, or possible diversion of ships."<sup>85</sup>

The permissibility or non-permissibility of the system, since it involved a form of coercion, must be resolved on the grounds of reasonableness in the context of, and in relation to, the total scheme of maritime quarantine.

Permissibility can be supported on at least three grounds: (1) minimum interference with the free use of the sea by all states; (2) minimum violence; and (3) prior state practice. Although grounds one and two are separate and distinct, they are closely interrelated and will be considered together.

States continuing to trade with Cuba or utilizing waters within the established quarantine zone for transit could logically be suspected of contributing either directly or indirectly to the Soviet build-up in Cuba. Additionally, vessels proceeding through the interception zones could be suspected of intending to enter a port in Cuba or to interfere with the quarantine operations. An operative clearance certificate system permits location, inspection, and clearance activities to be accomplished ashore, thus resulting in a minimum of interference with a vessel's mobility. Through this policy, an effort was made to avoid wholesale diversion, although the right of boarding and inspection at sea was reserved.<sup>86</sup>

The traditional requirement that maritime interdiction be effective necessarily includes the possibility of force, or voluntary acquiescence to measures imposed by the interdicting authority. The demands of minimum interference and minimum violence are variables themselves and interact upon the degree of naval effectiveness and also upon the use of supplementary non-naval control procedures. If a system of certification is not employed, factual effectiveness of the measures of interdiction must depend directly on the effectiveness of naval operations.

Despite the many modern technical innovations in the conduct of naval and air warfare, so long as the principle of effectiveness is present, it necessarily involves the threat or use of force as a means of control. This increases the possibility of violence. Inspection and clearance of vessels in port can serve to minimize this possibility, as well as to reduce the opportunity for error and accident, thereby decreasing the danger of injury to persons and property. In the context of maritime quarantine operations, institution of a system of clearance certification goes to both the question of proportionality and the over-all determination of reasonableness, for it can serve to reduce the degree of interference and to minimize the possibility of violence.

The final ground supporting permissibility of a clearance certificate

<sup>85</sup> Appendices I and II, below. See discussion at pp. 529-530 above.

<sup>86</sup> *Ibid.*



system is that of prior state practice. As a belligerent-type measure of interdiction, the British Navicert systems of World War I and World War II had as their objective the maximum degree of isolation and resultant economic strangulation of the enemy. The legal argument supporting permissibility was grounded on a theory of reprisal against German maritime activities which were considered to be unlawful, *i.e.*, unrestricted submarine warfare.

The point we wish to make of the British practice is, if that Navicert system were permissible as an adjunct to war, may not the Cuban Clearcert system, which sought to minimize violence and interference with shipping, be valid as a reasonable measure supplementary to the quarantine? We assert, however, that the Clearcert system need not rely upon the British experience, but may be based exclusively on the duality of minimum interference and minimum violence.

The consequences flowing from the systems are entirely different. For example, the British Government claimed permissibility of, and applied a procedure for, condemnation of vessels and cargoes not possessing proper certification. No such claim was interjected as a part of the 1962 clearance certificate system. At the most, the placing of violating vessels and craft under custody for failing or refusing to obey interdictory force direction was to be the immediate sanction flowing from the Quarantine Proclamation. Further, utilization of the certification system was to be optional on the part of vessel operators and no claim of mandatory applicability was advanced.

#### CONCLUSION

The maritime quarantine was valid under international law. We have endeavored to demonstrate that, just as the doctrine of proportionality offers numerous reasonable options to the world community, so also does international law in its entirety establish a variety of permissible responses to national conduct which seeks by flagrant and deliberate means to distort the uneasy equilibrium of the world's power structure. We suggest that there are at least three substantive legal bases upon which permissibility of the 1962 maritime quarantine may be supported in international law. It may be supported in customary international law by the inherent right of self-defense, either individual or collective.<sup>87</sup> It may be supported by a realistic interpretation of Article 51 of the United Nations Charter (an interpretation which takes into account the tempo and scientific capabilities of the atomic-space age). It may be supported by the right of collective action to maintain Hemispheric peace and security as a part of the larger right to maintain and extend general international peace and security. Perhaps it may be supported in other ways. We do not wish to preclude this possibility.

<sup>87</sup> It would be uniquely ironic if the quarantine as a new legal option for the use of force in peace would have as a major by-product the eroding of the principle of self-defense, no matter how narrow or broad the latter may be thought to be.

## APPENDIX I

*Excerpts from Notice to Mariners, No. 47 \**

(6206) NOTE—*Special Warning No. 30.*—The President of the United States has proclaimed a quarantine of offensive military equipment under shipment to Cuba. Reactions may make Windward Passage, Yucatan Channel and Florida Straits dangerous waters. Ships are advised to use Mona Passage. Ships transiting the Straits of Florida are advised to navigate in proximity of the Florida Keys. Ships passing through Yucatan Channel are advised to favor the coast of the Yucatan Peninsula.

(See N.M. 1 (IV) 1962.)

(0.0.)

(N.M. 47/62.)

(6207) NOTE—*Special Warning No. 31.*—  
*Reference to Special Warning No. 30.*

The Presidential Proclamation of October 23, 1962, covered delivery of offensive weapons and associated materiel to Cuba. The prohibition of surface to surface missiles in the proclamation covers, of course, a prohibition of missile propellants and chemical compounds capable of being used to power missiles.

(See N.M. 1 (12) 1962.)

(See N.M. 45 (5889) 1962.)

(0.0.)

(N.M. 47/62.)

(6208) NOTE—*Special Warning No. 32.*—Pursuant to proclamation of the President of October 23, 1962, on the "Interdiction of the delivery of offensive weapons to Cuba" the Secretary of Defense has today issued the following submarine surfacing and identification procedures when in contact with U. S. Quarantine Forces in the general vicinity of Cuba. U. S. Forces coming in contact with unidentified submerged submarines will make the following signals to inform the sub that he may surface in order to identify himself: Signals follow—Quarantine forces will drop 4 to 5 harmless explosive sound signals which may be accompanied by the International Code signal "IDKCA" meaning "Rise to surface." This sonar signal is normally made on underwater communications equipment in the 8 kc. frequency range. Procedure on receipt of signal: Submerged submarine, on hearing this signal, should surface on easterly course. Signals and procedures employed are harmless.

(See N.M. 1 (IV) 1962.)

(0.0.)

(N.M. 47/62.)

(6209) NOTE—*Special Warning No. 33.*—  
*Reference to Special Warning No. 30.*

In connection with the quarantine of shipments of offensive weapons and associated materiel to Cuba proclaimed by the President of the United States on October 23, 1962, a clearance system has been instituted

\* Department of the Navy Oceanographic Office, Washington, D. C., pp. 2547-8.

"CLEARCERT" to avoid unnecessary delays and other difficulties arising out of stoppage, inspection or possible diversion of ships. This system contemplates granting of clearance for vessels destined for a non-Cuban port and to foreign vessels of any flag destined for a Cuban port with cargo, which contains no offensive weapons or associated materiel. Vessels in foreign ports may arrange for suitable clearance at American Embassies and Consulates. Foreign vessels in any U. S. port may arrange for suitable clearance with the Collector of Customs. Clearances will facilitate the movement of vessels. In unusual circumstances it may be necessary to stop, inspect or divert a ship despite the fact that it has a clearance.

(See N.M. 1 (IV) 1962.)

(O.O.)

(N.M. 47/62.)

#### APPENDIX II

### U. S. Acts to Avoid Delays for Ships Transiting Waters in Vicinity of Cuba \*

. . . . .

The system, developed by the State, Defense, and Treasury Departments, is designed to avoid unnecessary delays and other difficulties arising out of the stoppage, inspection, or possible diversion of ships.

The system is for the convenience of shipping, and clearances are obtainable upon application by ships' owners, agents, or officers.

A vessel departing a United States port may obtain a special clearance from customs authorities at the port of departure. A vessel departing a foreign port may obtain clearance from an American consulate.

The system covers two types of clearances. With respect to vessels departing American ports, whether destined for a Cuban port or merely transiting waters in the vicinity of Cuba, a Clearance Certificate (CLEARCERT) is obtainable from United States customs authorities.

With respect to vessels departing foreign ports, those which only transit waters in the vicinity of Cuba may file a Notice of Transit with the American consulate at the last port of departure; those destined for a Cuban port with a cargo containing no offensive weapons or other prohibited materiel may obtain a Clearance Certificate (CLEARCERT) from the American consulate at the last port of departure.

In unusual circumstances it may be necessary to stop, inspect, or divert a ship despite the fact that it has a clearance.

The procedure for the clearance of vessels from United States ports will be put in effect by the Treasury Department immediately. In the case of foreign countries, the procedure will become operative as soon as arrangements are made with those countries.

\* Department of State Press Release No. 644, dated Oct. 27, 1962; 47 Dept. of State Bulletin 747 (Nov. 12, 1962).

## THE CUBAN QUARANTINE

BY QUINCY WRIGHT

*Of the Board of Editors*

Many problems of international law have arisen in connection with United States-Cuban relations since the establishment of the Castro regime in 1959, especially in regard to the following incidents:

1. Castro's confiscation of American property in Cuba in 1960, said to be in reprisal against the United States reduction of the Cuban sugar quota, was asserted by an American court to have been a breach of international law,<sup>1</sup> and, following controversy over the number of persons in the U. S. Embassy in Havana, the United States broke diplomatic relations on January 3, 1962.<sup>2</sup>

2. Castro's acceptance of Communism in 1960 violated the declaration of the Caracas Conference of March, 1954, condemning international Communism, affirmed in subsequent declarations, and on this basis, the Punta del Este Conference of January, 1962, expelled the Castro government, though not Cuba, from participation in the Organization of American States, and recommended certain economic embargoes.<sup>3</sup>

3. United States complicity in the abortive Bay of Pigs invasion of Cuba by Cuban refugees and some U. S. citizens in April, 1961, was criticized by jurists and delegates in the United Nations as a violation of the general principles of international law requiring a state to use due diligence to prevent military expeditions from its territory against other states in time of peace, and of several inter-American conventions opposing "intervention" in American states, especially the Havana Convention of 1928 concerning "civil strife."<sup>4</sup>

<sup>1</sup> *Banco Nacional v. Sabatino*, 307 F. 2d 845 (1962); 56 A.J.I.L. 1085 (1962). A Cuban Association has been formed to press claims for an estimated \$1 billion of confiscated investments of American citizens and corporations in Cuba. *New York Times*, Nov. 11, 1962, p. 34.

<sup>2</sup> 44 Dept. of State Bulletin 103 (1961).

<sup>3</sup> U. S. Senate, Hearings before the Committee on Foreign Relations and the Committee on Armed Services, 87th Cong., 2nd Sess., *Situation in Cuba*, Sept. 17, 1962, pp. 99, 101, 103; 56 A.J.I.L. 610, 612 (1962).

<sup>4</sup> Quincy Wright, "Intervention and Cuba in 1961," 1961 Proceedings, American Society of International Law 2 ff.; 9 U.N. Review 14 ff. (April, 1962); note 49 below. It has been held that Sec. 960 of the U. S. Criminal Code (Sec. 5 of Neutrality Act of 1794), which punishes "Whoever within the United States knowingly begins or sets on foot or provides or prepares a means for, or furnishes money for, any military expedition or enterprise to be carried on from thence against the territory or dominions of any foreign . . . state . . . or people with whom the United States is at peace," applies, even if the final organization of the expedition took place outside U. S. territory (*Wiborg v. U. S.* (1896), 163 U. S. 632, 653), and even if initiated with knowl-

4. The United States' embargo against most exports to Cuba in 1960, followed by action in 1962, excluding from American ports foreign vessels trading with Cuba and all vessels of a country permitting arms trade with Cuba, in pursuance of the Punta del Este recommendation,<sup>5</sup> was criticized by some European shippers, and by Cuba and others in the United Nations. The United Nations, however, declined to support these criticisms.<sup>6</sup>

5. The United States' aerial surveillance of Cuba in 1962 was criticized as a violation of the general principle, accepted in the Chicago and other conventions on aerial navigation, that a state has sovereignty of its airspace, and foreign public aircraft cannot enter without its express consent.<sup>7</sup>

6. Soviet shipment to, and installation in, Cuba of medium-range missiles was declared by the United States in the Security Council on October 23, 1962, to be a "dangerous threat to the peace and security of the world" in violation of the Charter.<sup>8</sup>

7. The United States declaration on October 22, 1962, of a "quarantine" of Cuba to prevent importation of "offensive missiles" and to induce

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edge and approval of the President (U. S. v. Smith (1806), Fed. Case No. 16,342, pp. 1229, 1243); U.S.C.A. Tit. 18, Sec. 960, pp. 94, 95; 6 Moore's Digest §§ 908, 912, 918.

<sup>5</sup> Under Secretary of State George Ball, Oct. 3, 1962, 47 Dept. of State Bulletin 592 ff. (1962).

<sup>6</sup> Note 49 below.

<sup>7</sup> In a report to the New York Times on Oct. 24, 1962, John W. Fenney said that U. S. surveillance of Cuba was being carried on by Navy patrol planes photographing Soviet ships headed for Cuba and by military planes photographing Cuban territory obliquely from altitudes of around 40,000 feet and beyond the territorial boundaries of Cuba. "With the modern aerial cameras," he said, "it is no longer necessary to fly over the territory to be photographed. Using the technique of peripheral photography, often employed against the Soviet Union, the camera could easily take pictures covering the 80-mile width of Cuba." However, on Nov. 1, it was reported that Major Anderson's plane was downed by a missile while flying over Cuba, and on Nov. 16, Castro was reported to have notified the United Nations that he would shoot down over-flying American planes. The United States was reported to have intensified its aerial reconnaissance of Cuba early in October and to have said it would take "appropriate measures" to defend American planes, "would defend its aerial surveillance flights over Cuba if necessary, and would continue them until the Castro government agrees to better means of guarding against an offensive military build-up there." It considered such flights authorized by the Organization of American States (O.A.S.) in meetings in Washington on Oct. 3 and 28 (47 Dept. of State Bulletin 599, 723 (1962); New York Times, Nov. 17, 1962, p. 1). Khrushchev's complaint that U. S. planes had flown over Soviet territory on Aug. 30 and Oct. 28, 1962, brought "regrets" from President Kennedy, who said they were "unintentional," thus indicating his recognition that deliberate overflights were, in principle, illegal (47 Dept. of State Bulletin 449, 744, 746 (1962)). For general discussion of the law concerning aerial surveillance, see Quincy Wright, "Legal Aspects of the U-2 Incident," 54 A.J.I.L. 836 ff. (1960), and of the law concerning espionage, *idem*, "Espionage and the Doctrine of Non-Intervention in International Affairs," in R. J. Stanger (ed.), *Essays on Espionage and International Affairs* 3 (Columbus, Ohio State University Press, 1962).

<sup>8</sup> 9 U. N. Review 1, 6 (Nov., 1962). President Kennedy expressed concern about the Soviet build-up of armament in Cuba on Sept. 4 and 13, and in a telecast on Oct. 22 he declared that offensive weapons had been installed, a quarantine would be imposed, and the situation would be placed before the O. A. S. and the U. N. 47 Dept. of State Bulletin 450, 481, 715 (1962).

✓ withdrawal from Cuba of those already there was put into effect with Naval forces Oct. 24, 1962, and was protested in the Security Council on that day by Cuba as "an act of war" and by the Soviet Union as a "threat of war" in violation of the Charter.<sup>9</sup>

The present comment will deal only with the last of these incidents, but judgment on the legality of the "quarantine" is in some degree contingent on determination of the legality of the actions by Castro, the Soviet Union, and the United States in other incidents, especially those numbered 5 and 6 above.

#### AERIAL SURVEILLANCE

Under general principles of international law and several treaties, the United States was in principle bound to respect the sovereignty of Cuba in its airspace. Consequently, the evidence concerning the "offensive missiles" in Cuba, on the basis of which the "quarantine" was instituted, was illegally obtained, unless authority for such surveillance can be found in instruments to which Cuba had consented. The Rio Treaty of 1947 for Reciprocal Assistance, to which Cuba is a party, authorizes the Organ of Consultation of the American States to agree by a two-thirds vote on measures for their common defense and for the maintenance of the peace and security of the Continent.<sup>10</sup> The Punta del Este resolution, properly approved by that organ on January 31, 1962, and so constructively accepted by Cuba, although it did not concur, may have authorized aerial surveillance of Cuba when it urged the American states:

to take those steps that they may consider appropriate for their individual or collective self-defense, and to cooperate, as may be necessary or desirable, to strengthen their capacity to counteract threats or acts of aggression, subversion, or other dangers to peace and security resulting from the continued intervention in this hemisphere of Sino-Soviet powers, in accordance with the obligations established in treaties and agreements such as the Charter of the Organization of American States and the Inter-American Treaty of Reciprocal Assistance.<sup>11</sup>

The resolution of an informal meeting of representatives of the American States in Washington on October 3 "observed that it is desirable to intensify individual and collective surveillance of the delivery of arms to Cuba," thus supporting this construction. The resolution of the Organ of Consultation meeting in Washington on October 23, 1962, after the U. S. declaration of quarantine may be considered a retroactive justification of the American surveillance, as well as of the quarantine itself.<sup>12</sup>

#### THE SOVIET THREAT

It is difficult to find that the Soviet Union violated any obligation of international law in shipping missiles to, and installing them in, Cuba,

<sup>9</sup> 9 U. N. Review 1, 6 (Nov., 1962).

<sup>10</sup> Arts. 6, 8, 17. Senate Hearings 92 (cited note 3 above). The Charter of the O. A. S. (Bogotá, 1948) affirmed these principles. *Ibid.* 107, 109.

<sup>11</sup> *Ibid.* 98; 56 A.J.I.L. 607 (1962); 46 Dept. of State Bulletin 279 (1962).

<sup>12</sup> 47 *ibid.* 600 (1962).

at the request of the Castro government.<sup>13</sup> Under general international law, states are free to engage in trade in any articles whatever in time of peace. Treaties have been made restricting trade in arms, but no such treaty had been ratified by the Soviet Union, and the United States has refused to ratify such treaties on the ground, among others, that they might prevent countries without arms manufacture from providing for their defense.<sup>14</sup>

It has been argued that the installation of "offensive missiles" was a "threat of force" or a "threat to peace," violating the Soviet obligations under Articles 2 (4) and 39 of the United Nations Charter. "Displays of force" by naval vessels off the coast or by the mobilization of land forces on a frontier have been utilized by many states, including the United States, as a means to induce a state to modify its policy or as a preparation to defend itself from anticipated attack.<sup>15</sup> Mobilizations by European Powers for such purposes had much to do with the initiation of the first World War. Dangerous as they are, customary international law did not consider such "displays of force" illegal so long as they remained on the high seas or on the state's own territory, unless there was evidence of an immediate intention to use them for attack.<sup>16</sup> Such displays, however, constitute "threats of force" and consequently would appear forbidden by the U. N. Charter unless justifiable as measures of individual or collective self-defense. Khrushchev and Castro claimed that the missiles were shipped to, and installed in, Cuba only for that purpose. Khrushchev had promised that he would assist in the defense of Cuba<sup>17</sup> and it can hardly be doubted, in view of the Bay of Pigs affair, the President's somewhat ambiguous statement after that incident,<sup>18</sup> the economic measures taken by the United States to embarrass the Castro regime,<sup>19</sup> and the public demands for invasion of Cuba<sup>20</sup> by many American politicians,

<sup>13</sup> See note 17 below.

<sup>14</sup> Manley O. Hudson, in *International Regulation of the Trade in and Manufacture of Arms and Ammunition* (Nye Committee), 73rd Cong., 2nd Sess., Washington, 1935, p. 1 ff.; Quincy Wright, *A Study of War* 1175 (Chicago, 1942).

<sup>15</sup> Quincy Wright, *Control of American Foreign Relations* 294 (New York, 1922).

<sup>16</sup> As the British contended and the United States agreed in the *Caroline* incident of 1840. 2 Moore, *International Law Digest* 412.

<sup>17</sup> Note 8 above. The Soviet-Cuban agreement of Sept. 2, 1962, was printed in the *New York Times*, Sept. 3, and, together with the Soviet explanation of Sept. 11, in *Foreign Policy Association, Headline Series*, "The Cuban Crisis, A Documentary Record," pp. 3, 5 (Jan., 1963, No. 157).

<sup>18</sup> "If the nations of this hemisphere should fail to meet their commitments against outside Communist penetration—then I want it clearly understood that this government will not hesitate in meeting its primary obligations, which are to the security of our Nation." President Kennedy, to American Society of Newspaper Editors, April 20, 1961, 44 Dept. of State Bulletin 659 (1961). See also Wright, *loc. cit.* note 4 above, p. 17.

<sup>19</sup> See note 5 above.

<sup>20</sup> 47 Dept. of State Bulletin 281 (1962); Senate Hearings, p. 101. A Joint Resolution of Sept. 26, 1962, passed with one dissenting vote in the Senate and seven in the House, declared: "That the United States is determined—

"(a) to prevent by whatever means may be necessary, including the use of arms, the Marxist-Leninist regime in Cuba from extending, by force or the threat of force, its aggressive or subversive activities to any part of this hemisphere;

particularly during the election campaign of 1962, that Castro was justified in believing he needed assistance in defense. Furthermore, he may well have considered that the deterrent influence of medium-range missiles, threatening American cities, was the only feasible defense against the overwhelming naval, military, air, and missile power which the United States was capable of launching against Cuba. Khrushchev and Castro could defend this opinion by citing the American establishment of medium-range missile bases in Turkey and other countries near the Soviet Union to deter the latter from invading them.<sup>21</sup>

In principle, a sovereign state is free to take, within its territory, measures which it deems necessary for its defense, unless some obligation of international law or treaty forbids, and other states are free to assist it in such defense. This is well recognized by the United States in making

"(b) to prevent in Cuba the creation or use of an externally supported military capability endangering the security of the United States; and

"(c) to work with the Organization of American States and with freedom-loving Cubans to support the aspirations of the Cuban people for self-determination." 47 Dept. of State Bulletin 597 (1962).

Secretary of State Rusk believed such a resolution desirable if non-partisan. *Ibid.* and Senate Hearings, p. 30. The President cited "the Constitution as endorsed by the resolution" as authority for the quarantine, necessary "in the defense of our own security and of the entire Western Hemisphere" because "this secret, swift, and extraordinary build-up of Communist missiles—in an area well known to have a special and historical relationship to the United States and the nations of the Western Hemisphere, in violation of Soviet assurances, and in defiance of American and hemispheric policy—this sudden, clandestine decision to station strategic weapons for the first time outside of Soviet soil—is a deliberately provocative and unjustified change in the *status quo* which cannot be accepted by this country if our courage and our commitments are ever to be trusted again by either friend or foe." 47 Dept. of State Bulletin 716 (1962).

<sup>21</sup> Walter Lippmann pointed out the similarity between the U. S. missile bases in Turkey and the Soviet bases in Cuba and suggested a trade (N. Y. Herald Tribune, Oct. 25, 1962), as did Khrushchev in his note of Oct. 27, 1962 (47 Dept. of State Bulletin 742 (1962)). President Kennedy replied that the Cuban situation must be solved before considering "proposals concerning the security of nations outside the hemisphere" (*ibid.*), and in his subsequent note, proposing an agreement for Soviet removal of missiles from Cuba (see note 60 below), he said: "The effect of such a settlement in easing world tension would enable us to work toward a more general arrangement regarding other armaments." He felt sure a linking of these problems with the Cuban situation would prolong discussions and intensify the Cuban crisis and its risks to peace (*ibid.* 743). In a press interview on Sept. 29, Secretary of State Rusk had replied to a suggestion for a deal on U. S. overseas bases and Soviet Cuban bases: "This is not a negotiable point . . . You cannot support freedom in one place by surrendering freedom in another." 47 Dept. of State Bulletin 598 (1962). In his statement before the U. N. Security Council on Oct. 23, 1962, Ambassador Adlai Stevenson said that the argument equating Soviet bases in Cuba with NATO bases near the Soviet Union was invalid because of the "sudden and drastic" character of the Soviet action imperiling "the security of all mankind," and because the purposes were different. The NATO bases and missiles were for defense of NATO states threatened by Soviet missiles, the Cuban bases intruded a nuclear threat into an area now free of it and protected by a well-known international system of the Western Hemisphere. *Ibid.* 781.



large contributions of money, material and personnel to its allies to assist in their defense.

It was said, however, that the inherently offensive character of the long-range missiles in Cuba, the secrecy with which they were sent, the deception practiced by Soviet officials in denying that offensive missiles were being sent, the traditional attitude of the United States under the Monroe Doctrine, and the attitude of the Organization of American States under the Rio and Bogotá treaties opposing foreign intervention in the Western Hemisphere, constituted circumstances which made the sending of missiles to Cuba illegal.

It may be that some weapons should be regarded as inherently offensive, but no agreement to this effect has been made, and general international law, following the opinion of most strategists, has regarded the offensive or defensive character of weapons as dependent on their intended use. Any weapon can be used either defensively or offensively.<sup>22</sup>

There is no rule of international law that requires publicity for collective defense measures,<sup>23</sup> though such a rule may be desirable and indeed necessary if the installations are to have deterrent influence. While Soviet deception, asserted by President Kennedy and Ambassador Stevenson, certainly could not improve relations<sup>24</sup> and would render any agreement based on such deception voidable, it could not clearly demonstrate that

<sup>22</sup> Frank Aiken, Irish representative in the U. N. Security Council, Oct. 24, 1962, 9 U. N. Review 16 (Nov., 1962); Hanson W. Baldwin, "When are 'defensive' arms 'offensive'?" (New York Times, Oct. 25, 1962); Quincy Wright, *A Study of War* 793 ff., 805 ff.; Marion Boggs, *Attempts to Define and Limit Aggressive Armament in Diplomacy and Strategy*, University of Missouri Studies, Vol. 6, p. 43 (Columbia, Mo., 1941). As quoted by President Kennedy on Oct. 22 and by Ambassador Stevenson in the Security Council on Oct. 23, 1962, the Soviet and Cuban statements on Sept. 15, Oct. 8, and Oct. 18, referred to by the President as "false" and "deliberate deceit," asserted that the "sole purpose" of the weapons was to "contribute to the defense capabilities of Cuba" (see also note 17 above), though the Soviet statement that they "were designed exclusively for defensive purposes" suggests that an inherently defensive character of the weapons was also implied, and the Cuban reference to "inevitable weapons which we do not wish to employ" suggests that they had an inherently offensive character. 47 Dept. of State Bulletin 716, 732, 734 (1962).

<sup>23</sup> While the U. N. Charter calls for publicity of treaties (Art. 102), as did the League of Nations Covenant, strategic arrangements for implementing alliances have not in practice been published. Harvard Research in International Law, *Draft Convention on Treaties*, Art. 17, 29 A.J.I.L. Supp. 913 (1935). Secrecy undoubtedly militates against the growth of confidence and agreement to disarm, as noted by Secretary of State Rusk on Nov. 21, 1962. 47 Dept. of State Bulletin 871 (1962).

<sup>24</sup> The admitted deception by the United States in the U-2 incident was a factor in breaking up the Paris Summit Conference in May, 1960. Quincy Wright, "Legal Aspects of the U-2 Incident," 54 A.J.I.L. 836 ff. (1960). An editorial on "The Ethics of Lying" in *World View*, published by the Council on Religion and International Affairs, January, 1963, referred to lying, not by the Soviet Union, but by the United States in its "management of news" during the Cuban crisis. The Assistant Secretary of Defense had replied to a newsman's request for explanation of "the ethical bases for the government's self-asserted right to lie to the people," that the Government had an inherent right "to lie to save itself" and that the people would judge at the polls whether a particular falsehood was right or wrong. The editorial commented that an "adequate response to the problem" is not "easy or simple."

the purpose of the missiles was not defensive. If disclosed prior to installation, the missiles might be intercepted at sea, and, furthermore, it is not clear that the Soviet officials did not intend to assert by the alleged deceptive statements that the weapons were intended to be used only for defense and to reject the United States contention that medium-range missiles were inherently offensive.<sup>25</sup>

The Monroe Doctrine was declared in 1823 as a national policy by the United States designed to exclude European colonization or intervention in the Western Hemisphere. It was accompanied by a restatement of the American policy set forth in Washington's Farewell Address not to intervene in the Eastern Hemisphere. It never imposed international obligations, and its original reciprocal character has been eliminated by extensive United States interventions in the Eastern Hemisphere since the Spanish-American War, but particularly since the first World War. Furthermore, as a declaration of United States intention to defend the Americas by unilateral action, the Monroe Doctrine has, to some extent, been superseded by inter-American agreements, especially those of Rio and Bogotá, and by the United Nations Charter.<sup>26</sup> In hearings of the Senate Foreign Relations Committee on September 17, 1962, Secretary of State Rusk said:

The method of carrying it [the Monroe Doctrine] out has been altered, perhaps both by circumstances and by agreement, but it is still an elementary part of our whole national security interests.<sup>27</sup>

In any case, it is clear that neither the Monroe Doctrine nor inter-American treaties can impose obligations of international law on the Soviet Union, though politically they constitute a warning to non-American countries of attitudes likely to be taken by the American countries.<sup>28</sup> The Soviet Union

<sup>25</sup> Note 22 above.

<sup>26</sup> In a press conference on Nov. 20, 1962, President Kennedy said: "The United States has the means as a sovereign power to defend itself and of course, exercises that power: has in the past and would in the future. We would hope to exercise it in a way consistent with our treaty obligations, including the United Nations Charter. But we, of course, keep to ourselves, and hold to ourselves, under the United States Constitution and under the laws of international law, the right to defend our security on our own if necessary, though we . . . hope to always move in concert with our allies but on our own if that situation was necessary to protect our survival or integrity or other vital interest." New York Times, Nov. 21, 1962, p. 10. See also Senator Wayne Morse, Senate Hearings, p. 20.

<sup>27</sup> Senate Hearings, p. 34. Former President Truman, in a press statement on Feb. 24, 1963, supported intervention in Cuba on grounds of the Monroe Doctrine and the "Platt Amendment," though the Treaty of 1903 (4 A.J.I.L. Supp. 177 (1910)) permitting U. S. intervention as provided by this Amendment to the Army Appropriation Act of 1901, was terminated by a new treaty in 1934. 28 A.J.I.L. Supp. 97 (1934); Samuel F. Bemis, *A Diplomatic History of the United States* 504-507 (3rd ed., New York, 1950).

<sup>28</sup> See also note 21 above. Ambassador Stevenson said in the U. N. Security Council: "The principle of the territorial integrity of the Western Hemisphere has been woven into the history, the life, and the thought of all the people of the Americas. In striking at that principle the Soviet Union is striking at the strongest and most enduring strain in the policy of this hemisphere." 47 Dept. of State Bulletin 731 (1962). See also President Kennedy's statement, note 26 above. The value of the Monroe

was certainly aware that a nuclear missile attack upon the United States or any other American country would bring about nuclear retaliation from the United States, whether the missiles were launched from Cuba or from Russia, and it also seems clear that neither Khrushchev nor the Soviet people wanted nuclear war.

No satisfactory evidence has been presented to indicate that Khrushchev's purpose in sending the missiles was other than to deter attack on Cuba, and his willingness to withdraw them when the United States made the conditional pledge not to invade Cuba would support this defensive intent on his part.

It is possible that Castro hoped to use the presence of missiles as a threat to expand his influence among the Caribbean republics.<sup>29</sup> It can also be argued that Castro violated obligations under inter-American agreements and resolutions by his close relations with the Communist Powers, but such intentions or obligations of Castro could not impose obligations on the Soviet Union.<sup>30</sup> It is difficult, therefore, to support the allegation that the Soviet Union violated international obligations in sending and installing missiles in Cuba.

#### THE QUARANTINE

Efforts have been made to justify the United States quarantine, declared by President Kennedy in a radio broadcast on October 22, 1962,<sup>31</sup> and put into effect the next evening, on the following grounds:

1. It was a "pacific blockade" traditionally recognized in international law as constituting a "peaceful method" for settling a dispute as called for by Article 2 (3) of the U. N. Charter.<sup>32</sup>

2. It was not directed against the territorial integrity or political independence of any state and was not contrary to any purpose of the United Nations, and was therefore consistent with the obligations of the United States under Article 2 (4) of the Charter.<sup>33</sup>

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Doctrine depended in large measure on the natural defense of the Americas by oceanic distances and has greatly declined with the development of jet planes and intercontinental missiles.

<sup>29</sup> Castro had initiated invasions of Panama, Nicaragua, the Dominican Republic and Haiti in 1959. 44 Dept. of State Bulletin 107 (1961).

<sup>30</sup> Senator Keating of New York deduced Soviet aggressive intent from the aggressive capability of the missiles, the possibility of future use of the Cuban bases, and the history of Soviet aggressions and subversive interventions in the past. Senate Hearings, p. 7.

<sup>31</sup> 47 Dept. of State Bulletin 715 ff. (1962).

<sup>32</sup> This argument has been implied, rather than expressed, from the use of the term "quarantine," not a term of art in international law, but used by President Franklin D. Roosevelt in his Chicago Bridge speech in 1937 as a possible response to aggression after Japan had invaded China. By using this word the Government apparently hoped to avoid the legal implications of blockade and to emphasize the non-warlike intent of its action. New York Times, Oct. 24, 1962.

<sup>33</sup> This argument was made to justify the Anglo-French invasion of Egypt in 1956. See notes 44 and 65 below.

3. It was justified by the Rio Treaty and resolutions of the Consultative Organ of the O. A. S. in pursuance of that treaty, and could not be regarded as "enforcement action" requiring prior consent of the Security Council under Article 53 of the U. N. Charter.<sup>84</sup>

4. It was initiated as a measure of individual and collective self-defense in response to a "threat of force" amounting, under present conditions, to "armed attack," and was, therefore, permissible under Article 51 of the Charter, prior to submission to the United Nations as normally required by Article 37 of the Charter.<sup>85</sup>

#### PACIFIC BLOCKADE

Pacific blockade was a procedure often used in the 19th and early 20th centuries, generally by one or several large Powers against a small state, and was generally considered acceptable in international law if it conformed to the rules of "reprisal." The legitimacy of reprisals was held to depend on three conditions: that the purpose was to obtain remedy for injury resulting from illegal action, that non-coercive methods to obtain such remedy had failed, and that the measures taken were not out of proportion to the injury suffered.<sup>86</sup> Furthermore, with specific reference to pacific blockade, it was held, especially by the United States, that, differing from a war blockade, it did not permit interference with vessels of a third state, but only with vessels of the blockading and the blockaded states. Thus a Senate resolution of 1858 asserted that American vessels on the high seas are not subject to search in time of peace,<sup>87</sup> and, in accord with this principle, the United States objected to stoppage of its vessels by the pacific blockade established by Germany, Italy, and Great Britain against Venezuela in 1902.<sup>88</sup> Under these conditions a pacific blockade may prove ineffective, and consequently it may lead to a declaration of war, permitting a war blockade, as was indeed the case with the Venezuelan blockade of 1902.<sup>89</sup>

<sup>84</sup> This is the main argument relied on by the State Department. See Legal Adviser Abram Chayes, "The Legal Case for U. S. Action on Cuba," 47 Dept. of State Bulletin 768 (1962); *idem*, "Law and the Quarantine of Cuba," 41 Foreign Affairs 550, 554 (1963), reprinted in Congressional Record, May 2, 1963, A2732. See also Arthur Larson, former head of the U. S. Information Agency, New York Times, Nov. 26, 1962, and note 53 below.

<sup>85</sup> The Legal Adviser notes that President Kennedy did not invoke this argument and the O. A. S. did not act under Art. 3 of the Rio Pact dealing with "armed attack," but under Art. 6 dealing with other threats to the peace. *Loc. cit.* 764. See note 53 below.

<sup>86</sup> Naulilaa Case, Portugal v. Germany, Arbitration, July 31, 1928; Herbert Briggs, The Law of Nations 951 (2nd ed., New York, 1952); Hindmarsh, Force in Peace 58 (1938).

<sup>87</sup> 2 Moore, International Law Digest 946; Q. Wright, Control of American Foreign Relations 281 (New York, 1922).

<sup>88</sup> 1903 U. S. Foreign Relations 420 ff., 452 ff.; League of Nations, Memorandum on Pacific Blockades (Doc. A.14. 1927. v. 14, p. 89); Briggs, *op. cit.* 959.

<sup>89</sup> This development induced President Theodore Roosevelt to demand that the Venezuelan issue be arbitrated in order to avoid a war and possible invasion of

An effort to justify the quarantine by the historic doctrine of pacific blockade, therefore, fails because the United States did not make it clear what illegal act of Cuba it was trying to remedy and, if it had been claimed that Castro's installation of the missiles manifested allegiance to Communism in violation of obligations of Cuba under O. A. S. resolutions, non-coercive means of settlement had not been exhausted. Indeed, negotiations to remedy the situation could not be utilized because the United States had broken diplomatic relations with Castro and induced his expulsion from the O. A. S. at the Punta del Este Conference of January, 1962.

Furthermore, if the quarantine was a pacific blockade directed against Cuba, only Cuban or American vessels could be stopped, but the quarantine was designed primarily to stop Soviet vessels. Under the American concept of freedom of the seas and pacific blockade, this would be illegal, unless conditions for reprisals against the Soviet Union existed. This was alleged, but, as noted, it is difficult to show that the Soviet Union, in its relations with Cuba, had violated any obligation of international law owed to the United States.

Finally, even if the quarantine had conformed to the traditional conception of pacific blockade, it could not, in spite of its name, be reconciled with the obligations of all Members of the United Nations to "settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered," and to "refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."<sup>40</sup> The quarantine, as indicated by the President's Proclamation of 7:06 p.m., October 23, 1962, putting it into effect, implied use of land, sea and air forces to prevent delivery of the prohibited materials to Cuba by intercepting vessels within a designated zone around Cuba; directing stopping, visiting, and searching them; and using force to the extent necessary, if they tried to escape or resist.<sup>41</sup> Such procedures are not "peaceful means" but "threats or uses of force," and they do endanger both international peace and justice, and have in the past sometimes resulted in war.<sup>42</sup> Furthermore, the Charter seems to specify the "peaceful means"

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Venezuela in violation of the Monroe Doctrine, and this was done. The Venezuelan Preferential Case, Permanent Court of Arbitration, The Hague, 1904, Scott, Hague Court Reports 56; Briggs, *op. cit.* 958, 959. For detailed study of pacific blockades see Hogan, *Pacific Blockade* (1908); League of Nations Memorandum, note 38 above.

<sup>40</sup> U. N. Charter, Art. 2, pars. 3, 4.

<sup>41</sup> 27 Fed. Reg. 10401; 47 Dept. of State Bulletin 717 (1962); 57 A.J.I.L. 512 (1963). On Sept. 17, 1962, before the quarantine declaration, Senator Wayne Morse expressed grave concern at such action on grounds of international law. Senate Hearings, cited note 3 above, p. 20.

<sup>42</sup> The French jurist, Charles Rousseau, identified the measure with "pacific blockade," which term, he writes, manifests a "contradiction between substance and epithet," and, although used in the "interventionist policies" of the great Powers in the 19th century, is inconsistent with principles now accepted, as indicated by the International Court of Justice in condemning the British "policy of force" against

intended by Article 2 (3), by the terms of Article 33, which requires:

The parties to any dispute . . . likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.

Blockade, even if called "pacific," seems to be excluded, particularly by the phrase "of their own choice," unless applied with the constructive consent of the state against which it is directed, a condition possibly applicable to Cuba<sup>43</sup> but not to the Soviet Union.

#### TERRITORIAL INTEGRITY AND POLITICAL INDEPENDENCE

It has been argued that the obligations imposed by Article 2 (4) of the Charter cannot be understood unless the paragraph is read as a whole, and that a threat or use of force is not directed "against the territorial integrity" of a state unless its purpose is permanent acquisition of the territory belonging to that state, and that it is not directed against the "political independence" of another state unless its purpose is permanent subjection of that state to domination.<sup>44</sup> Common sense, however, sug-

Albania in the Corfu Channel case and by the United States in condemning the Franco-British action at Suez in 1956. "Le blocus Américain de Cuba et le droit international," *Le Monde*, Oct. 24, 1962.

André Fontaine comments that, instead of utilizing secret diplomacy, Platonic protests, or U. N. procedures, the United States "tranquilly violated the most elementary rules of international law by imposing, in time of peace, a control of traffic to Cuba and demanding that Russia withdraw its missiles under the threat of acts of war." "Les Américains séduits par la 'realpolitik'," *ibid.*, Dec. 6, 1962.

Raymond Aron writes that the real basis of the quarantine is "the traditional and cynical prerogative of the major powers to impose limits on the action of the lesser powers . . . There is no article in the Charter authorizing a nation to be sole judge of which weapons in its opinion, constitute a 'threat of force'," but in the world of today "the practical application of international law is only distantly related to the theory of international law." So he congratulates the United States that after one President, in the Suez crisis, "had placed considerations of international law above the ties of friendship," another President has "placed their security above the law." "International Law—Reality and Fiction," *New Republic*, Dec. 1, 1962, p. 13.

Charles Burton Marshall, formerly in the State Department, writes: "Blockade is a belligerent prerogative. If parties affected choose not to acknowledge its belligerent character it gets by as a peaceable act," United States action was probably not countenanced by the Charter, but "it is beyond law to provide a signal for a transgressor against one's vital interests" and "in a match of one-upmanship, the adversary saw himself as one-up. This had to be redressed." "Afterthoughts on the Cuban Blockade," *ibid.*, Nov. 10, 1962, pp. 18 ff.

Former President of Mexico, Lazaro Cardenas, in a letter of Oct. 27, 1962, to the *New York Times*, writes: "A dangerous situation was created by the great power of the North in decreeing illegal unilateral blockade constituting a criminal threat to the liberty and sovereignty of Cuba and other nations." See note 66 below.

<sup>43</sup> See note 47 below.

<sup>44</sup> Julius Stone seeks to justify acts of war without such purposes as measures of reprisal (*Aggression and World Order* (London, 1958); 39 *Foreign Affairs* 553 (July, 1961)). See comments by Quincy Wright, *The Role of International Law in the*

gests that invasion and occupation of a state's territory by armed force, whatever the purpose or whatever the intended duration, violates that state's "territorial integrity," and that use or threat of military force against a state's vessels on the high seas to induce its government to change its policy or to abandon its rights violates the state's "political independence." This common-sense interpretation is supported by the final clause of Article 2 (4), which forbids threat or use of force "in any other manner inconsistent with the Purposes of the United Nations." The first purpose of the United Nations is to "maintain international peace and security . . . and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace."<sup>45</sup> Clearly, territorial invasion and forcible reprisals are uses of force in "a manner inconsistent" with these purposes, and are therefore forbidden by Article 2 (4), as are declarations of war, stimulation of guerrilla activities abroad, or complicity in military expeditions departing from the state's territory. The quarantine, therefore, in addition to being a non-peaceful means forbidden by Article 2 (3), was a "threat of force" forbidden by Article 2 (4), unless coming within one of the special exceptions to be discussed in the next sections.

#### AUTHORITY OF THE ORGANIZATION OF AMERICAN STATES

The main argument put forward by the United States to justify the quarantine was that it was permitted by Articles 6 and 8 of the Rio Treaty of 1947, implemented by the Consultative Organ of the Organization of American States in its resolution at Washington on October 23, 1962. This argument suffers from the fact that Article 3 of the Rio Treaty permits unilateral action of forcible character only in case of defense against armed attack. Article 6, however, provides:

If the inviolability or the integrity of the territory or the sovereignty or political independence of any American State should be affected by an aggression which is not an armed attack or by an extra-continental or an intra-continental conflict, or by any other fact or situation that might endanger the peace of America, the Organ of Consultation shall meet immediately in order to agree on the measures which must be taken in case of aggression to assist the victim of the aggression or, in any case, the measures which should be taken for the common defense and for the maintenance of the peace and security of the Continent.

Article 8 provides: "For the purposes of this Treaty, the measures on which the Organ of Consultation may agree will comprise . . . : [among others] use of armed force."

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Prevention of War 6, 48 (Manchester University Press and Oceana Publications, 1961), and Ian Brownlie, "Recent Appraisals of Legal Regulation of the Use of Force," 8 Int. and Comp. Law Q. 707 ff. (1959). Philip Jessup concludes that hostile measures short of war, traditionally regarded as lawful remedial means of self-help, have ceased to be lawful if they involve the threat or use of force (A Modern Law of Nations 157 ff.). See also Briggs, *op. cit.* 960 ff.

<sup>45</sup> U. N. Charter, Art. 1, par. 1.

At a meeting on October 23, 1962, in Washington, the Organ of Consultation of the O. A. S. passed a resolution <sup>46</sup> with 19 affirmative votes:

1. To call for the immediate dismantling and withdrawal from Cuba of all missiles and other weapons with any offensive capability;

2. To recommend that the member states, in accordance with Articles 6 and 8 of the Inter-American Treaty of Reciprocal Assistance [the Rio Treaty], take all measures, individually and collectively, including the use of armed force, which they may deem necessary to ensure that the Government of Cuba cannot continue to receive from the Sino-Soviet powers military material and related supplies which may threaten the peace and security of the Continent and to prevent the missiles in Cuba with offensive capability from ever becoming an active threat to the peace and security of the Continent . . .

This resolution might justify action against Cuba on the ground that as a member of O. A. S. Cuba had constructively consented and so was legally bound by it.<sup>47</sup> It was passed after the initial declaration of unilateral action by the President on October 22, but before the quarantine was formally proclaimed on the evening of October 23, to go into effect at 2:00 p.m. on October 24. The Consultative Organ of the O. A. S. was, it is true, hardly in a position to give a free judgment, as contemplated by the Rio Treaty. It was faced by a *fait accompli*, but formally the United States acted in conformity with the resolution. The resolution could not, however, in law affect the rights of the Soviet Union, against which the quarantine was primarily directed. A state's rights, under international law, cannot be reduced by a treaty to which it is not a party.<sup>48</sup>

The question also arises whether the quarantine constitutes "enforcement action" which, under the United Nations Charter, cannot be instituted by a regional organization such as the O. A. S. without prior consent of the Security Council. It has been suggested that "enforcement action," as used in Article 53, includes only "enforcement measures under Chapter VII" referred to in Article 2 (7), and binding upon states by virtue of a Security Council decision, and that it does not include action taken by a state on the basis of a "recommendation" of a United Nations organ or an organ of a regional agency.

Diplomatic and economic measures recommended by the Consultative

<sup>46</sup> 47 Dept. of State Bulletin 722 (Nov. 12, 1962). Uruguay abstained, but cast an affirmative vote on the following day. Brazil, Mexico and Bolivia abstained in regard to the authorization to use "armed force . . . to prevent" the missiles in Cuba from becoming an "active threat" to the peace of the continent, because they thought this might support invasion of Cuba. New York Times, Oct. 24, 1962, p. 23.

<sup>47</sup> A League of Nations Committee held during the Ethiopian crisis of 1935 that a Member State could apply economic sanctions against Italy in accord with Art. 16 of the Covenant, even though contrary to commercial treaties, because Italy was bound by the Covenant, which abrogated inconsistent obligations among its Members (Art. 20), and by sanctions in accord with it. See 30 A.J.I.L. Supp. 49 (1936). See also Robert Layton, "The Effect of Measures Short of War on Treaties," 3 University of Chicago Law Review 105 (Autumn, 1962).

<sup>48</sup> Harvard Research in International Law, Draft Convention on Treaties, Art. 18, 29 A.J.I.L. Supp. 918 (1935).



Organ of the O. A. S. against the Dominican Republic in September, 1960, and against Cuba by the Punta del Este meeting in January, 1962, were considered by the United Nations, but it took no action, thus sustaining the competence of the O. A. S.<sup>49</sup> Measures of this kind, it has been suggested, come within the "resort to regional agencies or arrangements" contemplated by Article 33 of the Charter. This article, however, characterizes such resort as "peaceful means of their own choice," and it seems difficult to consider the quarantine as a peaceful means of Cuba's choice, even though in accord with the Rio Treaty to which Cuba is a party, and with the recommendations of the Consultative Organ of the O. A. S.<sup>50</sup> It seems rather to be enforcement action, and Article 53 says that "no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council." Application of this article to the O. A. S. resolution is supported by the fact that Article 51 of the Charter, which permits "collective self-defense" without prior Security Council approval, was adopted at San Francisco on behalf of the American States because it was thought that Article 53, as provided at Dumbarton Oaks, would prevent forcible, autonomous measures by these states.<sup>51</sup>

On the other hand, in order to justify the "Uniting for Peace" Resolution of 1950, "action" in Article 11, paragraph 2, of the Charter was held to refer only to "action" by the United Nations because of a Security Council "decision" and not to "action" by states because of a "recommendation" of the General Assembly or the Security Council. This construction has been supported by the International Court of Justice.<sup>52</sup> A similar interpretation may be given to "enforcement action" in Article 53. This interpretation makes it possible for the United States to justify the quarantine against Cuba by the O. A. S. resolution, but it certainly cannot justify its action against the Soviet Union by that resolution.

#### NECESSARY DEFENSE

Finally it has been argued that the quarantine and the O. A. S. resolution were justified as measures of "individual or collective self-defense"

<sup>49</sup> The U. N. Security Council on Feb. 27, 1962, refused to put on its agenda a Cuban charge that the O. A. S. violated the Charter in excluding the Cuban Government from the O. A. S. and initiating economic enforcement measures; and on March 23, 1962, it rejected a Cuban request for an advisory opinion of the Court on the subject. The General Assembly took no action on the Cuban complaint in August, 1961, alleging United States aggression, and on Feb. 20, 1962, it rejected a Mongolian proposal recalling principles of the Charter in this context. 9 U. N. Review 1, 13 (March, 1962); *ibid.* 1, 14 (April, 1962).

<sup>50</sup> The recommendations were approved by more than a two-thirds vote in the Consultative Organ, so constructive consent of Cuba might be assumed, even though Cuba has not been represented in that Organ since January, 1962.

<sup>51</sup> Report to the President on the Results of the San Francisco Conference, by the Secretary of State, Dept. of State, June 26, 1945, pp. 103, 107. The exception in Art. 53 of "enforcement action" against "enemy states" in World War II has no applicability to either Cuba or the Soviet Union, who were "allies" in that war.

<sup>52</sup> Advisory Opinion on Certain Expenses of the United Nations, [1962] I. C. J. Rep. 151; 56 A.J.I.L. 1062 (1962).

permitted by Article 51 of the Charter. It is suggested that the term "armed attack," which alone justified such defense without prior United Nations authority, must be interpreted to include a serious threat of armed attack.<sup>63</sup> Reference has been made to the statement by Secretary of State Webster in the *Caroline* case, generally accepted prior to the Charter, that military defensive action was permissible in case of "an instant and overwhelming necessity," thus creating a limited right of preventive action; that such a construction is necessary in the nuclear age because to delay defensive action until an actual nuclear attack would be suicidal, and that the Charter supports this construction by forbidding "threat" as well as "use" of force in Article 2, paragraph 4.

These arguments are not convincing. It appears that the Charter intended to limit the traditional right of defense by states to actual armed attack, even though it forbade "threat of force" and authorized the Security Council to intervene to stop "threats to the peace." Professor, now Judge, Philip Jessup wrote in 1948:

This restriction in Article 51 very definitely narrows the freedom of action which states had under international law. A case could be made out for self-defense in the traditional law where the injury was threatened but no attack had yet taken place. Under the Charter, alarming military preparations by a neighboring state would justify a resort to the Security Council, but would not justify resort to anticipatory force by the state which believed itself threatened.<sup>64</sup>

The obligation of states to refrain from threats to the peace under Article 2, paragraph 4, and the competence of the United Nations to take action in case of a threat to the peace under Article 39, were not intended to give a unilateral right of military self-defense in case of such threats. For that reason, self-defense against "threats" was excluded in Article 51, and states were explicitly obliged to submit disputes or situations which they think threaten peace, to the United Nations and to refrain from unilateral use of force. Article 33 requires "peaceful means" to settle disputes, "the continuance of which is likely to endanger the maintenance of international peace and security." This and the following articles specify such means, and Article 37 declares: "Should the parties to a dispute of the nature referred to in Article 33 fail to settle it by means indicated in that Article, they shall refer it to the Security Council." The United States did submit its quarantine measures to the Security

<sup>63</sup> The United States has not used this argument officially (see note 35 above), but it was advanced by Arthur Larson (*ibid.*), who cites D. W. Bowett, *Self-Defence in International Law* (1958), and invoked a reply from Joseph H. Crown (New York Times, Nov. 26, 1962). Eustace Seligman finds the quarantine justified on grounds of self-defense, but not by the O.A.S. resolution. "The Legality of U. S. Quarantine Action Under the United Nations Charter," 49 A.B.A.J. 142 (1963). See note 56 below.

<sup>64</sup> Philip Jessup, *A Modern Law of Nations* 166 (New York, Macmillan, 1948). After an exhaustive discussion of "The Use of Force in Self-Defence," Ian Brownlie concludes that "the beginning of an armed attack is a condition precedent for resort to force in self-defence." 37 Brit. Yr. Bk. of Int. Law 266 (1962). See also notes 16 and 44 above.

Council, but only after it had decided to act unilaterally. It asked for a resolution noting the "serious threat" to the peace in the Caribbean and calling for the withdrawal of missiles in Cuba as a provisional measure under Article 40 of the Charter. The Soviet Union and Cuba asked for a resolution to consider the "threat to peace" or, according to Cuba, "act of war" by the U. S. "blockade." No resolution was passed, but the Secretary General, declaring that the issue involved "the very fate of mankind" and that "some of the measures which the Council is called upon to approve, are very unusual and I might say, even extraordinary, except in wartime," at the request of a large number of Member governments, assumed a mediatorial rôle and assisted in bringing about agreements which ended the quarantine.<sup>55</sup>

The suggestion that the concept of "armed attack" should be broadened because of the extreme dangers of atomic first strike was considered in the United Nations in connection with the Baruch proposal for international control of atomic energy. The United States, on July 12, 1946, suggested that a treaty providing such control should define "armed attack" in a manner appropriate to atomic weapons, and include in the definition not simply the dropping of an atomic bomb but also certain steps in themselves preliminary to such action. It was thought that a violation of the international control arrangements, by seizure, for example, by a government of an installation of the International Commission in the state's territory, might be so serious as to give rise to the inherent right of self-defense recognized in Article 51 of the Charter. Professor Jessup comments on this:

The point may well become one of utmost importance, but the view may be hazarded, because of the political difficulties involved, no forthright interpretation or clarification will be achieved in the course of the negotiations. It is to be hoped that the occasion will not arise for individual states to resort to their individual interpretations in some great crisis.<sup>56</sup>

Discussions since that time have appreciated the dangers of a nuclear first strike and efforts have been made to create a control system so that capabilities of a second strike will deter any nuclear state from a first strike. This development suggests that, far from extending the meaning of armed attack in Article 51, the meaning should be contracted to forbid defensive action with nuclear weapons against even an armed attack with conventional weapons, and limiting the use of nuclear weapons to defense against an actual nuclear attack. In his declaration of quarantine, President Kennedy kept within this limitation, stating:

It shall be the policy of this nation to regard any nuclear missile launched from Cuba against any nation in the Western Hemisphere as an attack by the Soviet Union on the United States, requiring a full retaliatory response upon the Soviet Union.<sup>57</sup>

<sup>55</sup> 47 Dept. of State Bulletin 724 (1962); 9 U. N. Review 6 ff. (Nov., 1962).

<sup>56</sup> *Op. cit.* 167. The present writer gave some support to the broader conception of armed attack in *The Rôle of International Law in the Prevention of War* 60 (1961).

<sup>57</sup> 47 Dept. of State Bulletin 718 (1962).

The quarantine itself was a preventive measure to be enforced with conventional weapons,<sup>58</sup> prior to an armed attack by Cuba or the Soviet Union upon the United States or any other American country, and without authority of the United Nations or the consent of all the states which might be injured by its application. It could not, therefore, be justified under the terms of Article 2, paragraph 4, of the Charter and the recognized exceptions, such as that in Article 51, to this general prohibition against the threat or use of force in international relations.<sup>59</sup> It should be noted in extenuation that, while a few vessels were boarded and others diverted, force was not actually used and, in spite of the incomplete fulfillment of the agreement,<sup>60</sup> the quarantine was ended on November 21, 1962.<sup>61</sup> On

<sup>58</sup> Although no force was actually used, the test of legality should be applied to the President's Proclamation, its intent as declared by the President's statements, and the implementing instruction to the Department of Defense. Authoritative legislation and declarations by governments constitute "acts of state" which can properly be protested by states whose legal rights would be impaired by their execution prior to such execution. Thus, before the Canal was completed, Great Britain protested the discriminatory Panama Canal Tolls Act of 1911 as contrary to its rights under the Hay-Pauncefote Treaty, and, in response, President Wilson urged Congress to repeal the discriminatory provision. *Diplomatic History of the Panama Canal*, 63rd Cong., 2nd Sess., Sen. Doc. 474, pp. 82-83; President Wilson's Message to Congress, March 5, 1914, 51 Cong. Rec. 431; Quincy Wright, *Control of American Foreign Relations* 32, 163. The use of force was clearly contemplated, but only against merchant vessels, not against the public forces or territory of another state, consequently "acts of war" were neither used nor contemplated as charged by Cuba, though not by the Soviet Union, in the Security Council on Oct. 23, 1962 (note 9 above). See Quincy Wright, "When Does War Exist?", 26 A.J.I.L. 362 ff. (1932).

<sup>59</sup> It would not constitute "aggression," if this term is defined in the legal sense as an illegal use of armed force in international relations, or more precisely as "a resort to armed force by a state when such resort has been duly determined, by a means which that state is bound to accept, to constitute a violation of an obligation." Harvard Research, *Draft Convention on Rights and Duties of States in Case of Aggression*, 33 A.J.I.L. Supp. 847 (1939). Considering the obligations and permissions for Members concerning "force" in the U. N. Charter, aggression can be defined "as the use or threat to use armed force in international relations except for purposes of individual or collective self-defense, under authority of the United Nations, or on invitation of the state against which the force is to be used." Wright, "Intervention and Cuba in 1961," cited note 4 above, p. 6. This definition may be questioned on the ground that "aggression" should not be found unless there have been actual "acts of war," thus excluding "threats" and lesser uses of armed force. Wright, "The Prevention of Aggression," 50 A.J.I.L. 526 (1956); *The Role of International Law in the Prevention of War* 59 ff.; *A Study of War* 891, 1340.

<sup>60</sup> Because of Castro's refusal to allow U. N. inspection within Cuba, in spite of the efforts to persuade him by U Thant, the U. N. Secretary General, and Mikoyan, the Soviet Minister, Secretary of State Rusk told the Senate Foreign Relations Committee on Jan. 11, 1963, that the "no-invasion commitment no longer exists," but the U. S. is bound to get approval of the O. A. S. before any such action. The agreement stated in President Kennedy's note of Oct. 27, 1962, was in these terms:

"(1) You would agree to remove these weapons systems from Cuba under appropriate United Nations observation and supervision; and undertake, with suitable safeguards, to halt the further introduction of such weapons systems into Cuba.

"(2) We, on our part, would agree—upon the establishment of adequate arrangements through the United Nations to ensure the carrying out and continuation of these

the principle of proportionality, defensive measures not involving military action are doubtless permissible against "threats of force" less than "armed attack."

#### CONCLUSION

It cannot be doubted that the United States Government acted skillfully to obtain the removal of the long-range missiles from Cuba. The form and timing of the quarantine declaration, the organization of naval forces, the procurement of consent by the O. A. S. and the NATO allies, and the utilization of the United Nations as a forum for discussion and explanation and as an instrument of mediation and supervision, achieved the results desired without hostilities or United Nations criticism.<sup>62</sup> The United States Government had gained in experience since the Bay of Pigs episode of the spring of 1961. Most Americans were happy that a conditional agreement was reached with Khrushchev, that the missiles were withdrawn, and that peace was maintained. It cannot be easily argued, however, that the United States has lived up to its legal obligations to respect the freedom of the seas, to submit threats to the peace to the United Nations before taking unilateral action, and to refrain from use or threat of force in international relations except in individual or collective self-defense against armed attack, under authority of the United Nations, or with consent of the state against which the force is used.<sup>63</sup>

The episode has not improved the reputation of the United States as a champion of international law and it may prove an unfortunate precedent unless it makes the United States more aware of the provocative influence of overseas missile bases and the importance of negotiating on the subject

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commitments—(a) to remove promptly the quarantine measures now in effect and (b) to give assurances against an invasion of Cuba. I am confident that other nations of the Western Hemisphere would be prepared to do likewise."

In his note of Oct. 28, the President said: "I consider my letter to you of October twenty-seventh and your reply of today as firm undertakings on the part of both our governments which should be promptly carried out." 47 Dept. of State Bulletin 743-746 (1962).

<sup>61</sup> *Ibid.* 918, and the President's statement at a news conference, Nov. 20, 1962, *ibid.* 874. A U. S. Senate Subcommittee Report on May 9, 1963, found that Soviet and Cuban forces on the island are "quite powerful defensively and could oppose severe opposition to any attack," and are "capable of suppressing any internal rebellion or revolt mounted without external support," but that "the intelligence chiefs [of the U. S.] do not believe that Communist forces in Cuba now present a direct aggressive military threat to the United States or Latin America." The Subcommittee thought that evidence was not "conclusive" on this, but was "overwhelming" that Castro was "supporting, spurring, aiding and abetting Communist revolutionary and subversive movements throughout the Western Hemisphere and that such activities present a grave and ominous threat to the peace and security of the Americas." New York Times, May 10, 1963, p. 2.

<sup>62</sup> Secretary of State Rusk's interview, Nov. 28, 1962, 47 Dept. of State Bulletin 909 ff., and detailed summary of procedures during the crisis, New York Times, Nov. 3, 1962, pp. 1, 6.

<sup>63</sup> See note 59 above. Covey Oliver doubts whether the resolution of the crisis was either an unqualified triumph of law or an example of "power politics" determinism." 57 A.J.I.L. 375 (1963).

to reduce international tension as a condition for further disarmament.<sup>64</sup>

The Cuban quarantine, like the Suez and Hungarian episodes of 1956, demonstrates the reluctance of a great Power to observe its legal obligations when dealing with unpalatable action or attitudes of a small state, especially when that small state is located in a position of strategic importance to the great Power. The British objected to the nationalization of the Suez Canal Company and the independent attitude of the Nasser Government. The Soviet Union objected to the abandonment of Communism and the Warsaw alliance by the Nagy government of Hungary, and the United States objected to the nationalization of property and the acceptance of Communism by Castro. In all three cases, the great Power intervened unilaterally in the domestic jurisdiction of the small state to get rid of the objectionable government. Soviet intervention in Hungary was the most drastic and immediately the most successful. The Nagy government was eliminated, many Hungarians were killed, more went into exile, and the Soviet Union was condemned by the United Nations as an aggressor. The British intervention in Egypt, assisted by the French, was less drastic, although many Egyptians were killed, but United Nations procedures supported by the United States and the Soviet Union, induced the intervening states to withdraw their forces and to reach agreement for Egyptian operation of the Canal and compensation of the owners of the International Company. President Nasser continued to rule Egypt and the intervening Powers escaped formal censure by the United Nations.<sup>65</sup>

The American intervention in Cuba was the least drastic, although some Cubans and a few Americans were killed in the Bay of Pigs incident and many Cubans went into exile. Two Soviet ships were stopped by the quarantine but none were sunk. Agreements were made with the assistance of the United Nations for removal of the missiles which Khrushchev had sent to Cuba, for stoppage of further such shipments, and for a United States pledge not to invade Cuba, conditioned on United Nations inspection in Cuba, which has not materialized. Subsequently, Castro released the Bay of Pigs prisoners in exchange for some \$53 million worth of medical supplies and food, paid for by private subscription, encouraged by the United States Government. Americans called this "ransom" for the prisoners and Castro called it "reparation" for Cuban losses due from the United States because of its complicity in this incident. The United States escaped formal censure by the United Nations for both the Bay of Pigs incident and the quarantine, but its actions were criticized by some foreign jurists and statesmen.<sup>66</sup>

<sup>64</sup> Both President Kennedy and Chairman Khrushchev manifested this awareness in their exchanges of Oct. 27 and 28, 1962 (note 60 above), and it has been reported that the United States has removed missiles from Turkey and Italy.

<sup>65</sup> The writer discussed the legal aspects of these incidents in 51 A.J.I.L. 257 (1957).

<sup>66</sup> See note 42 above, and debate in the U. N. Security Council, Oct. 23, 1962, especially remarks of the Irish, United Arab Republic and Ghanaian representatives. The criticisms by the Cuban, Soviet and Rumanian representatives were extreme. The vigorous defense of the United States by its representative, Adlai Stevenson, was

It is an interesting speculation whether the agreements reached could have been achieved if Castro's charge that the United States was threatening the peace by planning to invade Cuba, and the United States' charge that the Soviet Union and Cuba were threatening the peace by installing missiles in Cuba, had been submitted to the United Nations without prior threat or quarantine.

All the Members of the United Nations have accepted the Charter purpose to maintain international peace and security, its principles of sovereign equality of all states and non-intervention in the domestic jurisdiction of others, and its obligations to settle disputes by peaceful means, to refrain, with certain exceptions, from use or threat of force in international relations, and to submit disputes not settled by peaceful means to the United Nations. States tend to forget these purposes, principles and obligations when they think it possible to realize what seems an immediate interest by unilateral action. This is especially true of great Powers, accustomed in the past to dominate small states that get in their way, but other states have been guilty of the same forgetfulness, as indicated by several instances which have occurred since World War II. If international law is to become the bulwark of security for all, which Grotius hoped for and which the negotiators at San Francisco sought to institutionalize, governments must redefine their interests, nations must learn to practice tolerance, and peoples must accustom themselves to think, not of a world in their own image, but of a world of many states of varying policies, economics, cultures and ideologies, peacefully co-existing under that law.

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supported by representatives of the O. A. S. and NATO countries. 9 U. N. Review 6 ff., 16, 17 ff. (Nov., 1962).

## COMMONWEALTH CITIZENSHIP AND COMMON STATUS \*

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The transformation of the British Empire has affected in a striking manner relationships of the former Empire's people with respect to their nationality. Natural persons in the Commonwealth (whether living in monarchies that continue to acknowledge allegiance to the Queen or in republics acknowledging only that the Queen is "Head" of the Commonwealth) have preserved among themselves some legal arrangements as a heritage of the time when there was a common allegiance for all. Since any state has, consistently with international law, considerable freedom to say who shall be its nationals, and since dual or multiple nationality is still possible, there is room, without infringing that law, for some inventiveness and for some special statutory relationships. For the purpose of according certain legal rights (and in some instances, imposing obligations), Commonwealth states distinguish between the people of other Commonwealth states and the people of non-Commonwealth states.

The distinction is not a new one. What is relatively new is that the states making the distinction are now completely independent of each other. Some light upon the significance of present practice for international law may conceivably come from consideration of (1) the common code that originally existed, (2) the new (post-1948) concept of a common status for the peoples of the independent but still associated states, (3) some of the more obvious consequences of maintaining a common status, (4) types of discrimination that have existed despite the common status, and (5) continuing evidences of a kind of common nationality as seen in practice concerning international reclamations. The limitations of a brief study preclude more than illustrative coverage of the development and necessarily affect the force of conclusions.

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### 1. *The Common Code*

Prior to the end of the first World War there was only one category of persons owing allegiance to the Monarch, *i.e.*, British subjects. Through legislation in different parts of the old Commonwealth the status of British subject was maintained. A judicial holding in 1920, to the effect that naturalization in Australia did not necessarily cause the person naturalized to become a British subject in Great Britain,<sup>1</sup> emphasized the difficulties that attended the maintenance of the position that there was one single "British" category for legal purposes. When the self-governing Dominions became separate Members of the League of Nations, it became desirable for them to distinguish a kind of separate nationality—for the purpose, for example, of nominating persons as judges for the Permanent Court of International Justice. That such situations did not overturn the general notion of a single status throughout the Empire is illustrated in the continued operation of the *inter se* doctrine in such matters as extradition of fugitives, the use of letters rogatory, and the recognition of foreign judgments—in all of which matters co-operation between different Commonwealth members proceeded in accordance with Imperial Acts rather than on the basis of customary international law and treaties. By the Statute of Westminster, 1931, these Acts were to continue in force throughout the Empire unless and until specifically repealed by the government of a member state of the Commonwealth.

Not until after the second World War was there a departure from a common code. In the early postwar period there was experimentation through separate legislation looking to a common purpose, but with the possibility of disagreement among the legislatures of the fully independent states. A part of the difficulty which attended the effort was the natural result of the multiracial character of the Commonwealth's peoples and the insistence by some that the principle of reciprocity take precedence over the idea of unity in policy.

### 2. *New Concept of Common Status*

The Canadian Citizenship Act of 1946 heralded the demise of the common code on nationality, but it contained the germs of a new, although looser, common status. The new concept was, of course, more in keeping with the changed constitutional status and international position of the Commonwealth countries. The Canadian Act provided that all persons who were British subjects under the law of any other (Commonwealth) country would be recognized as such in Canada.

The United Kingdom took the next step—that of inviting representatives of member states of the Commonwealth to a conference at London in February of 1947. There an exchange of views resulted in the formulation of a general plan embodied in the British Nationality Act of 1948. A *White Paper* explained that the Act gave effect to the principle that nationals of the self-governing countries of the Commonwealth had a

<sup>1</sup> *Markwald v. Attorney-General*, [1920] 1 Ch. 348; 14 A.J.I.L. 276 (1920).

status as citizens of their respective countries and also a common status as members of the wider association of the Commonwealth. Envisioned was a general arrangement whereby each member state would pass legislation defining its citizens (who would also be British subjects) and recognizing the citizens of other members of the Commonwealth as British subjects. The *Paper* set forth that this "common clause" would create the dual status of citizen of a Commonwealth country and British subject; this would have the advantage of

... giving a clear recognition to the separate identity of particular countries of the Commonwealth, of clarifying the position with regard to diplomatic protection and of enabling a Government when making treaties with other countries to define with precision who are the persons belonging to its country and on whose behalf it is negotiating. Such a system also enables each country to make alterations in its nationality laws without having first, as under the common code system, to consult the other countries of the Commonwealth. . . .<sup>2</sup>

Consistently with this stated objective, Section 1 of the British Act declared that anyone who is a citizen of the United Kingdom and Colonies, a Commonwealth country, Singapore or the Federation of Rhodesia and Nyasaland shall have the status of a British subject or a Commonwealth citizen, which shall have the same meaning. Section 2 of the Act provided that any citizen of Eire who on January 1, 1949 (the effective date of the Act), was also a British subject, and who gave proper notification of intent to retain the status, would be treated as a British subject.<sup>3</sup>

<sup>2</sup> Omd. 7326. The common status was to apply not only to persons, but also to merchant ships. The British Commonwealth Merchant Shipping Agreement (Dec. 10, 1931) had provided in its Part I, Art. 2:

"(1) No ship shall be registered in any port within the British Commonwealth so as to acquire the status and recognition mentioned in paragraph (2) of this Article unless it is owned wholly by persons of the following description, namely:

- (a) Persons recognized by law throughout the British Commonwealth of Nations as having the status of natural born British subjects;
- (b) Persons naturalized by or in pursuance of the law of some part of the British Commonwealth;
- (c) Persons made denizens by letters of denization; and
- (d) Bodies corporate established under and subject to the law of some part of the British Commonwealth and having their principal place of business within the British Commonwealth.

"(2) Every ship so owned and duly registered within the British Commonwealth shall possess a common status for all purposes and shall be entitled to the recognition usually accorded to British ships." 129 L. N. Treaty Series 177.

<sup>3</sup> The British Nationality Act of 1948, 11 & 12 Geo. 6 (1948), c. 56; as amended by the British Nationality Act of 1958, 6 & 7 Eliz. 2 (1958), c. 10. The Act as amended will hereafter be cited as the British Nationality Act, unless otherwise stated. The operation of the principal Act in regard to protectorates, protected states, trusteeships and protected persons has been given effect by Orders in Council issued from time to time under the authority of the Act as follows: British Protectorates, Protected States and Protected Persons Order in Council No. 140 of Jan. 28, 1949, Statutory Instruments (1949), I, 522; British Protectorates, Protected States and Protected Persons (Amendment) Order in Council No. 457 of March 10, 1952, *ibid.* (1952),

Not all members of the Commonwealth followed the lead by adopting every detail of the new plan. However, no Commonwealth country considers British subjects or citizens of other Commonwealth countries to be "aliens" in the full sense of that word. India, for example, recognized that a citizen of another Commonwealth country would have "the status of a Commonwealth citizen in India," but it did not confer the status of Commonwealth citizens on citizens of India.<sup>4</sup> Pakistan, Ceylon and South Africa did not adopt the common clause at all, although the effect of their laws is similar to the effect that would have been achieved had such a clause been adopted. Section 2 of the Pakistan Citizenship Act of 1951, as amended, defines an alien as a person who is not a citizen of Pakistan or a Commonwealth citizen; and the term "Commonwealth citizen" is to have the same meaning as under the British Nationality Act of 1948. Section 15 of the Pakistan Act declares that "Every person becoming a citizen of Pakistan under this Act shall have the status of a Commonwealth citizen."<sup>5</sup> South Africa's Citizenship Act (1949) describes an

I, 437; British Protected States (Fujairah and Kalba) Order in Council No. 1417 of July 29, 1952, *ibid.* (1952), I, 436; British Protectorates, Protected States and Protected Persons (Amendment) Order in Council No. 1173 of Dec. 4, 1953, *ibid.* (1953), I, 188; British Protectorates, Protected States and Protected Persons (Amendment) Order in Council No. 259 of Feb. 19, 1958, *ibid.* (1958), I, 245; and the British Protectorates, Protected States and Protected Persons (Amendment No. 2) Order in Council No. 590 of April 3, 1958, *ibid.* (1958), I, 246. The operation of the Act for British communities not electing to join the Commonwealth, members leaving the Commonwealth, newly emerged Commonwealth countries, and certain self-governing units is effectuated by: the Burma Independence Act, 1947, 11 Geo. 6 (1947), c. 3; Ireland Act, 1949, 12 & 13 Geo. 6 (1949), c. 41; the Ghana Independence Act, 1957, 5 & 6 Eliz. 2 (1957), c. 6; the Federation of Malaya Independence Act, 1957, 5 & 6 Eliz. 2 (1957), c. 60; the Nigeria Independence Act, 1960, 8 & 9 Eliz. 2 (1960), c. 55; the Sierra Leone Independence Act, 1961, 9 & 10 Eliz. 2 (1961), c. 16; the Republic of South Africa (Temporary Provisions) Act, 1961, 9 & 10 Eliz. 2 (1961), c. 23; and the British Nationality Act, 1958 (Commencement) Order, 1958, Order in Council No. 327 of Feb. 27, 1958, which caused Sec. 1 of the British Nationality Act of 1958 to come into operation on March 1, 1958, Statutory Instruments (1958), I, 236. The nationality of adopted children is treated in the Adoption Act, 1950, 14 Geo. 6 (1950), c. 26, as amended by the Adoption Act, 1960, 8 & 9 Eliz. 2 (1960), c. 59.

<sup>4</sup> Citizenship Act No. 57 of 1955, Sec. 11, to be found in: India, Ministry of Law, Acts of Parliament (1955), p. 307, as amended by the Citizenship (Amendment) Act No. 65 of 1957, *ibid.* (1957), p. 492, hereafter cited as the Indian Citizenship Act. Citizenship is also covered by the Constitution of India of Nov. 26, 1949, Pt. II, Arts. 1-11, hereafter cited as the Constitution of India. The fact that the Indian Act does not confer the status of a Commonwealth citizen or British subject on the citizens of India would appear to have little effect within the Commonwealth as long as the laws of the other Commonwealth countries recognize a citizen of India as a British subject. For instance, in the case of *Bava Bhaga v. Parbhu*, tried by the Supreme Court of New Zealand in 1954, the defendant held that he was a citizen of India and not a British subject. The court found that he was a British subject and that a writ could issue to be served in India against him. See [1954] N.Z.L.R. 1039.

<sup>5</sup> Pakistan Citizenship Act, 1951, The Central Acts and Ordinances (1951), Act II of 1951; as amended by Pakistan Citizenship (Amendment) Act, 1952, *ibid.* (1952), Act V of 1952, hereafter cited as Pakistan Citizenship Act.

alien as a person who was not a citizen of South Africa, a Commonwealth country or the Republic of Ireland;<sup>6</sup> however, South African withdrawal from the Commonwealth in 1961 was the occasion for new legislation in that country and in the United Kingdom.<sup>7</sup> Section 26 of Ceylon's Citizenship Act defines an alien as a person who is not a British subject; the term "British subject" is to have the same meaning as it has in the law of the United Kingdom.<sup>8</sup>

In addition to the British subject or Commonwealth citizen, the British Nationality Act of 1948 mentions a transitional category, *i.e.*, that of British subject without citizenship; such a person was to have, even if temporarily, many of the privileges that British subjects had enjoyed under pre-1948 legislation. The category of British subjects without citizenship was to include subjects who would not attain citizenship under

<sup>6</sup> South African Citizenship Act of 1949, Sec. 1. Statutes of the Union of South Africa (1949), Act No. 44 of 1949, p. 414, hereafter cited as the South African Citizenship Act. Although South Africa has become a Republic and is out of the Commonwealth, laws existing as of May 31, 1961, were to continue in force for a period of one year from that date unless provision should be made to the contrary by the proper authorities. See Republic of South Africa (Temporary Provisions) Act, 1961, as cited in note 3 above.

<sup>7</sup> For the purpose of the present study, South African legislation is less pertinent than is that of the United Kingdom. South Africa's failure to encourage dual citizenship has been attested by her non-recognition of nationality *jure soli* in the case of a person whose father was a prohibited immigrant, and by her rule that a South African of full age acquiring the citizenship of the United Kingdom by registration would forfeit his South African citizenship. See Olive Parry, "Plural Nationality and Citizenship with Particular Reference to the Commonwealth," 30 Brit. Yr. Bk. of Int. Law 279 (1953).

The British Nationality Act of 1948 having defined "British subject" as anyone who is a citizen of named countries (without any specific mention of the Commonwealth), the rule continued to apply to South African citizens even after their state's leaving the Commonwealth. The precedent of Eire and certain wording in the United Kingdom-Burma Treaty of Oct. 17, 1947 (70 U. N. Treaty Series 188) did not, however, control British policy. The Parliament at Westminster, in the South Africa Bill of 1962 (House of Commons Bill 63/1961-'62), amended earlier legislation on nationality by providing that, at the end of a "stand-still" period (May 31, 1962), South Africans who were British subjects by reason of their South African citizenship would become aliens; until 1965, however, certain categories of South Africans can become United Kingdom citizens by registering instead of going through the naturalization process, and South African citizens employed in Great Britain in positions not open to aliens may, until the end of 1965, choose between applying for United Kingdom citizenship and abandoning such positions. See Olive Parry, "The Status of Citizens after May 31," *The Times* (London), March 21, 1961, p. 13.

In South Africa, the Commonwealth Relations (Temporary Provision) Act, 1961, provided that South African laws containing references to the Commonwealth or to a particular Commonwealth country should not be affected by the fact that the Republic was not a member of the Commonwealth. If, however, a Commonwealth country should exclude the Republic from the benefits enjoyed by other Commonwealth countries, the Republic might do likewise. Statutes of the Union of South Africa, 1961, p. 486.

<sup>8</sup> Ceylon Citizenship Act of 1948, Ceylon, Parliament of Ceylon, The Acts of Ceylon (1948), Act No. 18 of 1948, as amended by: Citizenship Amendment Act of 1950, *ibid.* (1950), Act No. 40 of 1950, and Citizenship Amendment Act of 1955, *ibid.* (1955), Act No. 18 of 1955, hereafter cited as the Ceylon Citizenship Act.

the laws of any Commonwealth country and would thus have become stateless unless some such provision had been made for them. By law of the United Kingdom, persons who had previously (*i.e.*, before the effective date of the Act) been British subjects and who gave proper notification of their intention to remain so, were to be treated as British subjects; until the country of residence had enacted a citizenship law and they had elected to become citizens of that country or had elected to become aliens, they would be British subjects without citizenship.<sup>9</sup>

Policy with respect to adoption of the "common clause" has not been the same in all member states of the Commonwealth. Nigeria and Sierra Leone adopted the clause in their respective constitutions. Although not all Commonwealth states have adopted the clause, in no one of these states was a British subject regarded as an alien. India recognizes that a citizen of another Commonwealth country has the status "of a Commonwealth citizen in India," but has not conferred the status of Commonwealth citizen upon *its own* nationals. Neither Pakistan, Ceylon, nor the Union of South Africa adopted the common clause, although it would appear that legislation in each of these countries accomplished substantially the same purpose as would have been accomplished by such adoption. The Pakistan Citizenship Act of 1951 defines an alien as one who is not a citizen of Pakistan or of a Commonwealth country (with a statement that the term "Commonwealth citizen" has the same meaning as it has in the British Nationality Act). By the Pakistan legislation, nationals of that country have the status of Commonwealth citizens. South Africa's Citizenship Act defines an alien as one who is not a citizen of the Union, of a Commonwealth country, or of the Republic of Ireland. By Ceylonese legislation an alien is one who is not a British subject—and here again the latter term is to have the same meaning as it has in the British Nationality Act.

As noted above, in addition to distinguishing the British subject or Commonwealth citizen, the British Nationality Act provided for a transitional status of British subjects without citizenship. Such subjects might be persons unable to attain citizenship under the laws of any Commonwealth country. United Kingdom law protects them from becoming stateless and enables them to enjoy many of the privileges of British subjects under pre-1948 British statutes. Under the 1948 Act, any person who has formerly been a British subject and is potentially a citizen of a Commonwealth country is a British subject without citizenship until legislation of the country in which he resides makes him an alien or a citizen. Statutes of New Zealand and Australia have similar provisions. In each of the three countries existing nationality provisions continue to apply to British subjects without citizenship, but in Australia and in New Zealand there are restrictions upon the transmission of this status to future spouses and children. Although South African law did not refer in specific terms to British subjects without citizenship, it appeared to regard such persons

<sup>9</sup> Australia and New Zealand also gave statutory recognition of such a status, and although not using the identical term, South Africa did so.

in South Africa as citizens of a Commonwealth country.<sup>10</sup> While legislation in some of the other Commonwealth countries omits reference to British subjects without citizenship, such persons are eligible to enjoy rights accorded to ordinary British subjects; in a sense they are, therefore, not aliens.

Still another category is that of British protected persons. Long used in British law to refer to certain protégés, the term apparently received statutory definition for the first time in the British Nationality Act.<sup>11</sup> Orders in Council provide that certain persons (or classes of them) are to continue to enjoy this special status.<sup>12</sup> Similar provisions are in the nationality laws of several other Commonwealth states. The New Zealand Act sets forth that the term "British protected persons" also means New Zealand protected persons.<sup>13</sup> The Australian Citizenship Act recognizes a British protected person as any individual under the protection of "the government of any part of His Majesty's dominions."<sup>14</sup> In contrast, the laws of Canada, Ceylon, Cyprus and the Union of South Africa apparently do not recognize this category of persons. With at least one exception (Ghana), Commonwealth states provide that such persons (not being

<sup>10</sup> See note 7 above concerning some more recent legislation in South Africa.

<sup>11</sup> See J. Mervyn Jones, *British Nationality Law* 186 (Oxford, 1956, rev. ed.), and the same author's discussion of "Who Are British Protected Persons?" 22 *Brit. Yr. Bk. of Int. Law* 122-129 (1945); S. A. de Smith, *The Vocabulary of Commonwealth Relations*, *Commonwealth Papers*, No. 1, p. 21 (London, 1954). Sec. 32(1) of the British Nationality Act defines a British protected person as a "person who is a member of a class of persons declared by Order in Council made in relation to any protectorate, protected state, mandated territory or trust territory to be for the purposes of this Act British protected persons by virtue of their connexion with that protectorate, state or territory."

<sup>12</sup> The Orders in Council not only stipulate the persons who will be entitled to status in different geographic entities, but lay down the rules for the acquisition and transmission of such status in much the same manner as the British Nationality Act itself does for citizens of the United Kingdom. For such Orders in Council passed to date, see note 3 above.

<sup>13</sup> British Nationality and New Zealand Citizenship Act, Act No. 15 of 1948, *New Zealand Statutes* (1948), I, 145, as amended by the British Nationality and New Zealand Citizenship (Amendment) Act, Act No. 38 of 1959, *ibid.* (1959), I, 344, hereafter cited as the New Zealand Citizenship Act. For citizenship of adopted children in New Zealand, see Sec. 16(2)(e) of the Act to consolidate and amend certain enactments of the General Assembly relating to the adoption of children, Act No. 93 of 1955, *ibid.* (1955), II, 1128.

<sup>14</sup> Nationality and Citizenship Act of 1948, Act No. 83 of 1948, *Commonwealth Acts* (1948), XLVI, 415, as amended by: Nationality and Citizenship (Amendment) Act of 1950, Act No. 58 of 1950, *ibid.* (1950), XLVIII, 180; Nationality and Citizenship (Amendment) Act of 1952, Act No. 70 of 1952, *ibid.* (1952), L, 258; Nationality and Citizenship Act of 1953, Act No. 85 of 1953, *ibid.* (1953), 305; Nationality and Citizenship Act of 1955, Act No. 1 of 1955, *ibid.* (1955), 321; Nationality and Citizenship Act of 1958, Act No. 63 of 1958, *ibid.* (1958), 608; Nationality and Citizenship (Amendment) Act of 1959, Act No. 79 of 1959, *ibid.* (1959), 356. The Nationality and Citizenship Act as amended will hereafter be cited as the Australian Citizenship Act. For special provisions regarding Burma, see Nationality and Citizenship (Burmese) Act, Act No. 12 of 1950, *ibid.* (1950), XLVIII, 21.

British subjects)<sup>15</sup> must be naturalized in order to become citizens of the particular country.<sup>16</sup> Since British protected persons, as the term indicates, enjoy the Crown's protection in the international law sense,<sup>17</sup> they may be represented in a foreign country by a member of the Commonwealth.

The practical effect of the post-World-War-II legislation is to accord dual status to nationals of Commonwealth countries. Many countries have labeled their new citizenship enactments "Nationality and Citizenship Acts." New Zealand's statute is appropriately entitled "British Nationality and New Zealand Citizenship Act." This seems to emphasize two different categories. The use of the term "British subject without citizenship" and statutory provisions (by which persons are "deemed" to be British subjects as of the effective date of the citizenship laws) further point up the dual status. Although British subjects without citizenship are not eligible in all cases to enjoy complete rights of citizens, they nevertheless enjoy substantial benefits. That gradations of status, in the matter of nationality, are not new is illustrated by the situation of American Indians in the United States prior to the time when they became citizens in the full political sense,<sup>18</sup> as also by the past practice of certain European states in having classes of citizens and sometimes making ethnic origin a basis for the classification.<sup>19</sup> A basic difference in the Commonwealth results from the fact that in the latter case there are so many different legislative bodies whose enactments need to be considered. That the distinctions made under these laws have not precluded discriminations will appear from policies followed by the Commonwealth states in their relations *inter se*.

### 3. Legal Effects of Having the Common Status

The presence in a Commonwealth country, of which he is not a citizen, of a British subject or Commonwealth citizen may involve him in various situations involving legal rights and duties. Thus, there might be, in particular countries, the right to vote if the person should register, or the duty to render service of the kind normally required of nationals.

<sup>15</sup> Cmd. 7326.

<sup>16</sup> See Ghana Nationality and Citizenship Act of 1957, Sec. 11, Ordinances and Acts of Ghana (1957), Act No. 1 of 1957, p. 183, which permits British protected persons to be registered as citizens in the same manner as Commonwealth citizens. The Ghana Act will be cited hereafter as the Ghana Citizenship Act.

<sup>17</sup> For the purpose of the law concerning international responsibility they are assimilated to British subjects. See J. Mervyn Jones, *op. cit.* 185, 195; Clive Parry, *Nationality and Citizenship Laws of the Commonwealth and of the Republic of Ireland* 116 (London, 1957); 1 Oppenheim, *International Law* 646, note 3 (8th ed., Lauterpacht, 1955); for an excellent treatment of the status of protected persons in general, see Parry, *op. cit.*, Ch. 7.

<sup>18</sup> D. O. McGovney's essay on non-citizen nationals, in Max Radin and A. M. Kidd (eds.), *Legal Essays* 323-374 (1935).

<sup>19</sup> Robert R. Wilson, "Gradations of Citizenship and International Reclamations," 33 A.J.I.L. 146-148 (1939).

In the case of military service, concerning which it is difficult to give a categorical answer to the question of whether international law prohibits the conscription of non-citizens,<sup>20</sup> practice in the Commonwealth indicates that British subjects are held liable to such service. The acquiescence of the individual's state (that of which he is a citizen) may be a factor.<sup>21</sup> The United Kingdom's National Service Acts of 1948 and 1955 include resident British subjects among those liable for military service. Australian law provides that all British subjects resident in Australia for more than six months shall be so liable. In the case of *Polites v. The Commonwealth of Australia*, the holding was that conscription of an *alien* was contrary to international law—although, in spite of this, the court allowed the legislative will to prevail.<sup>22</sup> It would appear that the treatment of an alien in Australia would not be more favorable than that of a British subject residing in Australia but not a citizen of that state. The position of Eire with regard to the drafting of its nationals resident in the United Kingdom for service in United Kingdom forces may have influenced the tendency to leave considerable discretion to the legislative will of the drafting state.<sup>23</sup> It would not necessarily follow that a person from another Commonwealth state who was conscripted would thereafter be regarded as a citizen of the conscripting state, for this, too, would be a matter for the conscripting state to decide in light of existing international law concerning the right of a state to confer its nationality.

In the matter of eligibility for other types of service, there has been a distinction between British subjects not having a Commonwealth citizenship and aliens. In the Northern Territory of Australia, for example, jurors must be British subjects. In application of this rule a lower court disqualified two persons on the ground that they had been born in Ireland and had failed to give notice of intention to continue as British subjects, as required by the Australian Citizenship Act of those desiring to be Australian citizens. On appeal, the High Court, while ordering a new trial on other grounds, questioned the ruling of the lower court concerning the two jurors. It observed that, under Section 9(2) of the mentioned Act, any law of the Commonwealth of Australia or of a territory thereof, passed prior to the commencement of the Act, would continue in force in relation to Irish citizens who were not British subjects, in the same manner as if they were British subjects. The Court also looked to Section

<sup>20</sup> On the controversial nature of the question, see Robert R. Wilson, *United States Commercial Treaties and International Law*, Ch. X (1960).

<sup>21</sup> See Nicholas Mansergh and others, *Commonwealth Perspectives* 70-71 (1958), for illustrative cases.

<sup>22</sup> The court admitted that the legislation was contrary to international law, but held that legislation could accomplish the purpose regardless of international law and that the Commonwealth enactment would have to be applied. 70 C.L.R. 60 (1945). The National Security Act 1939-1943 and the National Security (Aliens Service) Regulations covering the drafting of aliens were repealed in 1946. See *Commonwealth Acts*, Act No. 15 of 1946, XLIV, 42, and *Commonwealth Statutory Rules* (1945-1946), No. 184, p. 754.

<sup>23</sup> Cf. Clive Parry, "International Law and the Conscription of Non-Nationals," 31 *Brit. Yr. Bk. of Int. Law* 437-452 (1954).



24 of the Act's transitional provisions. This defined as a British subject a person who, immediately prior to the effective date of the Act, was entitled in Australia or in a territory thereof to all political and "other rights, powers and privileges" of a native-born British subject.<sup>24</sup> Irish citizens in Australia apparently continue to enjoy the advantages (and to have the obligations) of British subjects under the provisions of laws in Australia that were in force prior to the passage of the Australian Citizenship Act, even without formal election to be British subjects or Australian citizens.

Another practical problem has to do with the exercise of jurisdiction over extraterritorial offenses. In a number of Commonwealth countries citizenship laws contain no specific provisions applicable to British subjects or Commonwealth citizens in such situations. The British Nationality Act provides, however, that citizens of other Commonwealth entities, while within the United Kingdom, are not answerable therein, to the same extent as are United Kingdom citizens, for acts committed outside the United Kingdom. There are few situations in which courts in a common-law country such as the United Kingdom could exercise jurisdiction over aliens with respect to acts committed outside the jurisdiction.<sup>25</sup> Statutory provisions on this subject in the different Commonwealth countries vary considerably. Section 3(1) of the British Nationality Act provides that a Commonwealth citizen may not be punished for an offense occurring outside the jurisdiction of the United Kingdom unless such an offense would be punishable by the Commonwealth country of which the accused person is a citizen *if it were committed within a foreign country*. (The Merchant Shipping Acts are specifically excluded from the operation of the section.) It is for the court in the United Kingdom to determine in each case the extent of the extraterritorial jurisdiction exercised in the particular Commonwealth country whose citizen is accused, as this would be necessary in order to decide whether the United Kingdom court had jurisdiction. For example, Indian courts in some situations exercise jurisdiction over Indian citizens for their acts or omissions abroad.<sup>26</sup> Therefore a court in England, although it could not exercise jurisdiction over a United Kingdom citizen for an act committed in a foreign country, might find that under Section 3(1) it could exercise jurisdiction over an Indian citizen for the same kind of offense because the latter would have been punishable in India for a like offense committed in a foreign country.

<sup>24</sup> *Stapleton v. The Queen*, 86 C.L.R. 858, 377 (1952).

<sup>25</sup> British subjects have been within the jurisdiction of the courts in Great Britain for a number of acts or omissions committed abroad, as in the case of bigamy, murder or manslaughter, under the Offences Against the Person Act, 1861, Secs. 9, 57 (24 & 25 Vict., c. 100); treason under An Acte concerninge the Triall of Treasons comytted out of the King Majesties Domyinions, Sec. 1 (35 Hen. 8, c. 2), and certain offenses under the Merchant Shipping Act, 1894 (57 & 58 Vict., c. 60); Explosive Substances Act, Sec. 3 (46 & 47 Vict., c. 3); and the Official Secrets Act, 1911, Sec. 10 (1 & 2 Geo. 5, c. 28). *Cf.* the decision in *Joyce v. Director of Public Prosecutions*, [1946] A.C. 347.

<sup>26</sup> *Central Bank of India, Ltd. v. Ram Narain*, A.I.R. (1955) Supreme Court 36.

Provisions similar to that in the above-noted United Kingdom statute are in force in Australia, Ghana, New Zealand, Nigeria and Sierra Leone.<sup>27</sup> In contrast is the situation in Canada, under whose Citizenship Act an alien is subject to the same jurisdiction as a native-born citizen; it follows that in Canada, in jurisdictional matters, a Commonwealth citizen is in the same position as a Canadian citizen. It is obvious that in existing practice there may be considerable variation, from one Commonwealth country to another, in the jurisdictional arrangements that are applicable to persons possessed of the common status which the United Kingdom lawmakers of 1948 envisaged.

#### 4. *Discrimination against Persons Having the Status*

A British subject may encounter legal barriers to his establishing residence in Commonwealth countries other than that of which he is a citizen. Once admitted to such residence, he may find that ethnic origin is or has in the past been the basis for discrimination through law. Writing in 1930, one observer suggested that it was easier to enumerate the rights of native-born British subjects outside of the Empire than in it.<sup>28</sup> British subjects were not "aliens" within the Commonwealth before 1948, and they did not become so after that date. In certain circumstances, however, their disabilities might be as great as, if not greater than, those of aliens. The possibility of racial discrimination was left open as far as the common law was concerned. Since that law developed in England when questions of racial differences were not of great moment there, it was but natural that the common law should be silent on matters of race and color.

The actual rights of British subjects resident throughout the Empire became increasingly dependent upon local laws, and the latter varied considerably from colony to colony. Within this diverse legal system the law of domicile often tended to become a substitute for nationality law in determining the legal rights of subjects within the separate entities.<sup>29</sup>

<sup>27</sup> Australian Citizenship Act, Sec. 9; Ghana Citizenship Act, Sec. 10; New Zealand Citizenship Act, Sec. 5; Nigeria Constitution, Sec. 14(1); Sierra Leone Constitution, Sec. 8(1).

<sup>28</sup> E. F. W. Gey van Pittius, *Nationality Within the British Commonwealth of Nations* 9 (1930).

<sup>29</sup> The diversity of the law within the British Empire and the importance of the concept of domicile to such law was brought into sharp focus by the case of Johnson in *re Roberts v. Attorney-General*, [1903] 1 Chancery Division 821, 832-834, 885. A British subject born in Malta died in Baden, Germany. The law of Baden called for distribution of a foreigner's movable property in accordance with the law of the country of which he was a subject. Justice Farwell spoke to the question of the determination to be applied. He noted that the British Empire contained many different systems of law and that there was no one law which could be taken for this purpose as the law of nationality of *propositus*. The Justice queried: "... what nationality at his death can a Court which ignores domicile attribute to a man born in Scotland who makes his home and fortune at the Cape and dies in England?" The court, therefore, found that foreign courts should apply the law of the country with which

The idea of a common status did, however, help to preserve the so-called *inter se* doctrine for such matters as extradition, judicial assistance and recognition of foreign judgments.<sup>30</sup>

The right of migrating from one Commonwealth country to another does not flow from mere possession of the common status. As is well known, members of the old Commonwealth other than the United Kingdom have sharply regulated immigration to their respective territories.<sup>31</sup> For more than a decade after the passage of the British Nationality Act of 1948 the United Kingdom continued, in accordance with its traditional policy, to permit immigration from all parts of the Commonwealth. In actuality this meant that approximately one quarter of the earth's people had the legal right, in theory at least, to immigrate to, and reside in, the mother country, provided they had the money for the passage. The traditional policy came to an end in 1962. By the Commonwealth Immigrants Act, effective on July 1 of that year, Commonwealth citizens having no employment in view, having no special skills, and unable to support themselves without working, have been admissible only on a quota basis.<sup>32</sup> (There is still free entry for Irish immigrants and *bona fide* students.) It is common knowledge that the impetus for the new restrictions grew in large measure from the increased immigration to England of non-white British subjects. There was sharp criticism of the change in policy. The Leader of the Opposition in the House of Commons declared that the bill was "a plain anti-Commonwealth measure in theory, and a plain anti-colour measure in practice."<sup>33</sup> *The Times* (London) called the bill "bad" and editorialized that it "strikes at the very roots of British tradition and Commonwealth links." There was further editorial suggestion that the effect of the legislation would be to cause Commonwealth citizens to be treated "much the same as aliens"—a development not welcomed by the critic.<sup>34</sup>

Immigration policy in certain parts of the Empire and Commonwealth had in earlier years occasioned discussion at Imperial Conferences and

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they were in diplomatic relation, *i.e.*, England, and that the latter would determine the law to be applied by having regard to the individual's domicile of origin.

Professor Gey van Pittius (*op. cit.* 57) noted the ineffectiveness of nationality as an indication of status within the Empire and drew attention to the tendency to stress the place of a person's habitual residence. The concept of domicile was found to follow the inhabitant of the Empire "like a shadow" and make it possible to keep the separate legal entities of the Empire intact by subdividing British subjects according to the part of the Empire to which they were deemed to belong.

<sup>30</sup> On this doctrine and the decline of its importance, see J. E. S. Fawcett, *The Inter Se Doctrine of Commonwealth Relations* (1958), *passim*.

<sup>31</sup> An exceptional arrangement, which Canada concluded with India, Pakistan and Ceylon, allows a yearly quota of citizens from each of the Asiatic states to enter as immigrants. See 248 U. N. Treaty Series 90, 96, 102 (1956), and 316 *ibid.* 376 (1958).

<sup>32</sup> Pub. Gen. Acts, 10 and 11 Eliz. II, 1962.

<sup>33</sup> *The Times* (London), Nov. 17, 1961, p. 19.

<sup>34</sup> *Ibid.*, Nov. 19, 1961, p. 11. Cf. Alastair Buchan's suggestion that the Act "drives a long nail into the coffin of the Old Commonwealth." *The Observer* (London), July 15, 1962, p. 18.

at later Conferences of Prime Ministers. Even British subjects legally within a Commonwealth country might encounter discriminations. Initially these were to be found especially in the old Commonwealth, but they are no longer peculiar to those members.<sup>35</sup>

In Canada, British Columbia has apparently gone farther than any other Province in placing restrictions upon admitted persons of Oriental descent, even though such persons may be native-born British subjects or Canadian citizens. Judicial review of such legislation has sometimes, it must be noted, imposed limits. Thus, when British Columbia attempted to impose a special tax on immigrants, to prohibit the licensing of Orientals for engaging in certain types of work, and to prevent the employment of Chinese in underground mines, the law in each case was declared *ultra vires* by the Judicial Committee of the Privy Council. In the case of *Tommey Homma*,<sup>36</sup> however, the Judicial Committee sustained a British Columbia Act prohibiting the placing of Chinese, Japanese and Indians upon the voting register, despite the fact that Tommey Homma was a native-born British subject. A Saskatchewan statute of 1912 forbade Orientals, even if they were citizens, from employing white women in a place of business. A British Columbia statute of 1911 forbade the granting to persons of Chinese or Japanese ancestry of licenses to cut timber from Crown lands. In 1955 the Supreme Court of Canada declared that British subjects of Indian descent from Trinidad were Asians (since they were descended from an Asian ethnic group) and, as such, liable to deportation under the Immigration Act.<sup>37</sup>

Limitation upon a particular Commonwealth state's right to deprive persons possessing the status of British subjects of their status as British subjects in *another* Commonwealth state is implied in the holding of the Judicial Committee of the Privy Council in the case of the Japanese-Canadians. This was to the effect that Canada could deprive these persons of their Canadian citizenship, and could also deprive them of their status of British subjects *as far as Canada was concerned*, but could not deprive them of their status as British subjects *outside of Canada*.<sup>38</sup>

<sup>35</sup> For disabilities of British subjects within the Empire and Commonwealth, see Norman Mackenzie (ed.), *The Legal Status of Aliens in Pacific Countries* (London, 1937), Ch. I on Canada, Chs. II, III, and IX on Australia, Canada and New Zealand, respectively; C. F. Fraser, *Control of Aliens in the British Commonwealth of Nations* (London, 1940), *passim*; H. F. Angus, "The Legal Status in British Columbia of Residents of Oriental Race and Their Descendants," 9 *Canadian Bar Review* 1-12 (1931); Jean Mercier, "Immigration and Provincial Rights," 22 *ibid.* 856-869 (1944); Paras Diwan, "Treatment of Indians and the Question of Apartheid in South Africa," 16 *Supreme Court Journal (India)* 135-180 (1953); Henry J. May, *The South African Constitution*, Chs. X and XXIII (3rd ed., Cape Town—Johannesburg, 1955); G. W. F. Gould and C. P. Joubert, *The British Commonwealth*, Vol. 5: *The Union of South Africa*, Ch. XII (London, 1955).

<sup>36</sup> *Cunningham and Attorney-General for British Columbia v. Tommey Homma and Attorney-General for the Dominion of Canada*, [1903] A.C. 151, 152.

<sup>37</sup> *Harry Narine-Singh and Mearl Indra Narine-Singh v. Attorney General of Canada*, [1955] Can. Sup. Ct. 895.

<sup>38</sup> *Co-operative Committee on Japanese Canadians v. Attorney-General for Canada*, [1947] A.C. 87.

An alien in a Commonwealth state may, in actual fact, be in a better position under certain circumstances than is a British subject in Canada. This is illustrated by a 1908 decision, *In re Nakane Nokazake*. There was an appeal from the application to Japanese nationals of British Columbia legislation of that year (imposing certain restrictions upon entry), on the basis of a treaty with Japan covering rights of entry and sojourn. The legislation was found to be valid but, by reason of the treaty, was not enforced as to subjects of the Japanese Emperor.<sup>39</sup>

In South Africa, discrimination on the ground of race and color has not been relaxed by reason of the fact that some of the persons affected are British subjects. Pre-Union legislation discriminated in specific terms against Asians. By a law of 1891 the latter could not acquire land in Natal; in the Transvaal they could not own fixed property. With the formation of the Union, discrimination continued, but varied in degree in the separate states.<sup>40</sup> Uniformity came at length with the passage of the Act of 1950, which defined a colored person as "any person who is not a member of the white or the native group or any white person married to such a person or cohabiting with such a person." The designation of course included Indians and Pakistanis. Certain areas having been set aside for ownership by the respective groups (white, native and colored), after a specified date no one was to occupy premises or land not located in the area specified for his group. A license to carry on business or a trade was not to be renewed or issued unless the applicant could prove that he could lawfully carry on the activities on the premises he occupied. A system of permits applied to *bona fide* employees of persons lawfully occupying premises, with an exception being made for domestic servants.<sup>41</sup>

Until the passage of the 1962 immigration legislation noted above, Great Britain provided a sharply contrasting situation as far as discrimination was concerned. The moral force of the long-continued policy in the United Kingdom appears from a statement made in the course of a question period in the Legislative Assembly of the Gold Coast in 1955. The Minister of the Interior, when queried on the status of Africans in the United Kingdom, replied that he himself had exercised the right to vote in the United Kingdom.<sup>42</sup> (The privilege of British subjects in the matter of registering and voting in elections in Commonwealth countries other than that in which they hold citizenship has not been restricted to voting in Great Britain.)

<sup>39</sup> 13 British Columbia Reports 370 (1908). As a result of this finding the Hindu Friends Society of Victoria sent a petition to the Imperial Conference of 1911 which read in part: "The present Dominion Immigration Laws are humiliating to the people of India, when the aliens, such as the Japanese and Chinese, by their treaty rights, can come to Canada whereas our fellow British subjects are not allowed to enjoy the birth-right of travelling from one part of the British Empire to another." Cd. 5746-1.

<sup>40</sup> Cf. Henry J. May, *op. cit. passim*.

<sup>41</sup> Group Areas Act, Act No. 41 of 1950, as amended by Act No. 65 of 1952; Act No. 6 of 1955; Act No. 68 of 1955; Act No. 29 of 1956 and Act No. 57 of 1957. The amended acts were consolidated by Act No. 77 of 1957. Statutes of the Union\* of South Africa for the years cited.

<sup>42</sup> Gold Coast, Legislative Assembly Debates (1955), No. 1, Cols. 734-736.

It was but natural that discrimination in countries of the old Commonwealth should meet with reactions from Commonwealth countries in Asia. Such beneficent effect as flowed from the concept of a common status was inevitably affected when questions of inequality arose. For example, Section 12 of India's Citizenship Act makes the giving of any rights to British subjects discretionary, and places the granting of such rights on a basis of reciprocity. The use of the words "any rights of a citizen of India" suggests that the category of rights that *might* be enjoyed by British subjects from other Commonwealth countries could be quite extensive. Indian courts have held that, without specific grant by the Indian Government, these rights are not available to the Commonwealth citizen who is not a citizen of India.<sup>43</sup> On January 28, 1957, President Regendra Prasad signed an order which ended any special privileges Commonwealth citizens might enjoy beyond those which foreigners enjoyed in India. However, an order simultaneously issued stated that the ordinance applied only to citizens of South Africa and of Pakistan.<sup>44</sup>

Practice in Pakistan also illustrates the wide discretion left to officials with respect to treatment of British subjects. The Pakistan Citizenship Act of 1951 defines an alien as a person who is not a citizen of Pakistan or a Commonwealth citizen, but a Pakistan court has held that Pakistan's Foreigners Act of 1946 and the Foreigners Order of 1951 were applicable to an Indian citizen who had been seized as a spy in the North-West Frontier Province.<sup>45</sup>

Without suggesting that the few instances cited in illustration are more than isolated ones, it seems possible to discern from them that rights flowing from the common status remain on a precarious basis. Any government of a Commonwealth state, in the absence of an applicable treaty, may unilaterally, and even arbitrarily, modify operation of such rights. Citizenship laws in which there are references to the common status are subject to repeal or alteration. Thus, while the idea of a common status has survived in the concept of British subject or Commonwealth citizen, practice of the Commonwealth states in their relations *inter se* has caused

<sup>43</sup> In the case of *Noor Mohammed and Others v. The State*, 1956, petitioner, who was about to be deported from India, claimed that he was an Indian citizen. His counsel maintained that, even if the petitioner were a Pakistani, he would not be subject to deportation, since the Declaration of Foreign States Order declared that no Commonwealth country was a foreign state. The court, however, held that the 1950 order did not mean that such individuals were Indians for the purposes of the Constitution. Counsel for the petitioner further maintained that, since his client was a Commonwealth citizen, he would not be subject to deportation in view of the provisions of Art. 19 of the Constitution. The court rejected counsel's contention and drew attention to Sec. 12 of the Indian Citizenship Act. It was found that since the counsel could not point out any order of the Central Government conferring such rights in accordance with Sec. 12 of the Act, the petitioner in fact had no such rights. The court concluded: "All that is guaranteed to non-citizens is protection of life and liberty in accordance with the law of the land." A.I.R. (1956) M.B. 211-214. This decision was upheld in *Naziranbai v. The State*, A.I.R. (1957) M.B. 1.

<sup>44</sup> *The Times* (London), Jan. 29, 1957, p. 7, and Feb. 1, 1957, p. 7.

<sup>45</sup> *Mansab Ali v. N.-W. F. P. Government*, [1954] 2 P.L.D. Peshawar 84.

it to be less meaningful than was the older Imperial concept of British subject.

It remains to consider the utility of the concept for the purpose of dealings between the principal Commonwealth state, *i.e.*, the United Kingdom, and foreign states, a context in which international law normally provides the basic rules that are applicable. Involved are different procedures for the handling of the interests of British subjects or Commonwealth citizens in relation to foreign states, *i.e.*, states outside the Commonwealth.

### 5. *International Reclamations*

In a very broad but real sense the United Kingdom has represented the interests of the other Commonwealth members in the conversations with six European states concerning Britain's entry into the Common Market. The holding, within a very short time after these conversations, of a Conference of Commonwealth Premiers underlines the representative character of the British rôle. Since these developments are still current, however, it is not practicable to make any definitive statements concerning them.

In the less dramatic area of claims collection the concept of a common status has continued to have considerable utility and to influence practice. Apparently adapting the *inter se* doctrine, the United Kingdom has not only taken the position that it could properly present the claim of any British subject against an outside state, but apparently holds that any other Commonwealth government could exercise the same right. An examination of international contractual agreements on the subject reveals that the United Kingdom has at times represented the Commonwealth as a whole, has at other times acted in behalf of individual Commonwealth countries, and in still other instances has confined its representation to the people of the United Kingdom and Colonies. This, however, has not prevented other Commonwealth governments from presenting (without seeking the assistance of the United Kingdom) their respective claims against foreign states.

That in this sphere of activity the difficulty of defining "British subject" may cause some rather involved language to be used is illustrated in the agreement signed January 1, 1946, between the Governments of the United Kingdom, India and Siam concerning the termination of the state of war and the handling of certain claims arising out of the war. The term "British" as applied to physical persons was to include "all subjects of His Majesty the King of Great Britain, Ireland and the British Dominions beyond the Seas, Emperor of India, and all persons under His Majesty's protection." As applied to artificial persons (corporations), the same term meant those who derived their status from the law in force in any "territory under His Majesty's sovereignty, suzerainty, protection or mandate. . . ." <sup>46</sup> There was here no mention of "Commonwealth." Australia and Siam in fact signed a separate instrument (Final Peace

<sup>46</sup> 99 U. N. Treaty Series 132.

Agreement) on April 3, 1946. In this Siam agreed to restore unimpaired "the property rights and interests of all kinds in Siam of the Government of Australia and of Australians . . ." <sup>47</sup> and to pay compensation for loss or damage to such rights and interests. (At this time there was apparently no statutory definition of "Australians.") A subsequent agreement, signed on December 7, 1946, by the United Kingdom, Australia and Siam, referred to the Siamese Government's obligations to "United Kingdom, Australian and other British Commonwealth mine owners" arising out of the January 1 agreement. Australia being a party in this exchange of notes, the British note read: "On behalf of the British Commonwealth Governments other than the Government of Australia. . . ." <sup>48</sup> Fortunately for those having to interpret the commitments, in an exchange of notes on January 6, 1947, the United Kingdom provided for a British Commonwealth-Siamese Claims Commission to carry out relevant provisions concerning all British claims under the agreements of January 1 and April 3, 1946. By the new exchange, "British" was to have the same meaning as in the agreement of January 1, 1946. <sup>49</sup>

The device of using broadly covering language also finds illustration in the exchange of notes between the United Kingdom and Poland (January 24, 1948) concerning compensation by the latter country for losses caused to British interests by Polish nationalization measures. This agreement, applicable to all Commonwealth claims, employs the term "British subjects" as meaning "all British subjects and British protected persons belonging to the United Kingdom or to any colonies, overseas territories, or protected or mandated territories of the United Kingdom." The notes defined "British claimants" as physical persons who were British subjects on January 3, 1946 (or their heirs or legal representatives) and also companies or firms that had been constituted before January 3, 1946, under the law of the United Kingdom or the other territories specified in the language quoted above. <sup>50</sup>

With Yugoslavia, on December 23, 1948, the United Kingdom signed an agreement looking to compensation for "British property" nationalized in Yugoslavia. Although there had already been enactment (in the same year) of the British Nationality Act (and anticipation therein of separate nationality laws in the respective Commonwealth states), the language of the agreement itself reflected no change in the policy traditionally followed concerning presentation of claims for any of the Empire's people. British nationals were to include

- (i) Physical persons who are British subjects or British protected persons belonging to any of the territories mentioned in sub-paragraph (ii) . . . and their heirs and legal representatives; and
- (ii) Companies, firms and associations incorporated . . . under the laws in force in the territory of the United Kingdom of Great Britain and Northern Ireland, or Canada, the Commonwealth of

<sup>47</sup> Great Britain, 146 British and Foreign State Papers 552 (1946).

<sup>48</sup> 157 U. N. Treaty Series 104.

<sup>49</sup> 99 *ibid.* 150.

<sup>50</sup> 87 *ibid.* 3.



Australia, New Zealand, the Union of South Africa, India, Pakistan, Ceylon or in any territory for the foreign relations of which the Government of any of the aforesaid countries is, at the date of signature of the present Agreement, responsible.<sup>51</sup>

One change from language traditionally used was the omission of Eire. Eire had passed the Republic of Ireland Act, 1948, but the United Kingdom had still to enact legislation concerning the new status of Eire (as it later did in passing the Ireland Act of 1949). Presumably the United Kingdom did not present claims of Irish citizens to the Yugoslav Government.

In the United Kingdom's undertakings with other states in the 1950's there is reflection of the fact that certain new citizenship laws had come into effect in the Commonwealth. Thus, in a memorandum agreement which the United Kingdom and the United States concluded with Austria in 1955 concerning oil holdings in that country, there is reference to the oil drilling firm of R. K. Van Sickle, "a Canadian citizen."<sup>52</sup> Further illustration is in the Agreement Relating to the Settlement of Financial Matters, signed by the United Kingdom and Hungary on June 27, 1956. The first article dealt with certain sums of money due to the United Kingdom or to "British nationals" and to "United Kingdom nationals" as a result of certain commercial and banking transactions and claims "arising out of Article 26 of the Treaty with Hungary of 1947." Article 3 provided that for the purpose of the agreement the term "British nationals" should mean

- (i) physical persons who on the date of the signature of the present Agreement are citizens of the United Kingdom and Colonies, citizens of Southern Rhodesia, British subjects without citizenship, or British-protected persons belonging to any of the territories for whose international relations the United Kingdom Government are responsible; and
  - (ii) corporations or other juridical persons incorporated or constituted under the laws in force in the United Kingdom of Great Britain and Northern Ireland or in any territory for whose international relations the United Kingdom Government are, on the date of the present Agreement, responsible;
- provided that the persons concerned or their legal predecessors were equally British nationals in accordance with the foregoing definition on the date on which the claim arose, or in the case of claims arising under Article 26 of the Treaty of Peace with Hungary, were eligible to claim under the provisions of that Article.<sup>53</sup>

From the language quoted will appear the difficulties in suiting terminology to the developing situation. Parties to the agreement used the term "British national" and also the term "United Kingdom national"—the United Kingdom now being but one Commonwealth country, with its own citizenship. The claims provided for are not those of all Common-

<sup>51</sup> Cmd. 7600.

<sup>53</sup> 249 *ibid.* 20.

<sup>52</sup> 273 U. N. Treaty Series 121.

wealth citizens, but only those of persons who are citizens of the United Kingdom and Colonies. Yet the term "British national" apparently applies to any British subject without a citizenship. Under the arrangement Great Britain would presumably not present a claim on behalf of an Australian, but would present a claim on behalf of a person in Australia who, under the laws of Australia or some other Commonwealth country, was considered to be a British subject without citizenship.

The conclusion just suggested would be consistent with the stated purpose of the British Nationality Act of 1948, whereby no British subject was to lose that status without acquiring a new status of citizenship in the Commonwealth country of his residence. Claimants coming within the terms of the agreement as British-protected persons would not include all British-protected persons, but only those residing in territories for whose international relations the United Kingdom is responsible. This would exclude a British-protected person residing in any other Commonwealth country. While the preservation of such distinctions may present difficulties, draftsmen's skill has apparently been adequate for the task.

It remains to note the effects of the 1948 legislation (envisaging as it did a distinct citizenship for each Commonwealth country and also the existence of a common status throughout the whole of the Commonwealth) upon practice of individual Commonwealth states in the matter of international reclamations. It is clear that each state represents its own citizens, but here, too, there appear to have been some terminological difficulties. For example, an exchange of notes between Australia and Finland, dated January 4, 1951, refers to the "settlement of Australian claims against Finland arising out of the Second World War, including any claims arising out of the payment of moneys belonging to persons resident in Australia. . . ." <sup>54</sup> The reference to residents rather than citizens was presumably not inadvertent. Later in the same year, in an exchange of notes of September 2 and 28 between Australia and France, there is reference to ". . . the compensation of damage suffered during the Second World War by Australian citizens, companies and associations. . . ." <sup>55</sup> The language used, including as it does the designation of "Australian citizens" in relation to a period anterior to the passage in Australia of the Nationality and Citizenship Act of 1948, would apparently apply to persons who became "citizens" by virtue of that legislation. <sup>56</sup>

As the states members of the Commonwealth move into a period when they are completely independent of each other in the international sense (although still united by traditional and sentimental ties, and co-operating through the device of the Prime Ministers' Conference and many forms

<sup>54</sup> 80 *ibid.* 28.

<sup>55</sup> 161 *ibid.* 186.

<sup>56</sup> Although Canada had passed an Act in 1921 defining Canadian nationals (11 & 12 Geo. 5, c. 4) and the Union of South Africa had done so in 1927 (Statutes of the Union of South Africa (1927), Act No. 40 of 1927), Australia had no such act. As late as 1936 the Australian High Court was forced to admit that the term "Australian National" could not be defined for treaty purposes so as to separate Australian nationals from the general category of British subjects. See *The King v. Burgess*, *Ex parte Henry*, 55 C.L.R. 608, 647-651 (1936).

of technical, economic, commercial and intellectual activity), there arises the question of whether their official dealings with each other may not come to be placed more completely on the basis of ordinary international law. The *inter se* doctrine, under which one Commonwealth country is not regarded by another Commonwealth country as "foreign," will not necessarily provide a permanent barrier to a practice of directly exercising rights and acknowledging duties under ordinary international law. Nor would there necessarily be insuperable impediments to such a procedure as a reclamation by a Commonwealth country against another Commonwealth country because of the fact that the claimant was, in each of the two countries, a "British subject." In the American Federal system the common citizenship (national citizenship, as distinct from citizenship in the respective States—which flows from residence of United States citizens in the respective States) does not impede the Federal Constitutional plan whereby a State may sue another in the United States Supreme Court; and in some instances the basic law applied in such suits, as, *e.g.*, in river boundary cases, has been essentially international law. In the absence of an international claims tribunal with obligatory jurisdiction, and given the Commonwealth countries' practice, when accepting the Optional Clause of the International Court of Justice, of reserving disputes with other Commonwealth countries, adjudication of claims would in any case have to be through express agreement. A machinery such as that envisaged in a plan of 1930 for dealing with disputes of Commonwealth countries *inter se*, if adopted, might reasonably be utilized for claims.<sup>57</sup> In a series of bilateral agreements (concerning air navigation) some Commonwealth states have agreed, in relation to other Commonwealth states, to settle disputes through the International Court of Justice. Conceivably the successful operation of this plan might presage a practice of accepting an international body's jurisdiction for the greater miscellany of matters that general claims conventions might involve.<sup>58</sup>

If there were claims conventions between pairs of Commonwealth states, the fact that these conventions might cover claims of one Commonwealth state's citizens against another Commonwealth state would not necessarily preclude the retention, for other legal purposes, of the concept of a common status. The rules of international law concerning establishment of nationality of the applicant state would then be applicable to persons *qua* citizens of a particular state, rather than to persons *qua* British subjects or "Commonwealth citizens" in a more general sense.<sup>59</sup> Difficulties arising might require rather specific treaty provisions. As is frequently seen, however, draftsmen's skill may surmount considerable obstacles.

<sup>57</sup> On the development, see C. E. Carrington, "Disputes between Members of the Commonwealth," a memorandum distributed for the Royal Institute of International Affairs (1960).

<sup>58</sup> See, for examples, Australia-Canada agreement of June 11, 1946 (10 U. N. Treaty Series 47), Art. 9; Pakistan-India agreement of June 23, 1948 (28 *ibid.* 143), Art. 11.

<sup>59</sup> The directness of relationship between the individual claimant and the state espousing his claim might, as in the *Nottebohm* case ([1955] I. C. J. Rep. 4-27), be a matter for tribunals to determine.

In the determination of nationality for the purpose of international reclamations, there would doubtless be a tendency for a respondent state to question an applicant Commonwealth state's capacity to bring a claim in behalf of a person who was not a citizen of the applicant state, but was resident therein with the status of British subject or British-protected person.<sup>60</sup> In such situations, if the claims agreement were silent on the point, the conclusion might be analogous to a holding that the claimant was a stateless person. By specific agreement, however, the application of the ordinary rule of international law concerning the necessity of showing nationality at all relevant times might be modified—as it was modified (through Administrative Decision V) for the parties in interest before the Mixed Claims Commission between the United States and Germany after the first World War.

### 6. Conclusion

At the time when entities that are now members of the Commonwealth had no distinctive citizenship, and did not control that part of their foreign relations which involved the raising of questions concerning citizenship, it was natural that there should be throughout the Empire a common status of British subject. This was in accordance with a common code that served many purposes. The move after the second World War to have a new type of common status, one which would exist along with the newly recognized citizenship for each Commonwealth country, was responsive to practical need as well as sentimental feeling. It could conceivably turn out to be an intermediate step on the way to complete legal separation of Commonwealth states from other Commonwealth states as far as nationality is concerned. It seems more likely to be retained, at least for certain purposes.

One of these purposes would seem to be the protection of a residue of rights for individuals—British subjects in the new sense of that term, citizens of the Commonwealth as a whole, or British-protected persons. If the purpose of the 1948 legislation, stated or unstated, was to preserve or bring about a uniform set of rights throughout the Commonwealth, as against the government of any Commonwealth state of residence, the achievement has fallen far short of the goal. Discriminations on the basis of race or color, as embodied in immigration policies of certain members of the Commonwealth, have not terminated. The United Kingdom itself at length adopted a policy of immigration controls (not in terms based upon race or color) in the Commonwealth Immigrants Act which became effective in 1962.

The basic principle of recognizing a common status for persons, with at least minimal rights that should be the same throughout the Commonwealth, fell short of practical application in the face of continued discrimination. Response to discriminatory policies has taken the form, in such a Commonwealth member as India, of reciprocity as the standard in the treatment of British subjects not having Indian citizenship.

<sup>60</sup> Cf. Clive Parry, *op. cit.* 114-123.

In the matter of relations with foreign states, and notably in the espousal of claims of British subjects or Commonwealth citizens against such states, the United Kingdom has in some instances secured broadly inclusive clauses in treaties. In other instances the individual Commonwealth states have in their own right brought claims of their respective citizens. There is always the possibility of covering in persons who are citizens of other Commonwealth states through specific assent of the parties to particular treaties. There has so far been no such veering away from the older *inter se* rules of Commonwealth relations as would make common a practice of one Commonwealth state's bringing claims in ordinary international tribunals against another Commonwealth state on behalf of the former state's citizens. There would seem, however, to be no insuperable legal barrier to the development of such a practice.

The pragmatic approach of Commonwealth statesmen, the disinclination to employ stock formulas, and a willingness to depart from orthodox theories in the interest of serving practical needs, have marked the development. There are still some areas in which a Commonwealth citizen, finding himself in a foreign country, is able to enjoy the good offices of a Commonwealth country that is not his own, by reason of the fact that he is, in the broadest sense of these terms, a British subject or Commonwealth citizen. There remains in the association of these states a considerable measure of flexibility. As a United Kingdom Foreign Secretary has recently said, the Commonwealth has "always refused to institutionalize itself," although it has "wide political influence."<sup>61</sup>

<sup>61</sup> Reported remarks of the Earl of Home in connection with discussion of Great Britain and the Common Market, New York Times, Aug. 2, 1962, p. 4.

## EDITORIAL COMMENT

### THE QUARANTINE AGAINST CUBA: LEGAL OR ILLEGAL?

The domestic situation in Cuba and the diplomatic crisis to which the discovery by the United States of missile bases gave rise have created a series of problems of international law in respect to which a wide variety of opinions have been expressed. Criticism of the action of the United States has not been wanting. We have violated international law right and left; we have permitted armed expeditions to leave our shores in violation of the clearest provisions of our own municipal laws adopted to uphold international obligations; we have instituted boycotts and economic measures against Cuba prohibited explicitly by the Charter of our Inter-American Organization; we have violated the sovereignty of Cuba by surveillance flights over its national airspace; we have acted individually and unilaterally where the obligations of the United Nations Charter and the Rio Treaty called for collective action; we have called the Soviet Union to account for doing in Cuba what we ourselves have done in the NATO countries; we have risked a nuclear war which would have involved our Allies in Europe without prior consultation; and so on—a broad indictment.

1. Let us look first at the "law" that is being taken as the basis of the indictment. The Charter of the United Nations is a treaty, binding as such upon the United States. But what if the treaty has been consistently and at times flagrantly violated by the Soviet Union, and the veto of the Soviet Union has been used to defeat decisions by the Security Council? How much of collective security is left in the situation of "co-existence" in which we have lived with the Soviet Union for the past fifteen years? Must the United States continue to respect obligations and follow procedures when the other party to the contract violates them? Traditional international law is about as clear as it could be in recognizing the mutuality of contractual obligations.

2. What of the obligations of the Charter of the Organization of American States? We have pledged ourselves to observe them; but in respect to a particular member of the community account must be taken of the conduct of that member. Is Cuba to be free to violate one article after another and still claim the protection of the provisions of the Charter? Is Cuba to be allowed to set aside the Resolution signed at Caracas in 1954,<sup>1</sup> condemning the Intervention of International Communism, and still claim the protection of the Charter and the Rio Treaty? Obviously in a multipartite treaty, such as the Charter of the O.A.S., the United States is still bound by its obligations in respect to the other contracting

<sup>1</sup> Resolution XCIII, Tenth Inter-American Conference, 1954; 48 A.J.I.L. Supp. 123 (1954).

parties. But these obligations are for their benefit, not for that of the state which has defied the treaty and openly repudiated the principles upon which it is based.

3. What of the general principles of international law which, it has been asserted, the United States has violated? They are, indeed, still binding, assuming that it is possible to give specific application to them when the more definite obligations of treaties have been so flagrantly set aside. What other way was there of detecting the presence of missile bases than by aerial flights over Cuban territory?

4. What "law," then, is to be applied to the case? We are forced to assume that international law, such as we have known it, is in a state of transition. The Charter of the United Nations is still binding insofar as the conduct of two of its Members permits, with a presumption in favor of the Charter. So, too, with the Charter of the Organization of American States under the same conditions. Let us see how both apply to the concrete situation created by the quarantine imposed by the United States on October 24, 1962.

5. Article 51 of the Charter of the United Nations recognizes the "inherent right of individual or collective self-defense," the adjective "inherent" suggesting that the right of self-defense is a fundamental one, not to be restricted or qualified except insofar as the Charter may expressly do so. The right of self-defense under Article 51 is, however, qualified by the provision that there must be an armed attack, and the right only lasts until the Security Council has taken the measures necessary to maintain international peace and security. Putting aside the latter item, was there "an armed attack"? Clearly not, in the old traditional sense. But clearly so, if we are to regard an atomic warhead, ready to be fired from a missile base, as a potential or constructive armed attack when in the hands of one whose intentions could easily be read from his past conduct. An armed attack in the old days still gave time for defense; an armed attack from a missile base located within short range would make self-defense meaningless; there would be nothing left to defend, if the victim were to await concrete evidence of the attack. A "threat to the peace" takes on a new meaning when the threat can be converted at any moment into an armed attack against which defense would be too late. Who could feel secure if he had to live with a pistol pointed at him day and night?

Does that mean that in every case missile bases with atomic warheads constitute an actual armed attack? The conclusion would depend upon the circumstances. In television shows of the West the sheriff would be dead if he waited to see if the bad man, in reaching for his back pocket, were about to pull out a handkerchief or a gun. Was there reason to think, in October, 1962, that the Soviet Union, or its satellite, the existing government of Cuba, might have an aggressive intention? The record of the Soviet Union in Hungary and East Berlin, and the affectionate embrace of Marxist-Leninist doctrine by Prime Minister Castro pointed clearly in that direction. Even if not used, the mere presence of the

missile bases would have given the Government of Cuba the opportunity for blackmail, and it would have altered the "balance of terror" heavily in favor of Russia. Could the same be said of the bases in Turkey, which more than one writer has brought forward as a parallel case? The answer is, except for those of Marxist-Leninist sympathies, that the whole conduct of the United States over the past fifteen years gives no suggestion of aggressive intentions, as the overwhelming majority of the international community would testify.

The United States is charged with having violated the provisions of the Charter of the Organization of American States and of the Rio Treaty of Reciprocal Assistance. In what way? By not consulting with the other Members before taking action? The charge is technically accurate, but legally unjustified under the circumstances. Article 1 of the Rio Treaty carries an undertaking not to resort to the threat or the use of force in any manner inconsistent with the provisions of the Charter of the United Nations, and Article 7 of the Rio Treaty specifically recognizes that the provisions for collective action shall be "without prejudice to the right of self-defense in conformity with Article 51 of the Charter of the United Nations." We are back, then, to what constitutes an "armed attack" under Article 51, and we repeat that a missile base armed with an atomic warhead in such close striking distance that no defensive radar equipment could operate effectively could be and was properly interpreted as an armed attack, if in the hands of one whose hostile declarations and whose past conduct indicated an evil intention. The fact that the United States called a Meeting of Consultation under the Rio Treaty on October 23, the day following the declaration of the President, and that the Council, acting provisionally, endorsed the action of the President by calling for measures to support it, would seem to prove that the United States had not violated its obligations by acting unilaterally in self-defense without risking the delay incident to formal consultation.

Was the invasion of Cuba by Cuban refugees in April, 1961, a violation of international law? Technically considered, it is not difficult to see in it a violation of our neutrality laws, even though the invasion did not start from our shores; but by every principle of equity and justice, no. Account must be taken of the fact that the invaders were refugees from a government that was executing its opponents without constitutional trial, that had denied the fundamental rights of freedom of speech and of assembly, and that had set aside the orderly procedures of democratic government. It was a situation wholly unlike that contemplated by the Convention on the Duties and Rights of States in the Event of Civil Strife adopted at Havana in 1928,<sup>2</sup> or by the Protocol to the same Convention adopted in 1957. The Cuban Government was already receiving aid from the Soviet Union which would enable it to suppress an uprising of the people, even if a large majority might be opposed to the dictatorial regime of the government. Putting the case from another angle, it might be said that the Cuban Government had, by its violation of the Caracas Resolution

<sup>2</sup> Sixth International American Conference, 1928; 22 A.J.I.L. Supp. 159 (1928).



against the Intervention of International Communism and by its defiance of the principles of the Charter of the Organization, forfeited the right to the protection of the Convention on Civil Strife. The "present government of Cuba" had only recently been excluded from the Organization of American States by decision of the Meeting of Foreign Ministers at Punta del Este in January, 1962, because of its declared affiliation with the Marxist-Leninist system. What more was needed to make the provisions of inter-American treaties inapplicable to Cuba?

It is a principle of international law, as of municipal law, that an accomplice to a crime comes within the indictment of the criminal. Insofar, therefore, as Cuba acted illegally, violating its obligations as a member of the inter-American community, the Soviet Union shared in the offense; and insofar as the Soviet Union violated the provisions of Article 2(4) of the Charter of the United Nations and sought to upset the already unstable balance of nuclear power, unashamedly attempting to deceive the United States in so doing, Cuba shared in the offense. To say that, in the absence of a treaty forbidding it, the Soviet Union was free to engage in trade with Cuba in any articles whatever in time of peace is equivalent to a failure to distinguish in municipal law between the sale of a gun to an ordinary purchaser and a sale to a person who the seller knows is about to use it to blackmail, perhaps to murder, a neighbor.

Was international law violated in the enforcement of the quarantine against third states? Not if the quarantine was lawful against the two parties directly involved. International law is familiar with the former procedure of "pacific blockade," in the form of measures of coercion against a delinquent state when the claimant state, acting in its own individual interest, did not wish to resort to the more rigorous measures of formal war; and in such cases protests were frequently heard from third states when they were not in sympathy with the action of the claimant state. But with the adoption of procedures of collective security there were no "third states" to protest. Article 41 of the Charter of the United Nations clearly imposes upon all of the Members the duty of acquiescing in a blockade established by the Security Council as a measure to give effect to its decisions; but it is silent with respect to the effect upon third states of measures taken by a state or regional group of states acting in self-defense under Article 51 of the Charter. The parties to the Rio Treaty of Reciprocal Defense found no difficulty, in the case of the Dominican Republic in 1960, in planning to resort to measures of collective blockade as a sanction against a state held to be violating the provisions of the treaty. But again no provision was made in the treaty for the case of a state resorting to measures of blockade in self-defense when the urgency of the situation did not permit of delay.

Perhaps the simplest answer is that when the procedures of collective security, whether under the Charter of the United Nations or under the Rio Treaty, cannot meet a situation in which recourse to the inherent right of self-defense is justified, we are thrown back upon the law of pre-collective security days when a nation, confronted with the danger of an

attack, took such measures as in its judgment were necessary. In this case the measures, for obvious political reasons, were far short of the formal war of earlier days, which would have put third parties in the position of neutrals and imposed far greater restraints upon their trade. If the central act of self-defense was justified, the collateral effects upon the trade of third states, minor as they were in fact, could be overlooked. Complaints, if any, should be directed to the inefficiency of the procedures of collective security.

These procedures of collective security have indeed reduced the dimensions of the traditional right of self-defense recognized by international law from time immemorial. The law of the good faith of treaty obligations calls upon the Members of the United Nations and the parties to the Rio Treaty to seek the solution of situations involving a threat to the peace by the established procedures. But when these procedures fail, or prove inadequate, the fundamental right, implicit in the acceptance of all treaty obligations, returns. The illustration given by Senator Root in 1914 still holds good:

The most common exercise of the right of self-protection outside of a state's territory and in time of peace is the interposition of objection to the occupation of territory, of points of strategic military or maritime advantage, or to indirect accomplishment of this effect by dynastic arrangement.<sup>3</sup>

The words "dynastic arrangement" are perhaps an understatement of the presence of the many thousands of Soviet troops in Cuba.

It is indeed to be hoped that in time a more effective collective security system may be established. For the moment we are confronted with a divided world, in which the possession of the atomic bomb with the possibility of delivering it from missile bases within reach of the opponent has made it possible for a single member of the community to challenge the whole group. But if self-defense has still a place in the code of international law, it is obvious that in good faith it must be interpreted narrowly. The imminence of the danger must be balanced against the absence of organized procedures immediately at hand for the prevention of the attack. Taking all the circumstances into account, it is believed that the President was fully within the law of self-defense in taking the position declared on October 22, and making effective the quarantine on October 24.

C. G. FENWICK

#### SOME COMMENTS ON THE "QUARANTINE" OF CUBA

The "quarantine" of Cuba in the fall of 1962 demands thoughtful consideration by all international lawyers. It would be most unwise to be dogmatic in reaching conclusions as to the legality under international law of the measures employed in that crisis. What follows is an effort to place this serious episode in perspective, and suggest some considerations

<sup>3</sup> "The Real Monroe Doctrine," 1914 Proceedings, American Society of International Law at 11; 8 A.J.I.L. 427 at 432 (1914).

that lend support to the actions taken. It would be anomalous, indeed, in the present world context to find the generally non-aggressive Power an aggressor, unless the case for so doing is very clear. The time is not yet ripe for a final assessment, nor is this the occasion for a detailed legal analysis. But it may be opportune to suggest that this important incident presented a new situation that cannot be fruitfully analyzed exclusively in terms of past formulations.

Some commentators, popular and scholarly, have attempted to assess the matter as if it occurred in a nineteenth-century factual setting. In that period, the typical hostile situation involved a narrow confrontation between two states, or two geographically localized groups of states. In that context, "war" and "neutrality" were assumed to be the legal categories which would be appropriate tools for preliminary analysis. As is well known, the community of states at that time asserted no collective interest in the maintenance of peace. Resort to war remained the legal right of every sovereign state, and there were no community proscriptions of resort to force, except in the limited category of "forceful measures short of war." The principal policy goals of the international legal system were to regulate the modalities of hostilities, and to prevent their extension to other territorially organized units. The legal precepts that evolved in this milieu cannot be transposed to the present situation without critical analysis. It may be added that the certainty and precision sometimes currently ascribed to these precepts would probably amaze their original proponents.

What is important in interpreting the past is to extract the basic principles that underlay these rules as applied in the then existent situation. From this viewpoint, the rules of war and neutrality achieved a reasonably just resolution of the conflicting interests of belligerents and neutrals, and thus served the then viable objectives of nation states. "Forcible measures short of war," a concept susceptible to doctrinal attack, nonetheless made sense in that context. It provided a desirable escape-valve between the absolutes of war and peace. It may have continuing vitality in application to the current situation. Such a concept recognized the existence of power and served both to discourage resort to extreme violence, and to achieve defensible results, despite the occasional grave abuses and obvious lack of adequate international reviewing machinery. A warlike pacific measure is certainly better than a full-scale war unless we lose touch with reality.

It is within this framework that there has been much talk of the requirements for a lawful blockade in war as well as the contrasting requirements for a "pacific blockade" as a justifiable measure short of war. Under nineteenth-century conditions, the asserted requirements were relevant. The purpose behind the rules was to prevent undue interference with neutrals in their ordinary trade, even in war, and to prevent any interference with neutrals except in "war." The latter proposition was the United States position, although others urged that the requirements for "pacific blockade" were not so strict.

The basic challenge to the use of these older principles comes of course from the fantastic development of destructive weapons that are not only different in degree but achieve a new dimension. The fact that thermonuclear weapons are presently almost exclusively possessed and controlled by the two super-Powers further accentuates the need for a re-evaluation of the whole subject of force. The offensive-defensive weapons argument, never solved under the older law, presents an even greater dilemma in a thermonuclear age.

It would be strange, therefore, if these older principles, developed as they were to meet a different factual and legal setting, would be relevant in the new context. Not only has weaponry development revolutionized the situation, but the legal scene has been transformed. Through the League of Nations Covenant, the Paris Pact and the United Nations Charter, the community of states has now asserted an interest in preventing, and a right to control, resort to violence except in certain defined situations. Organizations, both quasi-universal and regional in character, have been created for the purpose of asserting this interest and enforcing this right. The existence of these organizations for these purposes has added a third dimension to the two-sided nature of the nineteenth-century conflict situation.

It is within this new technological and legal structure that the validity of the quarantine must be judged. We must also recognize that these new legal norms and the organizational means for their enforcement have not yet achieved their goals or been uniformly successful in their implementation. Yet it is at least clear that the nineteenth-century legal regime has been displaced. The claims of neutral traders or of neutrality itself and the regulation of means of warfare are no longer central objectives, although the continuing importance of the latter is not to be minimized. The question to be decided is whether the purposes sought and the means employed in the Cuban question were consistent with the world community's current policy values in the same sense that the nineteenth-century institutions and concepts served that society's purposes.

Apart from differences in legal policy, what were the factual disparities that made the Cuban question wholly different from the earlier stereotype? Surely, it was not just Cuba and the United States that were confronting each other. The Soviet Union was not a third party neutral in the traditional sense. More realistically, it was the rival security systems that were in potential conflict. Moreover, the quarantine was not directed at neutral trade on the high seas in the conventional manner. It was a highly selective interdiction of missiles and related components, strategic weapons of tremendous destructiveness, whether "offensive" or "defensive." It followed a secretive introduction of such weapons outside of the Soviet Union for the first time and into a location where they could be used to threaten the United States and the Western Hemisphere, and also where they posed the threat of a drastic change in the balance of power on which the universal and regional security systems depend.

The objective of the quarantine was to stop the intensification of this

threat. The means employed were moderate in the circumstances. Vessels carrying missiles and related accessories were to be diverted from their projected destination. Only if diversion was refused, was military force to be used as a sanction. If such force had to be employed, the means authorized were to be the necessary minimum, presumably conventional arms, not a nuclear response to a nuclear threat. Fortunately, the actual course of events did not require the use of such force.

Is that which seems factually reasonable to be deemed legally objectionable? The answer is to be sought in the legal rules of the new community institutions, universal and regional, with their policy objectives previously mentioned. In this totally different factual and legal situation, most of the older rules are inappropriate; some of them, however, may remain relevant, and susceptible of adaptation to new conditions. Thus, even in the unorganized nineteenth century which did not proscribe war, self-defense was recognized as a customary right of states, and its proper exercise did not warrant condemnation. Does this basic concept retain its validity in the present situation?

These new community rules, as has been noted, asserted the right to control resort to violence except in defined conditions. Broadly speaking, the principal exceptions were collective action at the direction of the community and action taken in individual or collective self-defense within Article 51 of the Charter as the controlling instrument. Writers have differed as to whether Article 51 has preserved the customary right of self-defense of the older law or has narrowed that right to a response to only an "armed attack." The customary law recognized, as a minimum, a right of self-defense against a threat to the political independence or territorial integrity of a state which necessitated an immediate response, provided the response was proportional to the threat. The thrust of the modern system is to substitute a community response for unilateral resort to coercion, but there remains the necessity of unilateral or collective response when the community response is unavailable.

Such a necessity is universally recognized even in highly developed municipal legal systems. It would appear that recognition of such a right is more urgent in the international system where community enforcement is so easily frustrated. Nothing in the history of Article 51 requires a construction limiting self-defense to a response to an armed attack. Realism, common sense, and the destructive nature of modern weapons demand the retention of this customary right under adequate safeguards until the community system makes its use no longer necessary.

Assuming Article 51 is not restricted to an actual armed attack, it must still be determined whether the measures involved in the quarantine met the tests of the customary law. Whether there was a necessity in fact for immediate response presents a difficult question for decision. Hind-sight could be an expensive luxury. It is not enough to suggest that a preliminary resort to the United Nations was a prerequisite, and that it would be interesting to know if it would have been successful. A threatened state must retain some discretion in its initial judgment of

necessity. Subsequent review will determine its validity. Inadequate as existing review procedures are, the unanimity of the Rio parties, and the general acquiescence by the overwhelming majority of United Nations Members suggests tacit agreement on the necessity.

With respect to the requirement of proportionality, it has already been indicated that the writer believes the response was factually proportional. It is submitted that it was clearly within the legal limits of proportionality as well. Nor was the response truly unilateral. The unanimous approval of the quarantine by the states parties to the Rio Treaty made the response also a collective one within Article 51.

The basic proscription of force in the Charter is contained in Article 2(4). For the reasons that follow in summary statement, it is believed that the quarantine did not transgress the terms or spirit of that provision. The quarantine was neither a threat or use of force against the territorial integrity or political independence of Cuba, nor for that matter, of the Soviet Union, the real party in interest. It was not in any other manner inconsistent with the purposes of the United Nations, since it was the exercise of individual and collective self-defense within Article 51 of the Charter. It was in fact anticipatory individual and collective self-defense permitted by that article. A realistic assessment of the situation would suggest that it was the Soviet-Cuban missile threat that breached the spirit, if not the letter, of Article 2(4).

This necessarily brief discussion of such a vital issue cannot do justice to its complexities. The purpose of this comment is to suggest that the doctrine of self-defense provides a substantial legal justification for the quarantine. This is not to imply that other grounds urged in support of the quarantine may not also be cogent, such as the State Department case, which is based essentially on the Rio Treaty.

No one who aspires to assist in the creation of a peaceful world order based on justice can remain content with the existing situation. Confrontation between great Powers is always dangerous. When such Powers are thermonuclear Powers, it is explosive. Intensive effort should be directed to the prevention of such confrontations in the future, either by disarmament agreements, or by agreements on the deployment of missiles, for example. The unending struggle to improve existing community institutions in order to make effective the new legal norms against violence must be continued with renewed dedication. We must never lose hope. In the fullness of time, the day may come when the historic right of self-defense may no longer be necessary.

It is indeed tragic that the community system is not as yet sufficiently effective and that self-defense continues to be a necessary safeguard for survival. Its invocation can only be justified by urgent necessity, and its exercise must be governed by proportionality. Ideally, judicial or some other form of community review should be ultimately determinative as to validity. In the absence of adequate provision for such review, the regional approval and the United Nations assessment that took place provided an imperfect substitute for community review. However imperfect,

it revealed wide community support for the legality of the measures employed by the United States.

Critics of the self-defense argument contend that self-defense is too dangerous an instrument, and therefore the United Nations Charter must be so construed as to forbid its invocation. But the alternatives seem even more dangerous. Conceding, as these critics do, that states whose survival is threatened will nonetheless react to such threats, such responses will then be either outside or above the law. Surely, this cannot be more desirable. The measures employed by the United States were not "preventive war." They were moderate measures, skillfully executed, whose purpose was to prevent war. Under all the circumstances, factual and legal, the quarantine of Cuba constituted substantial compliance with both the spirit and the content of the principles and procedures of the world community.

BRUNSON MACCHESNEY

#### THE SOVIET-CUBAN QUARANTINE AND SELF-DEFENSE

In an article appearing elsewhere in this issue Professor Quincy Wright concludes—among many other things, most of which are largely dependent upon this particular conclusion—that the quarantine imposed by the United States in October, 1962, upon the importation of offensive weapons into Cuba cannot be regarded as a lawful exercise by the United States of the right of self-defense. This conclusion Professor Wright seeks to establish by interpreting Article 51 of the United Nations Charter as limiting the traditional right of self-defense by states to reactions against "actual armed attack." Such an interpretation enables him, since the United States acted before any actual firing of the weapons, to avoid the difficult task of a careful appraisal of the United States' measure for its necessity and proportionality in total context. With greatest deference to Professor Wright, it may be suggested both that his conclusion is not a necessary one and that his reasoning is inimical to appropriate clarification under contemporary conditions of the common interest in a viable minimum world public order.

The broad outlines of a different approach may be indicated by briefly noting, first, the more important characteristics of the traditional, customary right of self-defense, secondly, the considerations which should guide a genuine, as contrasted with a spurious, interpretation of the whole United Nations Charter, and, thirdly, the more obvious factors in the context of this particular confrontation between the United States and the Soviets which should be taken into account in any serious assessment of the necessity and proportionality of the United States' action.

Historically, states have demanded, and reciprocally honored, a right of self-defense of considerable, though not unlimited, scope. In broadest formulation, this right of self-defense, as established by traditional practice, authorizes a state which, being the target of activities by another state, reasonably decides, as third-party observers may determine reason-

ableness, that such activities imminently require it to employ the military instrument to protect its territorial integrity and political independence, to use such force as may be necessary and proportionate for securing its defense.<sup>1</sup> In a still primitively organized world in which expectations are low about the effective capability of the general community to protect its individual members, this right has been regarded as indispensable to the maintenance of even the most modest minimum order.

The more important limitations imposed by the general community upon this customary right of self-defense have been, in conformity with the overriding policy it serves of minimizing coercion and violence across state lines, those of necessity and proportionality. The conditions of necessity required to be shown by the target state have never, however, been restricted to "actual armed attack";<sup>2</sup> imminence of attack of such high degree as to preclude effective resort by the intended victim to non-violent modalities of response has always been regarded as sufficient justification, and it is now generally recognized that a determination of imminence requires an appraisal of the total impact of an initiating state's coercive activities upon the target state's expectations about the costs of preserving its territorial integrity and political independence.<sup>3</sup> Even the highly restrictive language of Secretary of State Webster in the *Caroline* case, specifying a "necessity of self defense, instant, overwhelming, leaving no choice of means and no moment for deliberation," did not require "actual armed attack,"<sup>4</sup> and the understanding is now widespread that a test formulated in the previous century for a controversy between two friendly states is hardly relevant to contemporary controversies, involving high expectations of violence, between nuclear-armed protagonists. The requirement of proportionality, in further expression of the policy of minimizing coercion, stipulates that the responding use of the military instrument by the target state be limited in intensity and magnitude to what is reasonably necessary promptly to secure the permissible objectives of self-defense under the established conditions of necessity.

The honoring in international law of a customary right of self-defense has not meant—the point may bear emphasis—the exaltation of unilateral decision by particular states over inclusive decision by the general community. It has indeed been accepted principle that a target state may make a first, provisional decision that the conditions of necessity are such as to require it immediately to employ the military instrument for preservation of its territorial integrity and political independence. Given the

<sup>1</sup> Fuller exposition and historical development of the principle are offered in McDougal and Feliciano, *Law and Minimum World Public Order*, Ch. 3 (1961). See also Bowett, *Self-Defence in International Law* (1958); Brownlie, "The Use of Force in Self-Defence," 37 *Brit. Yr. Bk. of Int. Law* 183 (1961).

<sup>2</sup> Brownlie, *loc. cit.* note 1 above, 202, 220, 227.

<sup>3</sup> McDougal and Feliciano, *op. cit.* note 1 above, 229 *et seq.*

<sup>4</sup> Mr. Webster to Mr. Fox, April 24, 1841, in 29 *British and Foreign State Papers* 1129, 1138 (1840-41). See also Jennings, "The *Caroline* and *McLeod* Cases," 32 *A.J.I.L.* 82 (1938).



continuing ineffectiveness of the general community organization to act quickly and certainly for the protection of states, no other principle could be either acceptable to states or conducive to minimum order. Save for an occasional uninformed and uniformly rejected whisper, it has, however, been generally agreed that both this first provisional decision by a claimant target state and the measures it actually takes are subject to review for their necessity and proportionality by the general community of states.<sup>5</sup> The principle of auto-interpretation, that each state is authorized to interpret customary principles, has never been applied, any more to claims of self-defense than to claims about other matters, to preclude other states from passing upon the degree to which the actions of a particular state conform to general community expectations. Fortunately, today the authority structures of the United Nations, despite all their other weaknesses, do provide quickly available and convenient fora for general community review of the lawfulness of particular claims to employ the military instrument.

The position taken by Professor Wright that Article 51 of the United Nations Charter must be construed to limit the customary right of self-defense by states to reactions against "actual armed attack" would not appear to be supported by any of the commonly accepted principles for the interpretation of international agreements. It may be recalled that the appropriate goal in interpreting great constitutional agreements, such as the United Nations Charter, is that of ascertaining the genuine expectations, created by the framers and by successive appliers of the agreement, in contemporary community members about what future decisions should be; ~~and~~ words and behavior in the past are relevant only as they affect contemporary expectations about the requirements of future decision. There is not the slightest evidence that the framers of the United Nations Charter, by inserting one provision which expressly reserves a right of self-defense, had the intent of imposing by this provision new limitations upon the traditional right of states.<sup>6</sup> In fact, as Professor Bowett summarizes, the preparatory work suggests "only that the article should safeguard the right of self-defence, not restrict it."<sup>7</sup> Thus, Committee 1/I stressed in its report, approved by both Commission I and the Plenary Conference, that "The use of arms in legitimate self defense remains admitted

<sup>5</sup> Brownlie, *loc. cit.* note 1 above, 209; McDougal and Feliciano, *op. cit.* note 1 above, 218.

<sup>6</sup> The exact wording of Art. 51 may be noted: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security."

<sup>7</sup> Bowett, *op. cit.* note 1 above, 188. Cf. Waldock, "The Regulation of the Use of Force by Individual States in International Law," 81 *Hague Academy Recueil des Cours* 455, 497 (1952).

and unimpaired.”<sup>8</sup> The apparent purpose of the inept language of Article 51, commonly ascribed to the late Senator Vandenburg, was only that of accommodating regional organizations, as specifically envisioned for the inter-American system by the Act of Chapultepec, with the more comprehensive, centralized system of collective security projected by the Charter. Similarly, nothing in the “plain and natural meaning” of the words of the Charter requires an interpretation that Article 51 restricts the customary right of self-defense. The proponents of such an interpretation substitute for the words “if an armed attack occurs” the very different words “if, and only if, an armed attack occurs.” The fallacy in this word-juggling we have elsewhere described:

A proposition that “if A, then B” is *not* equivalent to, and does *not* necessarily imply, the proposition that “if, and only if, A, then B.” To read one proposition for the other, or to imply the latter from the former, may be the result of a policy choice, conscious or otherwise, or of innocent reliance upon the question-begging Latinism *inclusio unius est exclusio alterius*; such identification or implication is assuredly not a compulsion of logic. If a policy choice is in fact made, it should be so articulated as to permit its assessment.<sup>9</sup>

The factitious character of a reading of Article 51 to restrict the customary right of self-defense becomes even more apparent when Article 51 is related to Article 2(4), embodying the Charter’s principal prohibition of force. Article 2(4) refers to both *the threat* and use of force and commits the Members to refrain from “threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations”; the customary right of defense, as limited by the requirements of necessity and proportionality, can scarcely be regarded as inconsistent with the purposes of the United Nations, and a decent respect for balance and effectiveness would suggest that a conception of impermissible coercion, which includes threats of force, should be countered with an equally comprehensive and adequate conception of permissible or defensive coercion, honoring appropriate response to threats of imminent attack. There is, further, nothing in the subsequent conduct of the parties to the agreement expressed in the United Nations Charter which would indicate genuine shared expectations that they had in Article 51 given up their customary right of self-defense; indeed, again, the most relevant official utterances would suggest the exact opposite.<sup>10</sup> Finally, under the hard conditions of the contemporary technology of destruction, which makes possible the complete obliteration of states with still incredible speed from still incredible dis-

<sup>8</sup> Report of Rapporteur of Committee 1 to Commission I, 6 U.N.C.I.O. Docs. 446, 469. Discussed with further references in McDougal and Feliciano, *op. cit.* note 1 above, 235.

<sup>9</sup> McDougal and Feliciano, *op. cit.* note 1 above, 237, note 261.

<sup>10</sup> Relevant official utterances are collected in Mallison, “Limited Naval Blockade or Quarantine-Interdiction: National and Collective Defense Claims Valid Under International Law,” 81 George Washington Law Rev. 335 (1962), and in McDevitt, “The UN Charter and the Cuban Quarantine,” 17 The JAG Journal 71 (1963).

tances, the principle of effectiveness, requiring that agreements be interpreted in accordance with the major purposes and demands projected by the parties, could scarcely be served by requiring states confronted with necessity for defense to assume the posture of "sitting ducks." Any such interpretation could only make a mockery, both in its acceptability to states and in its potential application, of the Charter's major purpose of minimizing unauthorized coercion and violence across state lines.

A serious review from general community perspectives of the conditions of necessity confronting the United States when it imposed the quarantine would of course require systematic and disciplined appraisal of many features of the context of the particular events to which the United States reacted.<sup>11</sup> Some of the more important of these features may be briefly indicated under certain category headings useful for the description of any social process, persuasive or coercive: participants, objectives, situation, base values, strategies, and outcomes.

*Participants.* The threat against which the United States reacted came from the Soviet Union, not Cuba. The Castro regime contributed to the threat, but more as puppet or as potential irresponsible brandisher of borrowed nuclear weapons. The suggestion by Professor Wright that in the "Cuban quarantine" the United States was dealing with "unpalatable action or attitudes of a small state" scarcely accords with reality.

*Objectives.* The objectives of the Soviet Union in moving major military power into the Western Hemisphere were clearly expansionist. The missiles, had their installation been achieved, would have been directly pointed toward the "territorial integrity" of all states within range. The explicit and consistent public utterances of its official spokesmen, the totalitarian character of its internal structures of authority, and the monolithic character of its demanded system of world public order raised grave question about the genuineness of the Soviet Union's dedication to the basic principle of minimum order, that violence and coercion are not to be used as instruments of expansion across state lines.

*Situation.* The general geographic area into which the Soviet Union was moving was one which the United States and other states in the Hemisphere had long specified, through the Monroe Doctrine and otherwise, as of especial strategic concern to them. The specific location being sought by the Soviet Union for its missiles would, in more particular, have by-passed the Dewline warning system maintained by the United States for securing advance notice of the launching of missiles from the Soviet Union.<sup>12</sup> The by-passing of the Dewline would have grievously reduced the United States' reaction time to possible attacks from the Soviet Union, thus causing a serious disruption in the whole world balance of power between the totalitarian and non-totalitarian states. Even a few days'

<sup>11</sup> A comprehensive and persuasive review is offered in Mallison, *loc. cit.* note 10 above. The requirements of "collective self-defense," not considered in this editorial, are also discussed by Mallison, as well as by McDevitt, *loc. cit.* note 10 above.

<sup>12</sup> This point, among many others, is cogently developed by McDevitt, *loc. cit.* note 10 above.

delay by the United States in taking appropriate measures would have meant that the missiles would be in place and the situation irreversible.

Expectations of crisis in the world arena as a whole were high, and estimates of prompt and effective action from the organized community of states for ameliorating particular crises were realistically low.

*Bases of Power.* The Soviet Union, as one of the world's two major Powers, obviously disposed of ample bases of power to put into effect the threats explicit in its behavior.

*Strategies.* The strategies employed by the Soviet Union included manipulation of the military instrument in its most awesome and gruesome contemporary form. Special advantage was at first sought clandestinely, but this use of the military instrument was at all times accompanied by a fanfare of other instruments—ideological, economic, and diplomatic—with an explicit promise of still more to come in all areas of the Hemisphere. The reference by Professor Wright to the shipping and installation of missiles as “trade” between the Soviet Union and Cuba in “time of peace” would appear at least mildly euphemistic.

*Outcomes.* The outcome almost within the grasp of the Soviet Union was that of a new, more direct military threat to the whole of the Americas, with most major cities and military bases brought within the reach of momentary nuclear destruction. The intensity of the coercion which this nearly achieved threat imposed upon the United States and the other Members of the Organization of American States was accurately reflected in the unanimity, celerity, and effectiveness with which they acted, once the character and dimensions of the threat became apparent.

Responsible appraisal from general community perspectives of the proportionality of the action taken by the United States in response to the threat from the Soviet Union must require a similarly comprehensive reference to the major features of the context of that action. We may note some of the more important features by the same headings.

*Participants.* Though the decision to impose the quarantine was first taken by the United States alone, quick confirmation that this decision was not an egocentric one, in the special interest of the United States only, came from the other Members of the Organization of American States in associating themselves with the United States.<sup>13</sup>

*Objectives.* The immediate, manifest objectives of the United States were defensive: to secure the withdrawal and elimination of nuclear weapons from Cuba. The historic precedent by which Cuba was initially set free, the generally democratic internal structures of authority in the United States, and the pluralistic world order of independent states traditionally demanded and supported by the United States did not suggest covert, expansionist objectives.

*Situation.* The geographic area within which the United States applied its power was located largely upon the high seas, entailing the least possible interference within the internal territorial domain of any state.

<sup>13</sup> The details of the action by the Organization of American States are presented in Mallison, and McDevitt, *loc. cit.* note 10 above.

The duration of the interference was limited to that necessary to the effectiveness of defense.

*Bases of Power.* The bases of power of the United States and its associates, though great, were not sufficiently disparate from those of the Soviet Union and its associates to suggest disguised duress.

*Strategies.* The use by the United States of the military instrument was as limited as could have been fashioned, extending only to the selective interdiction of certain types of weapons. The United States acted openly, after advance warning that the establishment of an offensive military base in Cuba would be regarded as a threat to its security. The United States immediately reported its action to the United Nations Security Council, asking for appropriate measures from that body.

*Outcomes.* The quarantine was a reversible action, causing no irreparable destruction. The employment of force which it authorized was clearly limited in intensity and magnitude to that necessary to removal of the provoking threat.

Even this impressionistic recall of some of the more salient features of the larger context of threat and response should suffice to suggest that a third-party observer, genuinely concerned to clarify the common interests of all peoples, could reasonably conclude that the action taken by the United States was in accord with traditional general community expectations about the requirements of self-defense.<sup>14</sup> The flow of pertinent comment and decision since the incident would indeed seem to confirm that this has been the overwhelming conclusion of world public opinion.<sup>15</sup>

In a better organized world, mankind might be able to dispense with a conception of self-defense which confers upon a claimant target state as much initial discretion as does the conception so long honored in customary international law. Until that better organization is more nearly achieved, the task which confronts free peoples is, however, that of clarifying and applying a conception of self-defense which will serve their common interests in minimum order without imposing upon them paralysis in the face

<sup>14</sup> The same conclusion is reached by Mallison, *loc. cit.* note 10 above, and McDevitt, *loc. cit.* note 10 above. See also Oliver, "International Law and the Quarantine of Cuba," 57 A.J.I.L. 373 (1963); McWhinney, "'Coexistence', the Cuba Crisis, and Cold War International Law," 18 International Journal 67 (1962-63); Seligman, "The Legality of the United States Quarantine Action in Cuba," 49 A.B.A.J. 142 (1963); Larson, letter to the New York Times, Nov. 12, 1962, p. 28, cols. 5, 6; and statements by Professors Berle, Dillard, Lissitzyn, and Pugh in Columbia Law School News, Nov. 7, 1962.

The approach in Chayes, "Law and the Quarantine of Cuba," 41 Foreign Affairs 550 (1963), and, other official statements, builds more upon "regional arrangement" than upon self-defense. It is hardly to be expected, however, that general community expectation will immunize even the "political" or "legislative" decisions of the Security Council in reviewing regional measures from the basic constitutional policies of necessity and proportionality.

<sup>15</sup> It may be remembered how the tone of professional and popular comment changed when Ambassador Stevenson introduced into the Security Council certain photographic exhibits of Soviet activities in Cuba. For a description of this occasion, see 9 U. N. Review 6, 11 (November, 1962).

of attacks from community members who do not genuinely accept the principle of minimum order. The importance of the incident of the Soviet-Cuban quarantine is in its indication that such a clarification and application can effectively be made and that free peoples do not, as some have insisted, have to choose between the historic restraints of international law and their own survival.

MYRES S. McDOUGAL

#### THE SIXTH COMMITTEE AND NEW LAW

There can no longer be doubt that a significant segment of mankind is in search of new law. This theme is on the lips of delegates of more than half of the Members of the United Nations as they speak in the Sixth Committee. What do they want in uttering the magic word "new"? The record suggests that the demand in the Sixth Committee can be understood only as a part of the appeal being voiced in all committees of the United Nations and in the specialized agencies as well. It is the reflection in law of the search for recognition of human dignity—to be achieved in part by satisfaction of economic and cultural needs such as food and literacy, and in part by recognition that the day of colonialism is over.<sup>1</sup>

Current consideration of a desirable future direction for the development of international law has evolved from this urge for recognition of human dignity through a series of stages understood only by those who have witnessed its evolution. It is personified in the item "friendly relations and cooperation among states conforming to the Charter of the United Nations" as it appeared on the agenda of the Sixth Committee during the 17th Assembly.<sup>2</sup> This item continues to be in the forefront of the contemporary development of international law as it becomes the principal business of the Sixth Committee for the 18th Assembly<sup>3</sup> and probably for many of the sessions that are to follow.

Superficially, the work of the Sixth Committee, especially as it has related to development of this item, has sometimes been treated as an inseparable part of the exacerbated rivalry between two hemispheres.<sup>4</sup> This mental association is, in part, because the U.S.S.R. and its allies have been quick to appreciate the extent to which the newly developing nations of both Hemispheres are in search of new law to embody their interpretation of recognition of their aspirations. Having comprehended the revolutionary force of these aspirations with their consequent advantage to those who espouse a world of revolutionary change, statesmen of the Communist-oriented states have called for the development of a new international

<sup>1</sup> See report of Mr. Passou (Dahomey): "It was the Committee's duty to place its greatest hopes in the future of a law which would safeguard the dignity and integrity of mankind, and for that purpose each State should act in conformity with the principles of the Charter without looking to see whether the other States were actually observing those principles." See U.N. Doc. Prov. A/C.6/SR. 759, pp. 3-4.

<sup>2</sup> See General Assembly Res. 1686 (XVI), Dec. 18, 1961.

<sup>3</sup> See General Assembly Res. 1815 (XVII), Dec. 18, 1962.

<sup>4</sup> See report of Mr. Vasquez (Colombia), U.N. Doc. Prov. A/C.6/SR. 761, p. 15.

law of peaceful co-existence.<sup>5</sup> Some of the lawyers of the West were led astray for a time by this manoeuvre and responded petulantly to deny that any change was required in the institutions of international law hallowed by time. This extreme response led many Western-oriented lawyers to error in their initial reactions to the proposals within the Sixth Committee and contributed to widespread belief that the Legal Committee of the General Assembly was engaged in nothing more than a phase of hostile international competition for the minds of men. The record suggests another evaluation.

Interventions in the Sixth Committee indicate that at the outset the Indians were among the first to establish the theme of "peaceful co-existence" as a cornerstone of their foreign policy by incorporating it in their Treaty with China in 1954 relating to Tibet.<sup>6</sup> This cornerstone was expected by Indians to be the beginning of a new structure of law designed to foster recognition that colonial relations between master and servant were over forever and that the long conflict relating to the Sino-Indian frontier was at an end. In the Indian mind "peaceful co-existence" was not a means to advance expansionist interests of any state. The same concept prevailed at the Bandoeng Conference in 1955, when the nations of Africa and Asia incorporated "peaceful co-existence" as one of the ten principles guiding their relationships.

Intertwining of the term with other meanings began when it was appreciated generally that the term had special connotation for the countries guided by men of Marxist persuasion. For them the term was related to a concept of world order evolved by Lenin to inspire the peoples of his fledgling Soviet Russia, which feared the great Powers of Europe and also Japan. Lenin was directing a policy of dual character—designed both to hold the armies of the great Powers at bay and also to prepare the way for the eventual deterioration of these very Powers through social revolution, supported, if not inspired, by the agency of the Communist International, founded by him in 1919. In the years that were to follow Lenin's death in 1924, "peaceful co-existence" was less frequently mentioned, but the bifurcated policy it represented was continued, although with varying intensity of support by Stalin for one or the other of its aspects, as the circumstances of the moment seemed to require.

Since Stalin's death in 1953 the term "peaceful co-existence" has been restored to constant use by Soviet spokesmen, and in 1961 it was placed in the Communist Party's new program as the cornerstone of Soviet foreign policy.<sup>7</sup> This espousal coincided with the declaration of the Soviet Prime Minister that the U.S.S.R. had become so strong that it no longer had to fear destruction from abroad. Is it any wonder that for

<sup>5</sup> See report of Mr. Pechota (Czechoslovakia), *ibid.*, SR. 753, p. 7.

<sup>6</sup> For a history of the emergence of the concept of peaceful co-existence in international law, see Me. Henri Cochaux, "Aspects Juridiques de la Coexistence," International Law Association, Report of the Forty-Eighth Conference, New York, 1958, pp. 468-484. For a review of the problems of the Sixth Committee as they appeared in the spring of 1962, see 1962 Proceedings, American Society of International Law 89-114.

<sup>7</sup> See Program of the Communist Party of the Soviet Union, 1961, Pt. I, Ch. 8.

many statesmen in the developed countries beyond Soviet frontiers, and even for some of the developing countries, the term has come to be synonymous with a foreign policy appearing to emphasize the expansion of a political system inspired by the Russian Revolution—the more so since Chinese armies have marched into the land of a treaty partner with whom the term was originally conceived as suitable for postwar use?<sup>8</sup>

This prelude is necessary to an understanding of the Sixth Committee's work. The term "friendly relations and co-operation" was designed by statesmen of several states who knew this history and feared that, if the "international law of peaceful co-existence" were made the subject of study by the Committee, there would be confusion in some minds with the meaning given it in Lenin's time. Law under this concept might exist only to restrain marching armies, while leaving frontiers open to infiltration of agents desiring to subvert internal social and political orders in spite of the United Nations Charter restrictions on interference in internal affairs.

By degrees sufficient numbers of the experts of the newer states came to understand the hesitancy of those with longer diplomatic experience to accept "peaceful co-existence" as a goal of foreign policy and hence a concept to be fostered by international law. At the 16th Assembly the agenda item presently in use was accepted by a majority to express the desire to revise law in such measure as present circumstances required. Proponents of "peaceful co-existence" accepted the change, but only after indicating that in their minds it was equivalent to the majority's term.<sup>9</sup>

What is the task of the Sixth Committee in light of this history? It is to determine what can be accepted by a majority of the Members of the United Nations as the direction and extent of amendment of international law to meet the desires of the developing states for recognition of their aspirations. By this is meant that the Sixth Committee delegates must make the politico-legal decisions necessary to the development of international law so that law may advance, to the advantage of the world community, the position of its developing states.

Experience suggests that the world community will be served by establishing a balance between independence and responsibility. The developing states must be liberated from any threat of resubmission to colonial status. They must be aided in maintaining their independence, but at the same time they must accept their responsibilities to maintain peaceful relations among themselves and even to espouse domestic policies that offer no cause for complaint from other states on the ground that internationally recognized interests are being denied redress through existing institutions for settling disputes. There cannot be aggressive activity

<sup>8</sup> See report of Mr. Quintero (Panama): "The ideal of 'peaceful coexistence', which seemed to be the central point of the draft resolution [presented by Czechoslovakia] aroused the distrust of many countries, not because those words were improper or expressed an idea which was reprehensible in itself, but because the circumstances surrounding the birth of that slogan had rendered it suspect to many." U.N. Doc. Prov. A/C.6/SR. 760, p. 8.

<sup>9</sup> See report of Mr. Morozov (U.S.S.R.), *ibid.*, SR. 764, pp. 13-14.



designed to create a new hegemony, whether justified by ancient claims to territory, the need for economic integration, or the advantages to be expected from unity. There must be no new Alexander of Macedonia, no new Julius Caesar.

Such a policy of politically acceptable change requires maintenance of the essential fabric of international law, with amendment of those institutions that are acknowledged by the majority of the international lawyers of the Sixth Committee to foster continuation of colonial or semi-colonial relationships between states or the creation through aggressive action of new relations of domination by one former colony over another former colony. This position would require elimination from the body of international law of principles and institutions that in the past have permitted and facilitated forceful intervention in the affairs of other states to create or protect already established economic or political advantages of foreigners over citizens of the weaker state. Although recognition of such principles and institutions has been on the wane of recent years and would seem to be incompatible with the Charter, Sixth Committee delegates suggest that they are still a nightmare for many statesmen of former colonies or small underdeveloped states. It may be well to review all circumstances under which force has been permitted in the past for such purposes, and to make a formal and specific renunciation of force in such circumstances in the future. General obligations to renounce force suffer from the reputation acquired by the Briand-Kellogg Pact. Specific obligations must be defined.

What would such a policy of revision of international law in the interests of friendly relations and co-operation require in practice? A starting point in the analysis can be the views of the newly liberated states in declaration of what is necessary to recognize their newly acquired dignity. As evidence of these desires, take the first draft submitted to the Sixth Committee by ten such states in association with three states of longer independence, but subject in the past to constant threat of intervention from neighbors in whom they still have less than complete confidence.<sup>10</sup>

To this group, suspicion of those with power requires that international law be amended to assure peaceful relations between states in a spirit of "good neighborliness regardless of differences, the degree of evolution or the nature of their political, economic or social development." In an effort to be more specific, they declare that the principles they seek to fortify exist already in the Charter of the United Nations and require reaffirmation only as the following: (1) abstention from recourse to the threat or use of force in any manner incompatible with the United Nations; (2) settlement of disputes solely through negotiation or other pacific means; (3) co-operation between states in all phases of international relations; (4) recognition of the right of self-determination of peoples; (5) recognition of the right of sovereign equality; and (6) respect for, and execution of, obligations assumed by treaty or other sources of inter-

<sup>10</sup> See U.N. Doc. A/C.6/L. 509, Nov. 21, 1962.

national law conforming to the aims and principles of the United Nations.

International lawyers must be candid. This declaration provides none of the detail required for amendment of the existing body of international law. The statement in its own terms is said to be a reaffirmation of existing general principles, and the lawyers are asked to provide the detail to implement them at future sessions of the Sixth Committee and in comments made to the Secretary General in the interim. Consequently, any hints as to what the detail will be can be found only by looking beyond the draft resolution presented by the states primarily concerned.

Slightly greater specificity appeared in the compromise draft resolution presented by some of the small states of East and West, together with the group already referred to, and eventually adopted by the General Assembly as the guide to future activity in the Sixth Committee.<sup>11</sup> The resolution selected four subjects for immediate detailed examination: (1) abstention from the threat or use of force against the territorial integrity or political independence of any state or from any other action inconsistent with the purpose of the United Nations; (2) settlement of disputes by peaceful means; (3) non-intervention in matters within domestic jurisdiction; and (4) sovereign equality.

By this enumeration the sponsors indicated their dissatisfaction with existing international law as to what constitutes aggression; what constitutes domestic jurisdiction; existing mechanisms for peaceful settlement of disputes; and what remains as the vestige of colonialism.

Delegates from the developing countries were more specific in their speeches. Tunisia<sup>12</sup> held that consular privileges and immunities had led to a real mutilation of sovereignty under the system of capitulations, and that the small countries consequently had certain reservations about the customary law that existed on the subject of consular rights. The Delegation objected to the International Law Commission's draft because it put consular officials on the same footing as diplomatic agents, and such an extension was prejudicial to small countries. The delegate spoke specifically against inviolability of premises and of the pouch as unnecessary to the free exercise of consular functions. He was frank to say that opposition was rooted in the still fresh memory of the privileges that had been granted in the past to colonial Powers.

Indonesia<sup>13</sup> had previously objected to the law of the sea because it took inadequate account of the sovereignty of states that were archipelagos. Concepts of territorial belts that permitted warships of hostile Powers to sail at will through straits between islands of the archipelago subjected the developing state to threat of pressure that was intolerable. Likewise, Indonesia<sup>14</sup> objected to the attitude that had been manifested in some

<sup>11</sup> See U.N. Doc. cited note 3 above.

<sup>12</sup> See report of Mr. Zoukir (Tunisia), U.N. Doc. Prov. A/C.6/SR. 775, p. 8.

<sup>13</sup> See report of Mr. Jusuf (Indonesia). General Assembly, 16th Sess., Official Records, 6th Committee, Legal Questions, Summary Records of Meetings, Sept. 20-Dec. 15, 1961 (New York, United Nations, 1962) p. 71 (SR. 702, par. 25).

<sup>14</sup> See *ibid.*

states that a developing state had no right to nationalize subsoil while leaving intact the right of a foreign owner to the surface of the land.

India<sup>15</sup> was fearful of the misuse of cultural exchange. It referred to efforts to impose culture and ways of thought under the guise of a civilizing mission. If such aims were absent, India stood open to all cultural influences as she had stood open to them in the past.

Chile<sup>16</sup> was fearful of negotiation of differences between strong and weak states. It preferred other means of settling disputes because small states might be induced to negotiate with powerful states under outside pressure. Japan<sup>17</sup> also noted the necessity for a review of the machinery for implementing the obligation of states to settle disputes peacefully, and suggested accumulation of the norms of conduct that had emerged in settling the manifold disputes arising out of the complexities of human life.

Tunisia,<sup>18</sup> in a second intervention, raised the question of economic, cultural and social assistance, calling for complete abandonment of the concept of charity in such relationships and the substitution of the concept of international solidarity. By this the delegate meant reaffirmation of the economic interdependence of all countries, that is, the concept that the economic well-being and cultural advancement of the developing countries are essential to the well-being of the strong Powers themselves, and assistance is not a graceful act performed by them to help paupers. He noted, as examples of the agreements Tunisia preferred, those that had been negotiated to maintain prices on coffee and cotton goods, in which co-operation had achieved improved prices for raw materials and also expansion of markets for European industrial goods.

Sierra Leone<sup>19</sup> was intent only upon reaffirmation of the principles of the United Nations Charter. The delegate met the oft-repeated statement of some of the strong Powers, that restatement of Charter provisions was unnecessary, by favoring a proclamation of faith that the United Nations continued to support these principles after many years.

Guatemala<sup>20</sup> expressed fear lest the internal structure of small states collapse under pressure from political parties serving great Powers, and urged that any declaration of principles ban the "type of party which constituted interference in countries' domestic politics, interference against which the country affected had the right to react." Mexico<sup>21</sup> spoke of its own revolution as establishing a balance between the rights regarded by natural law as inherent in the dignity of the human person and the rights which modern doctrine would call social guarantees. He called for a similar balancing between the individual state and the international

<sup>15</sup> See report of Mr. Miskra (India), U.N. Doc. Prov. A/C.6/SR. 770, p. 2.

<sup>16</sup> See report of Mr. Bernstein (Chile), *ibid.*, p. 10.

<sup>17</sup> See report of Mr. Sunobe (Japan), *ibid.*, SR. 754, p. 3.

<sup>18</sup> See report of Mr. Zoukir (Tunisia), *ibid.*, p. 5.

<sup>19</sup> See report of Mr. Collier (Sierra Leone), *ibid.*, SR. 756, p. 3.

<sup>20</sup> See report of Mr. Quisnoñes (Guatemala), *ibid.*, p. 14.

<sup>21</sup> See report of Mr. Moreno (Mexico), *ibid.*, SR. 758, p. 11.

community. Dahomey<sup>22</sup> castigated the Powers that justified their own aberrations on the ground that others were not observing the Charter. The delegate asked each state to attend to the legality of its own actions regardless of the illegality of others.

The Thai delegate provided the most exhaustive bill of particulars as to what was outmoded in international law.<sup>23</sup> He denounced as still remaining in international law the concept of intervention, even by arms, to protect the lives and property of nationals living in a foreign country. He declared that the African and Asian countries could no longer tolerate application of the rules of traditional international law regarding state responsibility and the treatment of aliens, stating that aliens could not expect preferential treatment over nationals.<sup>24</sup> He reviewed the history of chartered companies that had been granted governing rights over areas in the Far East, and noted that, although these companies had ceased to exist, private overseas corporations not infrequently exercised a large measure of control over the economy of less developed countries and could thus interfere in their internal affairs.

State immunity from jurisdiction as it existed in international law was denounced when it related to state trading, for the Thai delegate saw no reason why there should be favor to one party in foreign trade. As to international disputes generally, the provisions of Article 33 of the Charter of the United Nations seemed to be not always used in the spirit of justice, particularly when the dispute was between a great Power or a colonial Power and a small African or Asian state. He noted that the small state was subjected to all types of pressure.

The complaint of the small states over pressures exerted during diplomatic negotiations was heard frequently, notably when Austria's delegate recounted its experience<sup>25</sup> and Finland hers.<sup>26</sup> To the small states some means of settling international disputes had to be devised that required compulsory submission of the dispute. The optional clause of the Statute of the International Court of Justice was declared insufficient. No issue was as frequently alluded to by the small states as the matter of the inequity of diplomatic negotiation.<sup>27</sup> Israel<sup>28</sup> suggested that general acceptance had to be won for the idea that recourse to procedures calling for settlement of disputes by impartial arbitrators was not a hostile act.

Not all criticism was leveled by the small states at existing law. Colombia's delegate<sup>29</sup> saw the need to adapt international law to the new fields

<sup>22</sup> See report of Mr. Pessou (Dahomey), *ibid.*, SR. 759, pp. 3-4.

<sup>23</sup> See report of Mr. Sucharitkul (Thailand), *ibid.*, SR. 763, p. 8.

<sup>24</sup> Afghanistan also shared this view. See report of Mr. Tabibi (Afghanistan), *ibid.*, SR. 762, p. 8.

<sup>25</sup> See report of Mr. Herndl (Austria), *ibid.*, SR. 766, p. 4.

<sup>26</sup> See report of Mr. Saario (Finland), *ibid.*, SR. 765, p. 18.

<sup>27</sup> See report of Mr. Iqbal (Pakistan), *ibid.*, SR. 761, p. 3; also report of Mr. Anoma (Ivory Coast), *ibid.*, SR. 762, p. 18, and report of Mr. Mirfenderskiki (Iran), *ibid.*, p. 14.

<sup>28</sup> See report of Mr. Rosenne (Israel), *ibid.*, SR. 767, p. 14.

<sup>29</sup> See report of Mr. Vazquez (Colombia), *ibid.*, SR. 761, p. 16.

opened up by development of atomic energy, the use of outer space, and the sense of economic insecurity manifest in the developing countries. Afghanistan<sup>30</sup> found it necessary to establish some rules guaranteeing to inland countries access to the sea. The Philippines<sup>31</sup> favored establishment of rules relating to the extension of international assistance for development so as to avoid sensitive questions of national sovereignty.

What can be concluded in the light of the sentiments expressed in the record and from the resolution adopted by the Sixth Committee? Above all else there is evident the cry for the recognition of the dignity of the new states, with avoidance of any vestige of the colonial status from which they have only just emerged. This plaint rests upon the feeling that insecurity lies not only in the threat of renewed military intervention but also in economic and cultural assistance, where there may be strings attached that will bind or be intended to create bonds for the new state so that it cannot make its own decisions.

A candid appraisal of the details presented by the delegates in support of their complaint suggests that in some measure their fear is based more on expectation than reality, and that it is the fear of a party who has been disciplined for so long that when the discipline is removed by the ending of control there is disbelief that his liberation is real. The complaint also rests upon a misunderstanding of what independence really means for a state that is not equipped with vast resources of its own. The statesmen of the small but experienced states in Western Europe have known for generations that their choice of policies is definitely circumscribed by the policies of their great neighbors and their lack of resources. The new states of Africa and Asia that are weak and lacking in resources cannot hope to exceed the independence of Denmark, Finland, The Netherlands or Luxembourg because of very practical reasons, but they have a right to aspire to recognition of the dignity that is enjoyed by the small Western European states. If that dignity can be accorded to them, and they learn also of the limitations on independence of action that is inevitable for states with limited resources, the way should be open to their peace of mind for which every statesman of a great Power should strive.

There can be no reason why international law cannot be revised in those details to create what the new states want, or much of it, without establishing conditions of international chaos. International congresses concerned with the law of consular intercourse or of the sea can find responses to the fears of the former colonies, who see in consular privileges and immunities the means of perpetuating spy networks of great Powers on their soil, or, in the law of the sea, perpetuation of the military threat created by great navies in the past.

Economic and cultural aid can be funneled through the international agencies already existing, so that the great Powers are not suspected of attaching strings. Experience has shown that the World Health Organiza-

<sup>30</sup> See report of Mr. Tabibi (Afghanistan), *ibid.*, SB. 762, p. 8.

<sup>31</sup> See report of Mr. Jimenez (Philippines), *ibid.*, p. 16.

tion, UNESCO, the United Nations Special Fund and UNRRA have functioned well, and that the peoples who have benefited do not harbor misgivings about the Powers who have contributed to the resources used.

Even the much-discussed question of nationalization, which is admittedly the least satisfactory subject for the capital exporters, is not beyond the ingenuity of human beings to resolve. It is evident that a means must be found to increase the trade of the nationalizing Power so that reimbursement may be provided, and, if for political reasons this becomes undesirable, the great Powers concerned must provide for reimbursement of their own nationals who are having to bear the cost of a policy designed to benefit the broader interests of the whole nation. If investment is made through international agencies such as the International Bank, it may be possible to establish the thought in the receiving Powers that nationalization without prompt and adequate payment reduces credit standing and cannot be undertaken lightly without careful evaluation of the consequences of such loss. It is one thing to nationalize property of a creditor of long standing that has exerted political influence through its credits for many years, and another to default on a loan made by an international agency.

It is evident from the complaints in the Sixth Committee that the problems currently faced and causing tensions and distrust in contemporary law are mainly caused by a style or manner of acting rather than by the state of the law itself. The specific principles and institutions of international law that have been selected by the delegates of the developing countries for criticism are only incidental to the whole body of international law. They can be altered and the situation rectified without loss of the order that international law provides in the world community. Attention must focus on the style of conducting relations with the developing countries rather than on the substantive law.

Nothing has been said to this point about revision of international law to meet the desires of the U.S.S.R. and the peoples' democracies. This has been intentional, since the fabric of international order can be maintained if contemporary international law is rectified to meet the demand for dignity expressed by the developing states. If this need is met, many of the suggestions of the Soviet delegates for rectification will also have been met, since they stem either from the period in Soviet history when Soviet aspirations were not far different from those of the currently developing states, or from Soviet desires to espouse the cause of the currently developing states in expectation that, by doing so, friends will be won in important segments of the world.

Perhaps it is too much to expect that Soviet desires for change in international law exceeding those of the developing states can remain unanswered with impunity, yet that is what seems desirable. To the extent that consensus rests upon satisfaction of the preponderant majority of the Members of the United Nations, that consensus can be had, if the developing countries reach agreement with the developed countries of the West. The Eastern countries can be expected to find it advantageous to evidence

their good will by avoiding recalcitrance, for if they do not, they will be isolated and lose all influence among the developing states, in which lie such hopes as they may have for future long-range influence upon social conditions.

In summation, let lawyers of the United States, together with colleagues of the other developed states of the West, strive for such rectification of the whole body of international law as may be found necessary to reassure the developing states that dignity is accorded them; let the developed states create a style of activity that exudes respect for nations regardless of size, culture and power, and there will be no risk of losing the main body of international law which has in the main evolved of recent years in such a way that it serves the cause of order and does so without threat to interests of responsible states, no matter how weak. This should occasion no difficulty for the United States, for the good-neighbor policy incorporates such a concept, and American statesmen have already indicated their willingness to accept modifications of international law in specific spheres where inequity results from traditional practices.

Perhaps the greatest difficulty for some of the developing states lies in the American desire to protect American investors in these countries, but even here a solution has usually been found unless, as with Cuba, efforts to influence her political decisions with regard to the U.S.S.R. has made it necessary to terminate trade as a measure of pressure designed to protect the United States from annihilation.

After all, what all Westerners ought to be seeking is world-wide permanent toleration of diversity in political programs designed to achieve modernization. The Communist-oriented states still profess to see no possibility of permanent toleration, although circumstances may extend indefinitely the program of "peaceful co-existence" espoused by some of them. Westerners have no such compulsion to change the world to their own image institutionally. Westerners are increasingly aware that a distinction needs to be drawn between institutions and functions. If certain specific institutions cannot be preserved because developing states feel that they prevent modernization in terms of enhancement of human dignity through ample supply of food, clothing and homes, let them be changed so long as in their altered form there is preserved the function which the old institutions were intended to serve, namely, the production of wealth and the enhancement of human dignity, without which modernization is impossible. If this be done, international lawyers of states to which Hugo Grotius has long been a revered figure can accept change in the corpus of their law to assure that the dignity of no one, whether individual or state, is degraded. This is the honorable task of the Sixth Committee as it resumes its deliberations in 1963.

JOHN N. HAZARD

## NOTES AND COMMENTS

### REPORT OF THE ADVISORY COMMITTEE ON "FOREIGN RELATIONS"

The Committee met on November 2 and 3, 1962, and examined in detail the problems connected with the series. The gist of its conclusions was that the *Foreign Relations* series had fallen into serious disarray since 1953. Prior to that time the volumes had been published with fair regularity about fifteen years behind currency (volumes for the 1920's and early 1930's). Then, at the behest of several influential members of Congress, the Historical Office was required to push ahead with volumes on China (1942-1949) and on the top wartime conferences. Meanwhile the rest of the series was allowed to drop farther and farther behind currency until now it has slumped to twenty years and is losing ground every year. Further confusion was added in 1957 when the publication of the speeded-up *China* series was suddenly stopped by Secretary Dulles.

All this has meant loss of morale in the Historical Office, increased difficulties with clearance, and considerable unfavorable publicity for the series as a whole.

The central recommendation of our Committee is that this unhappy situation could be corrected if henceforth the *Foreign Relations* volumes were published in orderly fashion twenty years behind currency and if no series were undertaken out of chronological order.

We believe that a twenty-year lag behind currency is sufficient to take account of the problem of current sensitivity, particularly since the Historical Office is prepared to omit passages in documents that might really be offensive to friendly individuals or governments. Current sensitivity will also be greatly diminished by the mere fact that the volumes will again appear as a historical series in regular chronological order.

The Committee reports that Dr. William M. Franklin has now become director of the Historical Office. It believes that an excellent appointment has been made. His energy and competence impressed us all. The Committee also reports the addition to the staff of Dr. S. Everett Gleason, whose high abilities are known to all students of American foreign policy.

Under the new setup work has gone forward in tackling the problems presented in connection with the 1945 and 1946 volumes, and in selecting materials from the massive documentation for those years, so that the number of volumes per year can be held to a reasonable figure while keeping the quality high. Even with these improvements in procedure, the Historical Office will need some additional staff to cope with the tremendous documentation of the postwar years. The Committee has repeated its recommendation that two or three additional positions in the Historical Office are absolutely necessary to keep the series from sliding indefinitely backwards.

The Committee will explore with Dr. Franklin a suggestion for academic



interns in the Historical Office. We believe that this would have certain real advantages, but it would not lessen the immediate need for adding two or three regular positions to the staff.

Finally, the Committee desires to express its appreciation of the devoted and competent services of Dr. G. Bernard Noble who has now retired, and to pay tribute to Gustave A. Nuernberger whose death deprives the Office of a much valued member.

DEXTER PERKINS, *Chairman*

November 19, 1962

FRED H. HARRINGTON  
RICHARD W. LEOPOLD  
CLARENCE A. BERDAHL  
LELAND M. GOODRICH  
PHILIP W. THAYER  
ROBERT R. WILSON

This report, which was sent in slightly abbreviated form to the Secretary of State on November 19, 1962, was commented on by the Secretary as follows:

December 29, 1962

Dear Dr. Perkins:

Thank you for your letter of November 19, enclosing the report on the "Foreign Relations" Series. I have now had the opportunity to read this report with some care, and I should like to thank you and the other members of the Committee for the time and thought that you have generously given to the problem.

I think your recommendations that these volumes be published in regular chronological order and be kept within twenty years of currency are reasonable, and I shall so inform our Historical Office. You will understand, however, that publication of a volume may occasionally be delayed because of the current sensitivity of significant documents. I trust that such instances will be rare and that we can hold to a twenty-year line with fair regularity.

Sincerely yours,  
/s/ Dean Rusk  
Dean Rusk

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#### THE BEGINNINGS OF MARXIST SPACE JURISPRUDENCE?

During the first five years of the space age Soviet space law developed from a collection of principles, hastily adopted for the political defense of Soviet space activities, into a body of doctrine designed to support a Soviet political space offensive.<sup>1</sup> During 1962 the first indications appeared that Soviet space law was developing into an instrument to support the shift of this offensive from the political into the military realm. The

<sup>1</sup> See Robert D. Crane, "Soviet Attitude Toward International Space Law," 56 A.J.I.L. 685-723 (1962); and "Law and Strategy in Space," *Orbis*, Summer, 1962.

most significant indications of this shift were: (1) the refinement and even the rejection of the previous Soviet position that military uses of space are illegal; and (2) the development of a new theory of the interaction of modern technology and international law, which provides for the use of Communist technology to enforce and consolidate a new "progressive" international law. This new theory may have profound consequences for the further development of a general Marxist-Leninist theory of international law and may provide the basis for a new Soviet science of space legal philosophy.

These developments in Soviet space law and ideology may have resulted from the Soviet decision to develop offensive space weapons, which in turn seemed to result from a reorientation of Soviet strategic thinking based on Soviet analysis of United States foreign policy and of the potential of Soviet military technology.<sup>2</sup> The first public acknowledgment of the Soviet decision to develop offensive space weapons came on March 18 and 21, 1962, as a supplement to the Soviet announcement on March 16 that the U.S.S.R. had developed a "global rocket." The Soviets chose to announce their military space policy in the traditional way, best exemplified in Soviet statements defending their offensive missiles in Cuba, by claiming that this policy was forced upon the Soviet Union by the imperialists' aggressive intentions. On March 21 the Soviet Ministry of Defense alleged in its official journal, *Krasnaya Zvezda*, that the United States is interested in space as a source of surprise attack on economic, political and military targets in the socialist countries. The Soviets accordingly stated: "The Soviet Union, while decisively opposing the use of space for military purposes, cannot ignore all these preparations of American imperialists and is forced to take corresponding measures."

This new strategy was incorporated in May, 1962, in the Soviet book, *Military Strategy*, which represents the first major attempt at consolidating the diverse views of Soviet strategists in the post-Stalin era and was presented as the first work on general military strategy to be published in the U.S.S.R. since 1926.<sup>3</sup> According to the new military doctrine,

the leading principle in the field of foreign policy of the Party and Soviet government, as before, is the battle for peaceful coexistence of

<sup>2</sup> See Robert D. Crane, "Space Arms Control at the Crossroads," *World Politics*, Fall, 1963.

<sup>3</sup> *Voyennaya Strategiya* [Military Strategy] (ed., Marshal of the U.S.S.R. Valerian Sokolovsky. Moscow: Voennoye Izdatel'stvo Ministerstva Oborony SSSR, 1962. pp. 460). This book was published in English by Prentice-Hall with a 78-page introduction and extensive annotations by Herbert S. Dinerstein, Leon Gouré, and Thomas W. Wolfe of the RAND Corporation; also by Frederick L. Praeger, publisher, with an introduction by Raymond L. Garthoff. A comprehensive analysis of the Sokolovsky book, *Military Strategy*, will be published in September, 1963, in the form of a panel discussion by the leading American specialists on recent developments in Soviet strategy under the title *Nuclear War and Soviet Strategy*, edited by Robert D. Crane and W. Onaciewicz for the Center for Strategic Studies, with an introduction by Adm. Arleigh Burke, U.S.N. (Ret.) (Duell, Sloan & Pearce, New York, ca. 400 pages, 1963). See also David M. Abshire and Robert D. Crane, "The Soviet Strategy Debate and Ground Warfare," *Army*, July, 1963.

states with diverse social systems, for universal and complete disarmament. . . .<sup>4</sup>

In a discussion of the bourgeois error of dissociating military strategy from political analysis, however, the authors of this book state that "the political goal determines the just or unjust character of war," and "war between states with differing social systems is the highest form of class struggle."<sup>5</sup> The implications of this doctrine for Soviet space policy are clearly indicated by the statement, later publicly endorsed by one of the leading conservative Soviet generals, that:

It would be a mistake to allow any superiority whatever to the imperialist camp in the sphere [of the military uses of outer space]. It is necessary to oppose the imperialists with more effective means and methods of using space for military defense.<sup>6</sup>

The impact of this new Soviet military doctrine has been profound both on Soviet negotiations on space law in the United Nations Committee on the Peaceful Uses of Outer Space and on Soviet space legal writing within the Soviet Union. When the full U. N. Space Committee met for the first time in its history on November 27, 1961, and during the following two weeks in December, hope was great that the favorable Soviet response to Western initiative in ending the long procedural deadlock indicated Soviet willingness to participate in peaceful space co-operation. Soviet insistence on the equal right of every nation to block action not unanimously adopted by the Committee had been based apparently on grounds of national security, and it was hoped that Soviet willingness to trade this veto right for substantive concessions on the part of the Western nations signified that the Soviet Union was interested in reaching agreement on co-operation in, and regulation of, at least, those space activities which were not related to national security.

In the opening statement of the Soviet representative at the U. N. Space Committee on March 20, 1962, however, shortly after the Soviet announcement of the "global rocket" and of the necessity to prepare for space warfare, the Soviet representative outlined a broad approach to the U. N. Space Committee discussions which he knew could result only in hopeless disagreement and in the failure of the U. N. Space Committee. In his opening statement, the Soviet representative developed what was to become the *leitmotiv* of the meetings of the Legal Subcommittee and of the full Committee, respectively, during the summer and fall of 1962, namely, the insistence that, before the Soviets could discuss proposals for space co-operation and space regulation, the Committee must first unanimously approve three general principles to declare illegal: (1) nuclear explosions in space, (2) space reconnaissance, and (3) free enterprise in space.<sup>7</sup>

<sup>4</sup> *Ibid.* 3.

<sup>5</sup> *Ibid.* 21.

<sup>6</sup> *Ibid.* 360-361. See the review by General P. Kurochkin, "Voyennaya Strategiya," Krasnaya Zvezda, Sept. 22, 1962.

<sup>7</sup> The opposition to space reconnaissance was not included in the original verbatim record but was added to the final record by the insertion of the principle of "non-

The United States has always been the leader in trying to restrict the use of outer space to non-military purposes, but has insisted that, to avoid unilateral space disarmament by the free world, the prohibition of the military uses of outer space must be part of the broader picture of arms control and disarmament under realistic international inspection. Analysis of the U. N. discussions on space law in 1962 from March 19 through 29, during the summer from May 28 through June 20, particularly during the discussions in the fall from September 10 through 14, and to a much lesser extent during the winter discussions from December 3 through 11, indicates that Soviet insistence on discussing issues it knew could not possibly be resolved prior to the adoption of a realistic Soviet policy in the U. N. disarmament negotiations was designed to create the impression that the United States was obstructing the peaceful uses of outer space. This would serve to shift to the United States the onus for the hostile military uses of space by the Soviet Union.<sup>8</sup>

The new Soviet military doctrine seemed to have an equally profound impact on Soviet space legal writing. During 1962 the Soviets published several major works on space law which seemed to reverse or at least strongly to qualify the previous Soviet opposition to the legality of military uses of outer space. The Soviets had always refused to agree to the demilitarization of outer space except within a broad disarmament framework designed to eliminate the strategic delivery systems of the United States without providing for inspection to assure reciprocal elimination by the Soviet Union.<sup>9</sup> Although the Soviets thus implied that outer space could legally be used for the transit of ICBMs, they opposed any arms control measures which might tend to legalize the use of outer space for other military uses, and warned that it might be dangerous to apply to outer space the analogy of *res communis* from the law of the sea precisely because the practice of using the sea for military purposes "is incompatible with the principles of the U. N. Charter and with the Kellogg Briand Pact."<sup>10</sup>

The first indications of a shift in the Soviet position appeared in two companion volumes on space law published in May and June, 1962. The first volume, *The Cosmos and International Law*, is a symposium sponsored by the Soviet Academy of Sciences and is significant mainly because of a

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aggression," which prior to June, 1962, was used in the space context only in opposition to space reconnaissance. For comment on this change, see Robert D. Crane, "U. S. Space Legal Policy—Some Basic Principles," Cong. Rec., Aug. 9, 1962, p. 15009, published under the title "Basic Principles in U. S. Space Policy," Federal Bar Journal, Summer, 1962.

<sup>8</sup> The extent of the failure engineered by the Soviet Union was underlined when the majority of the members of the U. N. Space Committee attempted to include in the final report of the Committee a statement from the report of the Legal Subcommittee that there at least had been a useful exchange of opinion. Even this statement, despite its modest nature, was excluded from the final report upon the insistence of the Soviet Union.

<sup>9</sup> See Robert D. Crane, "Soviet Attitude Toward International Space Law," 56 A.J.I.L. 700-704 (1962).

<sup>10</sup> *Ibid.* 694-695.

major contribution by the Deputy Chairman of the Academy's Space Law Commission, G. P. Zadorozhny, entitled "Basic Problems of the Science of Space Law."<sup>11</sup> The second book, entitled *The Way to Space Law*, is the first comprehensive treatment of space legal problems to appear within any Communist country, and is really the first Communist book on space law.<sup>12</sup>

The new Soviet approach to the legality of military space activities was introduced by Zadorozhny in his article on "Basic Problems of the Science of Space Law," in which he attacked the resolution of the International Law Association which allegedly provided "that outer space henceforth may be used only for peaceful purposes." Zadorozhny asserted:

This resolution is designed to secure the narrow and egoistic strategic/military interests of the United States to the detriment of the legal interests of all peace-loving states and above all of the USSR.

This resolution has nothing in common with international law, which for the time being does not provide for the prohibition of the use of outer space for military purposes and which considers even the high seas as a theatre of military operations.

Outer space, as well as the high seas, will cease to be a theatre of military operations only when states establish the appropriate norms of international law which provide for general and complete disarmament or at least for the simultaneous liquidation of all means of delivering nuclear weapons . . . including the liquidation of foreign military bases.<sup>13</sup>

<sup>11</sup> *Kosmos i mezhdunarodnoye pravo* [The Cosmos and International Law] (ed. Yevgeny Aleksandrovich Korovin. Moscow: Institut Mezhdunarodnykh Otnosheny, 1962. pp. 182. Kopecks 60). This symposium, which was announced by TASS on March 31, 1962, but was not available publicly until May, contains, in addition to the major work by Zadorozhny, articles of high quality by the Chairman and Executive Secretary of the Academy's Space Law Commission, respectively, Yevgeny A. Korovin and Gennady Petrovich Zhukov (alias G. A. Petrov), by the Academy's principal specialist on international space organizations, V. S. Vereshchetin, and by one of the senior space legal specialists of the Soviet Ministry of Foreign Affairs, Galina Alekseyevna Osnitskaya (alias A. Galina). This book was reviewed in N. A. Ushakov, "Kosmos i Mezhdunarodnoye Pravo, Sbornik Statey," *Sovetskoye Gosudarstvo i Pravo*, December, 1962 (No. 12), pp. 146-148.

<sup>12</sup> *Na puti k kosmicheskomu pravu* [The Way to Space Law]. By Feliks Nikolayevich Kovalev and Ivan Ivanovich Cheprov (Moscow: Institut Mezhdunarodnykh Otnosheny, 1962. pp. 179. Kopecks 60). Both authors of this book are members of the Soviet Ministry of Foreign Affairs and have represented the U.S.S.R. at United Nations meetings during the past year. This book presents an encyclopedic, though outdated and occasionally badly distorted, analysis of Western views on space law and provides a framework for the innovations of Zadorozhny's work. Both of these Soviet space law books were translated by the Aerospace Information Division of the Library of Congress.

<sup>13</sup> *Loc. cit.* note 11 above, 38. The requirement that foreign military bases be liquidated was not given on p. 38 but was added to an identical statement on p. 64. Zadorozhny failed to note, incidentally, that the resolution to which he refers, which was adopted in August, 1960, by the Committee on Air Law of the I.L.A. with the support of the Communist delegates, stated merely that the paragraph "outer space and celestial bodies should be utilized only for peaceful purposes" was one of the

Further elucidation of the new Soviet position was given by two space legal experts of the Soviet Ministry of Foreign Affairs, F. N. Kovalev and I. I. Cheprov, who stated that there is no "organic contradiction" between the use of space for scientific purposes and its use to protect national security.<sup>14</sup> Of particular interest was their explicit reversal of Korovin's position as stated in January, 1959, that the destruction of satellites would be an act of war, whereas reconnaissance by satellites would be merely an act of cold war. After pointing out Korovin's error, Messrs. Kovalev and Cheprov stated that:

The use of artificial satellites for purposes of military espionage . . . should be separated out from the general problem of prohibiting the military use of space. . . . [Espionage] is illegal even though at present the question of prohibiting the military use of outer space as a whole has not been decided.<sup>15</sup>

In August, 1962, at the Brussels Conference of the International Law Association, the Executive Secretary of the Space Law Commission of the Soviet Academy of Sciences, G. P. Zhukov, elaborated in detail the Soviet position on the legality of the military uses of outer space. Zhukov stated that, although the term "peaceful uses" should be restricted in meaning to "non-military uses," and although "the task of peace-loving states is to achieve prohibition of the military use of space," nevertheless:

From the fact that international law, including the U. N. Charter, applies to outer space it by no means follows that it is forbidden to use this space for striking through it or with its aid a retaliatory blow at the aggressor in the course of legitimate self-defense. In other words, this fact does not mean prohibition of the use of outer space for military purposes in conformity with Article 51 of the U. N. Charter which provides for individual and collective self-defense against aggression. . . .<sup>16</sup>

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two most important principles which could serve as the basis for the conclusion of an international agreement.

<sup>14</sup> *Op. cit.* note 12 above, 81.

<sup>15</sup> *Ibid.* 123. In view of the alarming developments in Soviet military strategy during the first half of 1962, it seemed significant that the Soviets took the unusual step of reviewing this book before it became publicly available and that the Soviets stressed the importance of this reversal of Korovin's position. The principal Soviet criticisms of this book by Kovalev and Cheprov are that it unduly emphasized the scholarly analysis of problems discussed in the West, and that it thereby failed to bring out sufficiently the importance of disarmament and of general principles of space law, and to bring home to the reader the dire consequences which might result from continuing U. S. efforts to "obstruct" progress in disarmament and in the development of international space legal principles. See A. P. Movchan, "The Way to Space Law," *Sovetskoye Gosudarstvo i Pravo*, May, 1962 (No. 5), pp. 143-145.

<sup>16</sup> Gennady Petrovich Zhukov, "Problems of Space Law at the Present Stage," Memorandum of the Soviet Association of International Law at the Brussels Conference of the International Law Association 30, 35-36 (Institute of World Economics and International Relations, U.S.S.R. Academy of Sciences, 55 pp., August, 1962). Reproduced in Proceedings of the Vth Colloquium of the International Institute of Space Law, Varna, Bulgaria, September, 1962.

Evaluation of the legality of American space activities is governed, according to Zhukov, by the principle that

space activities of States must be so conducted as not to prejudice the security of other States, i.e. must not commit any aggressive action against them, must not resort to the threat or use of force.<sup>17</sup>

Although the criterion of "aggression" is certainly consonant with international law,<sup>18</sup> the practical application of this criterion by the Communists, according to recent Soviet statements, would render almost all American space activities illegal. This results from the subjective view expressed by G. P. Zhukov, writing under his pseudonym, G. Petrov, in the recent Soviet space law symposium, that:

As long as imperialism exists, the economic impetus for war will continue. . . . The aggressive nature of imperialism has not changed. It was and remains an aggressor, trying to profit from war and from the suffering of the masses.<sup>19</sup>

Following this basic assumption, Zhukov details a wide variety of American space activities and concludes that, in one way or another, they all contribute to espionage and that U. S. space "espionage" is by nature aggressive. In this same symposium, the Chairman of the Space Law Commission of the Soviet Academy of Sciences, Yevgeny A. Korovin, asserts that "even those satellites designated as the most peaceful ones—communication, meteorological and navigational satellites—are to be used according to the schemes of Pentagon leaders primarily to augment the U. S. arms buildup,"<sup>20</sup> that the Echo satellite is "counter-revolutionary,"<sup>21</sup> and that the weather satellite Tiros is "an auxiliary means of preparing for nuclear war."<sup>22</sup>

The second criterion adopted by Zhukov to determine the legality of

<sup>17</sup> *Ibid.* 34.

<sup>18</sup> See Sen. Albert Gore, "United States Policy on Outer Space," 48 Dept. of State Bulletin 21-29 (excerpt in 57 A.J.I.L. 428 (1963)), reproduced from the opening statement of the United States at the meetings of the U. N. Political Committee considering the report of the U. N. Space Committee, Verbatim Record of the 1289th Meeting of the First Committee, Dec. 3, 1962, U. N. Doc. A/C.1/P.V. 1289, pp. 7-32.

<sup>19</sup> *Loc. cit.* note 11 above, 174.

<sup>20</sup> *Ibid.* 7.

<sup>21</sup> *Ibid.* 9. Soviet attacks on American space communications increased shortly before the writing of the present note in January, 1963, and were typified by the statement of one of the leading Soviet space lawyers, M. I. Lazarev, in the December issue of the leading Soviet law journal that:

"The U. S. has long put . . . telecommunications to the service of imperialism. Even before the Second World War American radio companies imposed their will on such countries as China and Czechoslovakia. After the Second World War American leaders used radio extensively on military bases of the United States in various countries of the world to confiscate radio frequencies for *aggressive* intelligence purposes [emphasis added]. Radio in general has been turned by the United States into a weapon of the "war of the ether," into an instrument of ideological export of counter-revolution, and is used by the United States to limit and destroy the legal rights of other states in the ether." M. I. Lazarev, "Technical Progress and Contemporary International Law," *Sovetskoye Gosudarstvo i Pravo*, December, 1962 (No. 12), p. 106.

<sup>22</sup> *Loc. cit.* note 11 above, 9.

U. S. space activities, namely, whether they constitute a threat or use of force, may be applied by the Communists in an equally subjective manner. Thus in September, 1962, one of the leading Communist international lawyers stated that:

Reconnaissance from orbit . . . is in the context of modern global strategy a violation of the obligation of member states to "refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state" [Art. 2(4), U. N. Charter] . . . and violates the right of each state to self-preservation.<sup>23</sup>

The criterion adopted by Zhukov for evaluating the legality of anti-satellite warfare against devices which are aggressive and/or threats was expressed as follows:

Article 51 of the U. N. Charter provides for the right of self-defense only in case an armed attack occurs against a member of the United Nations and, thus, does not allow preventive actions by way of "self-defense." Such a presentation of the question does not deprive a State of the right of taking the necessary and corresponding measures for safeguarding its security. In our opinion, the principle of commensurateness is the decisive criterion for interpreting Article 51 of the U. N. Charter.<sup>24</sup>

Armed attack, according to Zhukov, must be strictly interpreted and does not include even the stationing in space of nuclear weapons.<sup>25</sup> Although Zhukov implies that there is a difference in an attack on "peaceful satellites" launched by another state and an attack on military satellites, *i.e.*, American satellites,<sup>26</sup> he has expressed the opinion privately that the minimum conditions for the legality of anti-satellite warfare would be an incident on earth involving an armed attack by one state against another. This opinion must be viewed, however, against Zhukov's qualifying statement that the requirement of "armed attack" does "not deprive a State of the right of taking . . . measures for safeguarding its security"; against his statement that "the launching of spy satellites endangers not only the security of States, but the peace in general";<sup>27</sup> and against Zadorozhny's statement in the recent Soviet space law symposium that:

The right of a state to destroy [*unichtozhit'*] a satellite-spy and in general every space device whatsoever interfering with the security of this state is indisputable.<sup>28</sup>

The most striking feature of all of the Soviet space legal writing during 1962 was the attempt to create a moral dichotomy between American and Soviet space technology. The largest part of the two Soviet books and of the several Soviet monographs on space law published in 1962 are devoted to an attempt to prove that the United States and its NATO allies use

<sup>23</sup> Gyula Gal, "Some Legal Aspects of the Uses of Reconnaissance Satellites," Proceedings of the Vth Colloquium of the International Institute of Space Law, Varna, Bulgaria, September, 1962.

<sup>25</sup> *Ibid.* 25.

<sup>27</sup> *Ibid.* 34.

<sup>24</sup> *Op. cit.* note 16 above, 36.

<sup>26</sup> *Ibid.* 35.

<sup>28</sup> *Loc. cit.* note 11 above, 53.



space technology to intensify the cold war, whereas the Soviets use space technology in accordance with the principles of "peaceful co-existence."

Accompanying this attempt to create a dichotomy is a conscious effort to present the idea that Soviet space technology and Soviet space law will go hand in hand to create a new Communist era in man's history. Thus Kovalev and Cheprov conclude their book on *The Way to Space Law* with the sentence that: "The way to international space law is to effectuate the Soviet program of general and complete disarmament." They introduce their book with the statement that:

The new cosmic era in the history of mankind is the era of the colossal expansion of the sphere in which mankind lives and acts. . . . The cosmic era by right is called the era of the Soviet Union.

Even more striking, in view of the above developments, was the complete absence in the two Soviet space law books and in the monographs of any attempt to fit Soviet space law into Marxist-Leninist theory. A partial explanation of this failure to develop a theory of Soviet space law may be the fact that it is precisely in the field of general international legal theory that Soviet ideology appears now to be in the greatest state of flux.<sup>29</sup> The only direct reference to this problem in any of the Soviet space law publications appeared in G. A. Osnitskaya's monograph on "The Conquest of Space and International Law," in which she states that, due to the complexity of the legal problems in this new domain and to the diversity of views of individual scholars, "there is not yet a completed theory of space law."<sup>30</sup>

In October, 1962, Professor Yevgeny A. Korovin published an article which contained perhaps the first beginnings of a Communist theory of space law. Professor Korovin stated in this article that:

The prospects for further development of space law are to a significant degree bound up with the foreign policy of the United States. There is not and there cannot be peaceful co-operation in space without peaceful co-existence and friendly co-operation on earth. No matter how great are the difficulties facing mankind in this regard there is no basis for exaggerating them. The Communist Party of the Soviet Union said in its Program that: "In circumstances when imperialism has ceased to play a dominant rôle in international affairs and the socialist system is playing an ever increasing rôle, when the influence of states which have obtained their national independence and of the masses in capitalist countries has increased sharply in

<sup>29</sup> For a discussion of some of the most basic and still unresolved conflicts, see the review of the papers given at the Fifth Annual Meeting of the Soviet Association of International Law in January, 1962. *Sovetskoye Gosudarstvo i Pravo*, June, 1962 (No. 6), pp. 138-141. This meeting in 1962 witnessed perhaps the most profound debate ever conducted in the Soviet Union on international legal theory.

<sup>30</sup> Galina A. Osnitskaya, *Osvoyeniye Kosmosa i Mezhdunarodnoye Pravo* [The Conquest of Space and International Law] 70 (Gosyurizdat, 1962, Moscow, September, 1962). Osnitskaya did, however, indicate some of the procedure for developing space law when she stated on p. 31 that in the space age the sources of any new branch of law, such as space law, are [in the following order]: custom based on state practice and national legislation, international conferences, treaties, and scholarly treatises.

world politics, a real possibility is created for the new principles advanced by socialism to conquer the principles of aggressive imperialist politics." To the extent that these [Communist] principles are further consolidated in international relations, space law will take shape and will grow and be strengthened. . . .<sup>31</sup>

Upon these beginnings M. I. Lazarev developed a new theory in an article on "Technical Progress and Contemporary International Law," in which he emphasized that, contrary to some bourgeois theories, technical progress has importance only as a tool of politics, and that technical progress therefore is good if it supports Communist principles and bad if it supports the principles of capitalism. Lazarev developed in detail his thesis that the imperialist Powers use modern technology to violate and destroy international law. On the other hand, "in conformity with the development of human society and with the will of the peoples, socialism uses technical progress to create, consolidate and develop general humanistic, democratic principles and norms of international law and also principles and norms of a still higher and more perfect nature."<sup>32</sup>

The most significant of these principles are the principles of criminal responsibility and of enforcement in international law. According to Lazarev, the power and influence of the world socialist system have consolidated the new institution of international law, which provides that a state is criminally responsible for its actions not merely to those states which it has injured but to the general community of nations.<sup>33</sup> The enforcement of this responsibility is illustrated, allegedly, by (1) the use of Soviet rocket power to make possible the criminal prosecution of Gary Powers for the violation of the sovereignty of socialist states by American U-2 reconnaissance, and (2) the use of Soviet ballistic/nuclear threats to prevent a United States invasion of Cuba.<sup>34</sup> According to Lazarev:

The appearance of the dreadful power of nuclear-ballistic weapons in the hands of socialist states, which defend the law of peace and of peaceful co-existence, guarantees the possibility in an ever-increasing degree to prevent both small and large misdemeanors and crimes by the imperialist states, and this consolidates and stabilizes the entire international legal order. Evidence of this is . . . the very recent prevention of a direct attack by the United States on Cuba. . . . As was pointed out in the Program of the Communist Party of the Soviet Union [at the Twenty-Second Party Congress in October, 1961] this is the way in which "a real possibility is being created for the victory of new principles advanced by socialism over the principles of aggressive imperialist politics" . . .<sup>35</sup>

This new theory of international law developed by Lazarev may be useful to Soviet theoreticians in their attempt to fit international law in

<sup>31</sup> Yevgeny A. Korovin, "Space Law," *Aviatsiya i Kosmonavtika*, October, 1962 (No. 10), p. 20.

<sup>32</sup> *Loc. cit.* note 21 above, 107.

<sup>33</sup> This "new institution" is explained by G. I. Tunkin in his new book, *Voprosy Teorii Mezhdunarodnogo Prava* [Problems of International Legal Theory] 294-296 (Gosyurizdat, Moscow, July, 1962).

<sup>34</sup> For an estimate of the impact of the Cuban crisis on Soviet military and political strategy, see Robert D. Crane, "The Cuban Crisis: A Strategic Analysis of American and Soviet Policy," *Orbis*, Winter, 1963, pp. 528-563. <sup>35</sup> *Loc. cit.* note 21 above, 108.

general and space law in particular into a Marxist framework of class and superstructure. In such a system international law would be transformed by the new laws of "proletarian internationalism" and would become a worldwide superstructure reflecting the global interests of the "working class" as determined by the Communist Party of the Soviet Union. Ultimate enforcement of the new Communist international law would be provided by Soviet deployment of advanced space weapons systems designed to neutralize American deterrent power and to provide strategic support for local war and revolution.

ROBERT D. CRANE

#### ANNUAL MEETING OF THE SOCIETY

The 57th annual meeting of the American Society of International Law took place at the Statler Hilton Hotel in Washington, D. C., from April 25 to 27, 1963. The general theme of the meeting—"Law and Conflict: Changing Patterns and Contemporary Challenges"—was a provocative one which drew interested audiences at the panel sessions on various aspects of the subject.

The meeting began at 2:15 p.m. on Thursday afternoon, April 25, with two simultaneous sessions, one devoted to discussion of international legal aspects of the Cuban quarantine and the other, in the form of a conference on research and teaching, to discussion of the application of social science methods to the study of international law. At the session on Cuba, Richard J. Barnet, of the Center of International Studies, Princeton University, discussed the Cuban crisis of last October and disarmament. Professor Quincy Wright, of Columbia University, discussed the legality of the United States action under the provisions of the United Nations Charter, maintaining that such action was in violation of obligations under the Charter. The action of the United States was defended by the Honorable Dean Acheson, former Secretary of State, and by the Honorable Abram Chayes, Legal Adviser of the Department of State. Mr. Chayes maintained that the United States acted strictly in accordance with its international obligations under the inter-American system as well as under the United Nations system.

The conference on research and teaching heard a report and commentary by Professor Wesley L. Gould of Purdue University on the survey made by the Society of international law teaching in political science departments. Professor Chadwick F. Alger of Northwestern University discussed from a sociological point of view "Relationships between the Organization of International Society and International Order," taking as his text a quotation from Eugene Ehrlich's book on the sociology of law: "Whence comes the rule of law and who breathes life and efficacy into it?" Professor Stanley Hoffmann of Harvard University discussed the study of international law from the point of view of the contribution which can be made by an historical sociological approach to international relations. Professor Merrill Jackson of the Mental Health Research Institute, Uni-

versity of Michigan, spoke on "Anthropological Methods for the Study of Intrасocial and Intersocietal Conflict Control." Professor David Deener of Tulane University took part as commentator on the papers.

On Thursday evening at 8:30 p.m. President Hardy C. Dillard, speaking on the rôle of law in conflict and change, introduced a panel discussion on the legal accommodation of contending systems among states. Professor Edward McWhinney of the University of Toronto Faculty of Law, Chairman of the panel, raised a number of questions for discussion, in view of the division of the world into two contending power blocs. Professor John N. Hazard of Columbia University gave a pragmatic view of the "new international law," explaining that the Communists, particularly the Russians, look upon international law as an instrument serving the purposes of the imperialist exploiters, and anticipate the evolution of a new function for international law which will make it new. The Asians and Africans look upon international law as having served colonialism and therefore needs to be changed to eliminate discrimination and unequal treatment. Professor Hazard pointed to the work of the International Law Commission in codifying and developing international law to meet these demands for changes, as well as to resolutions of the United Nations General Assembly which reflect the views of the developing states as to what international law should be.

Stephen M. Schwebel, Assistant Legal Adviser of the Department of State, spoke on the United Nations and the challenge of a changing international law. Referring to the attitude of the less developed countries to international law, Mr. Schwebel stated: "As the states of the world join together in the continuing United Nations process of codification and progressive development of international law, newer as well as older states should be afforded a sense of participation in the refinement and growth of international law which should conduce to its relatively universal acceptance and application." As to the Soviet thesis of peaceful co-existence as a new and higher stage in international law, Mr. Schwebel stated that, insofar as the phrase means only existence of the nations of the world in peace, it should be welcomed by the nations of the West, while at the same time recognizing the concept as expounded by Khrushchev to mean "a form of intense economic, political and ideological struggle of the proletariat against the aggressive forces of imperialism in the international arena." Professor Harold D. Lasswell, of Yale Law School, presented "A Brief Discourse about Method in the Current Madness."

On Friday morning, April 26, panel discussions were held on the subjects of "The Rôle of Force and the Rôle of Law in the Resolution of Contemporary Conflicts between States," and "Social Conflict in the World Today and the Future of the Legal Protection of Foreign Investment," respectively. Professor T. C. Schelling of the Center for International Affairs of Harvard University discussed the threat of violence in international affairs. Professor Kenneth Boulding, of the University of Michigan Department of Economics, spoke on "The Rôle of Law in the Learning of Peace." Commentators on this subject were Professor Harry G.

Frankfurt of the Department of Philosophy of Harpur College, and Professor Steven Muller of the Cornell University Center for International Studies.

The panel on legal protection of foreign investment heard papers by Professor A. A. Fatouros of the Faculty of Law of Western Ontario, Professor Wolfgang Friedmann of Columbia University Law School, and Mr. Charles M. Spofford of the New York Bar. Professor Stanley D. Metzger of Georgetown Law Center, presided and introduced the subject, pointing out the problems raised by the greatly intensified spirit of nationalism in new and potentially new states and by the desire of those states to achieve a great degree of distributive justice internally. The legal protection of foreign investment in conditions of nationalistic conflict and domestic social reform presents a number of important questions. Professor Fatouros spoke on "International Economic Development and the Illusion of Legal Certainty." Professor Friedmann discussed compensation for expropriated foreign property in the light of present changing economic, political and social conditions in many countries. He stated that the whole problem of the property and contract relations between developed and underdeveloped countries should be regarded as one which involves at once legal, equitable and policy considerations, and that the traditional principles of the law of nations are no more than a point of departure for the development of principles by a society which, in composition and purposes, differs drastically from that of even a generation ago.

The two sessions on Friday afternoon considered, respectively, the fundamental challenges to legal doctrines with regard to aggression, self-defense, non-intervention, self-determination and neutrality, and the status of competing claims to use outer space. Under the first subject Professor Louis Henkin of Columbia University Law School spoke on "Force, Intervention and Neutrality in Contemporary International Law." Messrs. Charles M. Spofford and Eli Whitney Debevoise of the New York Bar, and Professor Myres S. McDougal of Yale Law School were commentators in a lively discussion of basic principles regarding the relations and obligations of states with regard to the use of force.

On the panel on outer space, various viewpoints were expressed as to the law to be applied. Professor Howard J. Taubenfeld of Southern Methodist University Law School read a paper giving an American view. Mr. Franco Fiorio of the Republic of San Marino presented the views of a small country on the subject. Messrs. Zhukov and Cheprov of the U.S.S.R. presented the views of their country, upon which Mr. Robert K. Woetzel of New York University made comments.

On Friday evening two panels considered, respectively, "Emerging Patterns of Federalism in a World of Conflict," and "The Management of Violence by International Institutions" such as the United Nations, International Control Commissions and regional organizations. Problems of federalism were discussed by Professors Carl J. Friedrich of Harvard University and Edward McWhinney of the University of Toronto Faculty

of Law, Professor Friedrich considering "New Dimensions of Federalism in Theory and Practice," and Professor McWhinney discussing "The European Community Movement as a Case Study."

The rôle of the United Nations in keeping peace was discussed by Professor Louis B. Sohn, of Harvard Law School, whose topic was "The Rôle of the United Nations in Civil Wars"; Oscar Schachter, Director, General Legal Division, United Nations, whose subject was "Preventing the 'Internationalization' of Domestic Conflict," in which he gave a legal analysis of the United Nations' experience in the Congo; and Richard N. Gardner, Deputy Assistant Secretary of State for International Organization Affairs, who discussed the development of the peace-keeping capacity of the United Nations. Mr. Gardner stated that the peace-keeping functions of the United Nations are an indispensable element in plans to escape from the balance of terror and to create a disarmed world under law, and that recognition of its importance is one of the major points separating the Western countries and the Communist bloc.

On Saturday afternoon, April 27, at 2:15 p.m. a student moot competition named in honor of Judge Philip C. Jessup, and arranged by the Association of Student International Law Societies, was held. The case argued was a hypothetical one arising out of a collision on the high seas involving conflict between the law of the forum and the provisions of a convention. Students from the University of North Carolina Law School represented the United States, as one of the parties, and students from Columbia University Law School represented Belgium, as the other party. The judges were the Honorable Edward Dumbauld, U. S. District Judge for the Western District of Pennsylvania; Professor Michael H. Cardozo, Cornell University Law School, and Leavenworth Colby, Chief of the Admiralty and Shipping Section, U. S. Department of Justice. The Columbia University Law School took honors as the best all-around team, and for the best written memorial. A member of the University of North Carolina team was judged the best single oralist.

At the same time a session of the Society was devoted to discussion of perspectives of foreign scholars on the status of international law. His Excellency Ambassador Pericles Gallegos, alternate Permanent Delegate of Ecuador to the United Nations, spoke on American international law, pointing out that Bolívar, in calling the Panama Conference of American States of 1826, originated the American concept of international law, as well as the modern concept of international organization and collective security, which were outlined in the Treaty of Unity establishing a permanent confederation to maintain peace in the Hemisphere, and in the Military Contingents Pact providing for a permanent military force to maintain peace. Professor Aleksandar Magarašević, of the University of Novi-Sad Law School, Yugoslavia, set forth the Yugoslav view of international law, emphasizing the importance of "active peaceful co-existence." Stating that changed conditions require the establishment and progressive development of a universally institutionalized international legal order to regulate comprehensive international co-operation, Professor Maga-

rašević declared that such an order necessitates a change in the principles of traditional international law. This can be done by further development of the Charter and practice of the United Nations, so that the Charter can provide a universal legal framework for the regulation and peaceful change of international relations.

Mr. M. K. Nawaz, of the World Rule of Law Center, Duke University, discussed international law in the contemporary practice of India, showing the influence of India's past legal traditions, as well as British legal institutions, on its present practice and policy in international law and relations.

The meeting concluded on Saturday evening, April 27, with the annual dinner, at which the new President of the Society, James Nevins Hyde, presided. Ambassador Francis T. P. Plimpton, Deputy U. S. Representative to the United Nations, made an after-dinner address on the United Nations, in which he pointed out that the United Nations is not a super-government but an association of 110 governments representing differing interests and attitudes. He also called attention to the financial crisis of the Organization, stating that all countries, large and small, have a common interest in strengthening the United Nations as a dynamic instrument of collective security in a dangerous world, and that if the United Nations is to surmount its present financial crisis, the overwhelming majority of its Members will have to accept the financial consequences of this fact.

The other speaker at the dinner was Dr. Arnold Wolfers, Director, Washington Center for Foreign Policy Research, Johns Hopkins University, who discussed conflict and accommodation in the present state of international relations.

The Society at its business meeting on April 27, adopted amendments to Articles IV, V and VI of its Constitution, proposed by the Executive Council and submitted to the members in the President's letter to the members of April, 1963. These amendments, directed to certain organizational matters, were considered necessary in view of the Society's expanded activities. As adopted the amended portions of the articles read as follows:

#### ARTICLE IV—*Officers*

##### [first paragraph]

The officers of the Society shall consist of an Honorary President, a President, such number of Honorary Vice Presidents as may be fixed from time to time by the Executive Council, four Vice Presidents, a Secretary, and a Treasurer, all of whom shall be elected annually, but the President shall not be eligible for more than three consecutive annual terms.

#### ARTICLE V—*Duties of Officers*

##### [first paragraph]

The President shall preside at all meetings of the Society; shall appoint committees, except as otherwise determined by the Executive Council; and shall perform such other duties as the Executive Council may assign to him. The Executive Council may designate one of

the Vice Presidents to serve as Executive Vice President, who shall have responsibility for general executive direction of the Society and shall perform such other duties as the Executive Council may assign him. In the absence of the President his duties shall devolve upon one of the Vice Presidents to be designated by the President, or, if there be no President, or if the President be unable to act, by the Executive Council.

ARTICLE VI—*The Executive Council*

[2nd paragraph, 4th and 5th sentences]

. . . Elective members of the Council shall be eligible for re-election. Following service for two consecutive terms no elective member shall be eligible for re-election until at least one year after the expiration of his second consecutive term. . . .

In this connection the Society adopted the following resolution approved and submitted by the Executive Council:

RESOLUTION ON THE ORGANIZATION OF THE SOCIETY

*Whereas*, The American Society of International Law has undertaken an expanded program of activities that will greatly enhance its contributions to the scholarly and professional consideration of international legal affairs, and wishes to strengthen its organization to provide continuity and increased effectiveness in the planning and execution of these activities, and

*Whereas*, The Executive Committee and Executive Council of the Society have considered and recommended measures to provide for such continuity and increased effectiveness, and

*Whereas*, The Society has this day adopted Amendments to its Constitution that will make possible the plans and policies recommended;

*Therefore, Be It Resolved*, That the Society affirms the following policies as elements of a plan of reorganization, for the future guidance of the officers, Executive Council, and Committees.

1. More continuity shall be provided in the membership of the Executive Council, the governing board of the corporation, by a policy of re-electing at least half of the elected members so that they may serve for six consecutive years. Re-election should depend, among other things, on the ability of members to give attention to the affairs of the Society and participate in meetings of the Council.

2. There shall be a high degree of continuity in the composition of the Executive Committee.

3. There shall be established the office of Executive Vice President. The position of Executive Director may be held by an elected officer of the Society, who may be the Executive Vice President.

4. The re-election of the President for two or three terms, as authorized by the Constitution, can be another important element of continuity in the Society's organization.

5. There shall be a Board of Permanent Operations consisting of the President of the Society, the two past Presidents immediately preceding, the Executive Vice President, and two other members appointed by the President. The Board shall keep under continuous review the long-range plans and activities of the Society and maintain liaison with major donors.



Upon the recommendation of the Committee on Annual Awards the Society voted that its Certificate of Merit be awarded to Messrs. Adrian S. Fisher, Chief Reporter, and Covey Oliver, Cecil J. Olmstead, I. N. P. Stokes and Joseph M. Sweeney, Associate Reporters, as authors of the draft *Restatement of the Foreign Relations Law of the United States* of the American Law Institute.

Upon the recommendation of the Committee on Selection of Honorary Members, Professor Paul Guggenheim of Switzerland was elected an honorary member of the Society.

Mr. Denys P. Myers, Chairman of the Committee on Publications of the Department of State and the United Nations, reported for his committee and submitted the following resolution, which was adopted:

RESOLUTION ON PUBLICATIONS OF THE DEPARTMENT OF STATE

The American Society of International Law, at its 57th annual meeting,

Considering essential the publication of official documentary material relevant to the academic and professional needs of its members,

*Resolves:*

That the proximate publication by the Department of State of the first volume of the *Digest of International Law* prepared under the direction of Marjorie M. Whiteman is welcomed as a governmental contribution to scholarship;

That the policy of publishing *Foreign Relations of the United States—Diplomatic Papers* within a period of 20 years of currency, as enunciated by the Secretary of State, is strongly commended, but should be realized by adequate support in staff and budgetary appropriations;

That as Congress has come to play an increasing part in the field of foreign relations and as the activities of the Committee on Foreign Relations of the Senate and of the Committee on Foreign Affairs in the House of Representatives have become of more interest to us, we have noted with satisfaction that these committees have adopted liberal policies for distributing papers prepared under their authority;

That the studies and reports of the Inter-American Juridical Committee and the Inter-American Council of Jurists should be published by the Organization of American States in systematic and convenient form, so that they may be available to scholars who are engaged in the study of inter-American regional law.

Mr. James N. Hyde of New York was elected President of the Society, and the Honorable Dean Rusk, Secretary of State, Honorary President for the ensuing year. The retiring President, Professor Hardy C. Dillard, was elected an Honorary Vice President, and the incumbent Honorary Vice Presidents were re-elected for the coming year. Mr. H. C. L. Merillat and Professor Stefan A. Riesenfeld were elected Vice Presidents, and Professor Brunson MacChesney and Miss Marjorie M. Whiteman were re-elected to that office. The following were elected members of the Executive Council to serve until 1966: Richard R. Baxter, Benjamin Forman, Eric H. Hager, Edwin C. Hoyt, Jr., Harold D. Lasswell, Oscar Schachter, Carl B. Spaeth and Griffith Way.

The Society elected the following as members of the Nominating Committee for the coming year: Robert Dechert, Chairman; Wesley Gould, Arthur Larson, Myres S. McDougal, and Walter Surrey.

The Executive Council of the Society at its meeting on April 27, re-elected the Honorable Edward Dumbauld Secretary of the Society. Mr. Donald Claudy was elected Treasurer, and Mr. John Stafford appointed Assistant Treasurer, for the coming year. The Council also designated Mr. Merillat, the Executive Director and Vice President of the Society, to serve as Executive Vice President, as provided in the newly adopted amendments to the Constitution.

In accordance with the Society's resolution on organization, the Council adopted the following amendments to its regulations:

## SECTION II. REGULATIONS ON EXECUTIVE COUNCIL, EXECUTIVE COMMITTEE, AND BOARD OF PERMANENT OPERATIONS

1. The Executive Council (herein termed the Council) during the intervals between its meetings shall function through an Executive Committee consisting of the President, Executive Vice President, Treasurer, and five other members of the Council elected annually by the Council.

. . . . .

3. The Executive Council may establish a Board of Permanent Operations, to consist of the incumbent President, his two immediate predecessors as President, the Executive Vice President, and two other members annually appointed by the President. The Board shall maintain liaison with major donors to the Society and keep under continuous review the long-range plans and activities of the Society.

## SECTION VI. REGULATIONS ON THE OFFICE OF EXECUTIVE DIRECTOR

7. The position of Executive Director may be held by an elected officer of the Society, who may be the Executive Vice President.

The members of the Executive Committee were elected by the Council as follows: Robert Dechert, Hardy C. Dillard, Brunson MacChesney, Myres S. McDougal and Robert R. Wilson. President Hyde, Vice President Merillat and Treasurer Claudy are members *ex officio*.

The Executive Council elected Stefan A. Riesenfeld to the Board of Editors of the *Journal* and re-elected the incumbent members for the coming year. The Board of Editors as elected is as follows:

William W. Bishop, Jr., *Editor-in-Chief*

R. R. Baxter  
Herbert W. Briggs  
Hardy C. Dillard  
Alwyn V. Freeman  
Leo Gross  
John N. Hazard  
James Nevins Hyde  
Oliver J. Lissitzyn  
Brunson MacChesney

Myres S. McDougal  
Covey Oliver  
Stefan A. Riesenfeld  
Oscar Schachter  
Louis B. Sohn  
Eric Stein  
John R. Stevenson  
Robert R. Wilson  
Richard Young

*Honorary Members*

Philip Marshall Brown  
Charles G. Fenwick  
Hans Kelsen

Josef L. Kunz  
Pitman B. Potter  
John B. Whitton

Quincy Wright

ELEANOR H. FINCH

## REGIONAL MEETINGS OF THE SOCIETY

*Temple University, March 30, 1963*

The Legal Aspects of International Health Programs were the subject of a regional meeting held at Temple University School of Law, Philadelphia, Pennsylvania, on March 30, 1963. The meeting was sponsored by the Schools of Law, Pharmacy, and Medicine of the University. The welcoming address was given by Dr. Paul R. Anderson, Vice President for Academic Affairs. Dr. Joseph B. Sprowls, Dean of the School of Pharmacy, presided at the morning session, which was devoted to the international legal problems of drugs. Mr. Charles I. Bevans, Assistant Legal Adviser for Treaty Affairs, Department of State, presented a paper on "International Conventions in the Field of Narcotic Drugs." Mr. Richard D. Tedrow, Secretary and General Attorney of Upjohn International, discussed "Drug Registration in International Trade." A general discussion followed.

At luncheon, over which Dr. Leroy E. Burney, Vice President for Health Sciences, presided, Dr. Luther Terry, Surgeon General of the U. S. Public Health Service, delivered an address on "United States' Policies in International Health."

At the afternoon session, over which Dr. Benjamin F. Boyer, Dean of the School of Law of Temple University, presided, addresses were given by Mr. Howard B. Calderwood, Office of International Economic and Social Affairs, Department of State, on "The World Health Organization and Its Regional Organization"; Mr. Sidney Edelmans, Chief, Environmental Health Branch, Office of the General Counsel, Department of Health, Education and Welfare, on "Health Problems in International Transportation"; and by Dr. James Watt, Chief, Division of International Health, U. S. Public Health Service, on "United States Programs in International Health." Following general discussion of the papers, a reception was held.

The papers will be published in a forthcoming issue of the *Temple Law Quarterly*, and individual copies are available at \$2.00 each. Orders should be addressed to the Law Library, Temple University School of Law, 1715 North Broad Street, Philadelphia.

*Northwest Pacific Regional Conference, University of British Columbia, April 5-6, 1963*

A regional conference was held at the Faculty of Law, University of British Columbia, Vancouver, B. C. April 5 and 6, 1963, under the spon-

sorship of the Faculty of Law of the University of British Columbia, the Vancouver Section of the Canadian Branch of the International Law Association, the School of Law and the Institute of International Affairs of the University of Washington, and of the American Society of International Law.

The conference opened with a dinner on the evening of April 5 at the Faculty Club, at which Dean Erwin N. Griswold of the Harvard Law School was speaker. On the morning of April 6 the subject for discussion was fisheries, on which the speakers were Dean G. F. Curtis of the Faculty of Law of the University of British Columbia, who discussed "Territorial and Fishery Limits"; Edward W. Allen, United States Commissioner, International North Pacific Fisheries Commission, who spoke on "North Pacific Fisheries—1963 and Beyond"; and A. D. Scott, Acting Head, Department of Economics and Political Science of the University of British Columbia, who discussed "The Treaty Approach to the Fishery Regime of the Oceans."

At luncheon on April 6, Professor Peter H. Rohn, of the Department of Political Science, University of Washington, gave an address on "An Introduction to the European Common Market." Following luncheon there was a discussion of the subject, in which Professor Ralph F. Johnson of the University of Washington School of Law, and Mr. M. J. Fawcett of the Vancouver Bar, spoke on "Legal Problems If the United Kingdom Enters into the Common Market." "The Impact of the Common Market on the Economy of the Pacific Northwest" was discussed by W. J. Kane, Vice President of Boeing International Corporation, Seattle, and Professor G. R. Munro of the Department of Economics and Political Science of the University of British Columbia.

The meeting was organized by Professor C. B. Bourne of the Faculty of Law of the University of British Columbia and Professor Ralph W. Johnson of the School of Law of the University of Washington.

E. H. F.

*Boston, Massachusetts, April 13, 1963*

A meeting was held on April 13 at the Statler-Hilton Hotel in Boston, Massachusetts, sponsored by the Boston Bar Association through its Committee on International Legal Practice, with the co-operation and support of the American Society of International Law, Greater Boston Chamber of Commerce, International Trade Association of New England, Inc., Massachusetts Society of Certified Public Accountants, New England Council, World Affairs Council, and World Trade Center of New England, Inc.

The general topic of the program was "Legal Problems of Doing Business Abroad." The session commenced at 9:15 a.m. with introductory remarks by the Chairman of the Committee on International Legal Practice, C. Peter Gossels, Esq., of the Boston Bar, who was in charge of arrangements for the meeting. Professor Wolfgang G. Friedmann, Professor of International Law at Columbia Law School, spoke on "Some

Legal Aspects of Foreign Investment." The morning session concluded with a panel discussion of "Tax Aspects of Doing Business Abroad," presented by four members of the Boston Bar: Messrs. Robert B. Fraser, Frederic G. Corneel, Champe A. Fisher and Carl A. Horne. At luncheon the guests were addressed by the Honorable Leverett Saltonstall, Senator from Massachusetts. The afternoon sessions consisted of two panel programs, one on "Common Market Antitrust Problems," presented by Professor Louis Schwartz of the University of Pennsylvania Law School, and three members of the Boston Bar, Messrs. Jean E. DeValpine, Conrad W. Oberdorfer and Richard A. Wiley. The second panel discussion on "Governmental Assistance to Companies Doing Business Abroad" was presented by Henry B. Shepard, Esq., of the Boston Bar, Mr. Francis X. Boylan, Secretary, the Foreign Insurance Credit Association, Mr. George C. Ricker, Assistant Vice President of the First National Bank of Boston, Mr. Charles B. Warden, Chief, Investment Guaranties Division, Agency for International Development and Mr. Albert J. Redway, Chief, Business Liaison Division, Export-Import Bank.

DETLEV F. VAGTS

*Ohio State University, Columbus, Ohio, April 19, 1963*

A regional meeting on the subject of "West Berlin: the Legal Context" was held in the auditorium of the College of Law at Ohio State University on April 19. Professor Roland J. Stanger of the College of Law made arrangements for the meeting, which was supported by the Mershon National Security Program of the University. Speakers included Professors Joseph W. Bishop, Jr., of Yale Law School; Hans W. Baade of Duke University School of Law; Saul H. Mendlovitz of Rutgers University School of Law; and Stanley D. Metzger of Georgetown University Law Center.

*Northwestern University School of Law, May 1-2, 1963*

A Conference on the Law of Space and of Satellite Communications was held at the Northwestern University School of Law, Chicago, Illinois, as a regional meeting of the Society, in co-operation with the Third National Conference on the Peaceful Uses of Space, the National Aeronautics and Space Administration, the Committee of International Law of the Chicago Bar Association, and the Section of International Law of the Illinois State Bar Association. The program was supported by the Charles C. Linthicum Foundation and the Ford Grant for International Legal Studies of the Northwestern University School of Law. The Conference Co-Directors were Professors Brunson MacChesney and John E. Coons.

The program on May 1, Professor MacChesney presiding, was devoted to the law of space. Dean John Ritchie of the School of Law of Northwestern University gave the address of welcome. He was followed by Professor Myres S. McDougal, who spoke on "The Emerging Customary Law of Outer Space." Comments were made by Professor Carl Q.

Christol of the University of Southern California, and Mr. Spencer M. Beresford, of the District of Columbia Bar. Mr. John A. Johnson, General Counsel, National Aeronautics and Space Administration, discussed "The 'Freedom' of Outer Space: Some Problems of Sovereignty, Control, and Jurisdiction." Mr. Beresford and Professor Maxwell Cohen, Director of the Institute of Air and Space Law, McGill University, commented upon Mr. Johnson's address. "International Organization and Space" was the subject of an address by the Honorable Abram J. Chayes, Legal Adviser of the Department of State, and of comments by Mr. David F. Maxwell, Chairman of the Committee on the Law of Outer Space, Section of International and Comparative Law of the American Bar Association, and by Professor Howard J. Taubenfeld, of Southern Methodist University.

The session on May 2, 1963, presided over by Professor Coons, considered communications satellites and the law. Mr. Bennett Boskey, of the District of Columbia Bar, spoke on "Monopoly and Antitrust Aspects of Communications Satellite Operations." Comments were offered by Mr. W. A. Schlotterbeck of the General Electric Company, Mr. George V. Cook, of the American Telephone and Telegraph Company, and Professor Carl H. Fulda of Ohio State University. Professor Victor G. Rosenblum of Northwestern University discussed "Administrative Aspects of the Satellite Communications Act." Comments upon his paper were made by Mr. Max D. Paglin, General Counsel, Federal Communications Commission, Mr. John A. Johnson, and Mr. Stanley Plesent, General Counsel, U. S. Information Agency.

The final session on May 2 was devoted to "Some International Aspects of Satellite Communications Systems." Professor Samuel D. Estep of the University of Michigan delivered the principal paper on the subject, upon which comments were made by Professor McDougal, Professor Cohen and Mr. Chayes.

*Oakland-Los Angeles, May 3-4 and May 10-11, 1963*

Meetings on "Legal and Tax Aspects of Doing Business Abroad" were held on May 3 and 4 in Oakland, and on May 10 and 11, 1963, in Los Angeles, California, under the sponsorship of the State Bar of California, in co-operation with the Committee on International Transactions of the Los Angeles Bar Association, the International Law Committee of the Bar Association of San Francisco, and the American Society of International Law. The Los Angeles Advisory Planning Committee for the program consisted of Gerald J. Mehlman, Chairman; Andrew Castellano, Richard D. DeLuce, Harry Donkers, Thomas L. Flattery, Edward C. Freutel, Jr., James D. Harris, James X. Kilbridge, and Professor Paul Proehl. The members of the San Francisco Committee were Alexander D. Calhoun, Jr., Chairman; Arthur R. Albrecht, Ernest J. Ettlinger, Allan N. Littman, and Murray Richards.

The first session on May 3 and 10 considered "United States Foreign Trade and Investment Policy." In Oakland, the speaker was the Honorable David R. Tillinghast, Special Assistant for International Tax Affairs,

U. S. Treasury Department. In Los Angeles the speaker was the Honorable Seymour M. Peyser, Assistant Administrator for Development Finance and Private Enterprise, Agency for International Development.

The second session discussed "Taxation of Foreign Income." The background of foreign tax provisions of the Revenue Act of 1962 was discussed in Oakland and Los Angeles by Lawrence M. Stone of Los Angeles. The pattern of taxation of foreign tax provisions of the 1962 Revenue Act was discussed in Oakland by Paul E. Anderson of San Francisco, and in Los Angeles by Gerald J. Mehlman of Los Angeles. In Oakland, Michael L. Mellor of San Francisco discussed provisions and methods of taxing income of U. S. shareholders, and in Los Angeles, Arthur B. Willis of that city discussed relief provisions of the 1962 Revenue Act. The "Taxation of Gain from Sales or Exchanges of the Stock of Controlled Foreign Corporations and from Distributions" was the subject of addresses by Richard M. Eigner of San Francisco in Oakland, and by James X. Kilbridge in Los Angeles. Stanley R. Fimberg of Los Angeles spoke in Oakland and Los Angeles on taxation of foreign income earned by U. S. individuals residing abroad.

A third session was devoted to "Choice of Forms and Locations in Doing Business Abroad," which was discussed in Oakland by Robert D. MacKenzie of San Francisco, and in Los Angeles by Zoltan M. Mihaly of that city.

A fourth session considered "Convertibility and the Protection of Property Abroad against Expropriation." This subject was discussed in Oakland and Los Angeles by George de Vajda of San Francisco.

A fifth session, on May 4 and 11, 1963, had as the theme "Selected Considerations on Engaging in Business Abroad." In Oakland Ernest J. Ettlinger and William J. Martin, Jr., of San Francisco, spoke, respectively, on U. S. antitrust considerations in doing business abroad, and antitrust considerations in doing business in the European Economic Community under the Rome Treaty. In Los Angeles, Professor Stefan Riesenfeld of the University of California School of Law, Berkeley, spoke on antitrust considerations in doing business abroad, and Thomas L. Flattery of Los Angeles, on drafting private international commercial agreements. Sam J. Farmer, Vice President and Counsel of General Atomic, San Diego, spoke in Oakland and Los Angeles on licensing and leasing property in international transactions.

The last session of the meetings was devoted to "Legal Problems in Doing Business in Selected Foreign Areas." Doing business in Japan was discussed in Oakland and Los Angeles by Alexander D. Calhoun, Jr., and Roger J. Fleischmann of San Francisco. Doing business in the European Economic Community was discussed in Oakland by Murray Richards of San Francisco, and in Los Angeles by Sam Pisar of Beverly Hills and Paris, France. Doing business in less developed countries was discussed in Oakland by David Hardy of Oakland, and Peter Anderson and Finley J. Gibbs of San Francisco. In Los Angeles the subject was presented by Professors Paul Proehl and Guillermo Margadant of the

School of Law, University of California, Los Angeles; and Andrew Castellano of Los Angeles.

E. H. F.

EUROPEAN COMMON MARKET CONFERENCE, GEORGE WASHINGTON UNIVERSITY

"Problems of Doing Business within the European Common Market" was the theme of a two-day conference held April 8 and 9 at the National Law Center of George Washington University under the direction of Professor Arthur S. Miller. Featured among the speakers were experts from Europe and the United States. In attendance were approximately 250 lawyers, business executives, government officials and academic personnel.

Four separate sessions, each consisting of formal addresses and a panel discussion, were presented. The first dealt with "Establishment Within the European Economic Community." Speakers included Mr. Michael G. Duerr of the Chase Manhattan Bank; Mr. Jean L. Blondeel of the Paris office of Cleary, Gottlieb, Steen & Hamilton; Mr. Paul Leleux, Counsellor for the Legal Services of the European Executives; Mr. Ernst Wohlfarth, Legal Advisor to the Council of Ministers of the E.E.C., and Mr. T. E. Brewton of the New York office of the First Chicago International Banking Corporation. Mr. Jack Sundelson of the Ford Motor Company was the moderator.

"Taxation: European and American" was the subject of the second session. Speakers included Mr. G. Heerkens of the fiscal staff of the E.E.C.; Mr. A. Edward Gottesman of the London office of Coudert Brothers; Mr. Joseph H. Guttentag of Surrey, Karasik, Gould & Greene; Mr. Michael Waris, Jr., of the Washington office of Baker, McKenzie & Hightower; and Mr. Stanford G. Ross of the U. S. Treasury Department. Mr. Alan R. Rado of Rado & Lee acted as moderator.

The second day was given over to "Patents and Patent Problems" and "Antitrust and Restrictive Business Practices." Speakers for the former were Dr. D. J. de Haan, President of the Patent Board of The Netherlands; Mr. S. Delvalle Goldsmith of Langner, Parry, Card & Langner; Mr. Otto R. H. Knopp of the International General Electric Company; Mr. Sigmund Timberg, Washington attorney; and Dr. Helmuth Wegner of G. D. Searle & Company. Professor John C. Stedman of the University of Wisconsin Law School was the moderator.

At the antitrust session, the featured speakers were Mr. Jacques Vandamme, Chief of Investigations of the EEC's Directorate of Competition; Mr. Robert C. Barnard of the Washington office of Cleary, Gottlieb, Steen & Hamilton; Professor W. W. Kirkpatrick of George Washington University Law School; Mr. Wilbur L. Fugate, Chief of the Foreign Commerce Section, Antitrust Division, Department of Justice; and Mr. Robert A. Bicks of Breed, Abbott & Morgan. Mr. Mark S. Massel, member of the senior staff of the Brookings Institution, moderated.

\*Proceedings of the Conference will be published by Commerce Clearing House, Inc., co-sponsor of the Conference.

ARTHUR S. MILLER.



## FELLOWSHIPS FOR AMERICAN WOMEN 1964-1965

The Educational Foundation of the American Association of University Women has announced the availability of forty-six fellowship awards for the year 1964-65, open to American women who hold a doctorate or who will have fulfilled all requirements for the doctorate except the dissertation by the beginning of the fellowship year, which is July 1, 1964, or who are established in professional careers and are recognized for scholarly competence. The awards range in amount from \$3,000 to \$5,000 and are unrestricted as to age of the recipients or place of research.

Application forms will be available August 1, 1963, and the deadline for filing applications is December 1, 1963. Requests for applications must indicate present academic status, and should be addressed to the Fellowships Office, AAUW Educational Foundation, 2401 Virginia Avenue, N. W., Washington 7, D. C.

Information concerning fellowships offered for women of other countries may be obtained by writing to the above address.

E. H. F.

## JUDICIAL DECISIONS

BY JOHN R. STEVENSON \*

*Of the Board of Editors*

*Preliminary question of existence of a dispute between the parties—origin, nature and characteristics of Mandates System—Mandate for South West Africa as an instrument of an international character—question of registration of Mandate: Article 18 of Covenant—Article 7 of Mandate as treaty or convention within the meaning of Article 37 of Statute—dissolution of League of Nations and survival of Mandate—essentiality of Article 7 of Mandate—capacity to invoke that article—scope of Article 7 and interest of Member States in performance of Mandate—rule of prior diplomatic negotiation and its applicability—Court's finding of jurisdiction<sup>1</sup>*

SOUTH WEST AFRICA CASES (ETHIOPIA *v.* SOUTH AFRICA; LIBERIA *v.* SOUTH AFRICA), PRELIMINARY OBJECTIONS.<sup>2</sup> I.C.J. Reports, 1962, p. 319.

International Court of Justice.<sup>3</sup> Judgment of December 21, 1962.

[On November 4, 1960, Ethiopia and Liberia instituted companion proceedings against the Union of South Africa relating to "the continued existence of the Mandate for South West Africa and the duties and performance of the Union, as Mandatory, thereunder." Jurisdiction of the Court was asserted under Article 7 of the Mandate of December 17, 1920, for German South West Africa,<sup>4</sup> and Article 37 of the Statute of the Court.<sup>5</sup> South Africa filed preliminary objections to the jurisdiction.

\* Assisted by Peter S. Paine, Jr., and William J. Williams, Jr., of the New York Bar.

<sup>1</sup> Headnote by the Court.

<sup>2</sup> Digested and excerpted by Wm. W. Bishop, Jr.

<sup>3</sup> Consisting for this case of President Winiarski, Vice President Alfaro, Judges Basdevant, Badawi, Moreno Quintana, Wellington Koo, Spiropoulos, Sir Percy Spender, Sir Gerald Fitzmaurice, Korotaky, Bustamante y Rivero, Jessup, and Morelli, and Judges *ad hoc* Sir Louis Mbanefo (named by Ethiopia and Liberia after the Court ruled that these governments were in the same interest and thus to be reckoned as a single party) and van Wyk (named by South Africa).

<sup>4</sup> Par. 2 of Art. 7 of the Mandate to South Africa for South West Africa provides: "The Mandatory agrees that, if any dispute whatever should arise between the Mandatory and another member of the League of Nations relating to the interpretation or the application of the provisions of the mandate, such dispute, if it cannot be settled by negotiation, shall be submitted to the Permanent Court of International Justice provided for by Article 14 of the Covenant of the League of Nations." 17 A.J.I.L. Supp. 175, 176 (1923).

<sup>5</sup> Art. 37 of the Statute of the International Court of Justice reads: "Whenever a treaty or convention in force provides for reference of a matter to a tribunal to have been instituted by the League of Nations, or to the Permanent Court of International

Ethiopia and Liberia contended that the Mandate remained in force, including the provision for jurisdiction; that South Africa remains subject to the obligations of the Mandate; that the General Assembly "is legally qualified to exercise the supervisory functions previously exercised by the League of Nations with regard to the administration of the Territory"; that South Africa remains obligated to report annually to the United Nations and to forward petitions from inhabitants of the Territory; that South Africa had in effect modified the terms of the Mandate; and that South Africa

has practised *apartheid*, i.e., has distinguished as to race, color, national or tribal origin in establishing the rights and duties of the inhabitants of the Territory; that such practice is in violation of its obligations as stated in Article 2 of the Mandate and Article 22 of the Covenant of the League of Nations; and that the Union has the duty forthwith to cease the practice of *apartheid* in the Territory.

They further charged that South Africa, by reason of the economic, political, social and educational policies applied within the Territory, "has failed to promote to the utmost the material and moral well-being and social progress of the inhabitants of the Territory"; and "has treated the Territory in a manner inconsistent with the international status of the Territory, and has thereby impeded opportunities for self-determination by the inhabitants of the Territory"; adding that South Africa "has established military bases within the Territory in violation of its obligations as stated in Article 4 of the Mandate and Article 22 of the Covenant."

South Africa's reply was that "the Governments of Ethiopia and Liberia have no *locus standi* in these contentious proceedings and that the Honorable Court has no jurisdiction to hear, or adjudicate upon, the questions of law and fact raised." South Africa contended:

*Firstly*, the Mandate for South West Africa has never been, or at any rate is since the dissolution of the League of Nations no longer, a "treaty or convention in force" within the meaning of Article 37 of the Statute of the Court, this Submission being advanced (a) with respect to the Mandate as a whole, including Article 7 thereof; and (b) in any event, with respect to Article 7 itself.

*Secondly*, neither the Government of Ethiopia nor the Government of Liberia is "another Member of the League of Nations," as required for *locus standi* by Article 7 of the Mandate for South West Africa.

*Thirdly*, the conflict or disagreement alleged by the Governments of Ethiopia and Liberia to exist between them and the Government of the Republic of South Africa, is by reason of its nature and content not a "dispute" as envisaged in Article 7 of the Mandate for South West Africa, more particularly in that no material interests of the Governments of Ethiopia and/or Liberia or of their nationals are involved therein or affected thereby;

*Fourthly*, the alleged conflict or disagreement is as regards its state of development not a "dispute" which "cannot be settled by negotiation" within the meaning of Article 7 of the Mandate for South West Africa.

The Governments of Ethiopia and Liberia thereupon asked the Court to dismiss the Preliminary Objections and to declare that the Court has jurisdiction. In its Opinion, the Court said:]

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Justice, the matter shall, as between the parties to the present Statute, be referred to the International Court of Justice." 39 A.J.I.L. Supp. 223 (1945).

To found the jurisdiction of the Court in the proceedings, the Applicants, having regard to Article 80, paragraph 1, of the Charter of the United Nations, relied on Article 7 of the Mandate of 17 December 1920 for South West Africa, and Article 37 of the Statute of the Court. In response to the Applications and Memorials of Ethiopia and Liberia, the Government of South Africa filed Preliminary Objections to the jurisdiction of the Court. It is these Objections which call for consideration in the present phase of the proceedings.

Before undertaking this task, however, the Court finds it necessary to decide a preliminary question relating to the existence of the dispute which is the subject of the Applications. The view has been advanced that if no dispute within the purview of Article 7 of the Mandate and Articles 36 and 37 of the Statute of the Court exists in fact, a conclusion of incompetence or *fin de non-recevoir* must follow.

It is to be noted that this preliminary question really centres on the point as to the existence of a dispute between the Applicants and the Respondent, irrespective of the nature and subject of the dispute laid before the Court in the present case. In the case of the *Mavrommatis Palestine Concessions* (P.C.I.J., Series A, No. 2, p. 11) the Permanent Court defines a dispute as "a disagreement on a point of law or fact, a conflict of legal views or interests between two persons." The said Judgment, in proceeding to examine the nature of the dispute, enunciates this definition, only after establishing that the conditions for the existence of a dispute are fulfilled. In other words it is not sufficient for one party to a contentious case to assert that a dispute exists with the other party. A mere assertion is not sufficient to prove the existence of a dispute any more than a mere denial of the existence of the dispute proves its non-existence. Nor is it adequate to show that the interests of the two parties to such a case are in conflict. It must be shown that the claim of one party is positively opposed by the other. Tested by this criterion there can be no doubt about the existence of a dispute between the Parties before the Court, since it is clearly constituted by their opposing attitudes relating to the performance of the obligations of the Mandate by the Respondent as Mandatory.

Inasmuch as the grounds on which the Preliminary Objections rely are generally connected with the interpretation of the Mandate Agreement for South West Africa, it is also necessary at the outset to give a brief account of the origin, nature and characteristics of the Mandates System established by the Covenant of the League of Nations.

Under Article 119 of the Treaty of Versailles of 28 June 1919, Germany renounced in favour of the Principal Allied and Associated Powers all her rights and titles over her overseas possessions. The said Powers, shortly before the signature of the Treaty of Peace, agreed to allocate them as Mandates to certain Allied States which had already occupied them. The terms of all the "C" Mandates were drafted by a Committee of the Supreme Council of the Peace Conference and approved by the representatives of the Principal Allied and Associated Powers in the autumn of 1919,

with one reservation which was subsequently withdrawn. All these actions were taken before the Covenant took effect and before the League of Nations was established and started functioning in January 1920. The terms of each Mandate were subsequently defined and confirmed by the Council in conformity with Article 22 of the Covenant.<sup>6</sup>

The essential principles of the Mandates System consist chiefly in the recognition of certain rights of the peoples of the underdeveloped territories; the establishment of a regime of tutelage for each of such peoples to be exercised by an advanced nation as a "Mandatory" "on behalf of the League of Nations"; and the recognition of "a sacred trust of civilisation" laid upon the League as an organized international community and upon its Member States. This system is dedicated to the avowed object of promoting the well-being and development of the peoples concerned and is fortified by setting up safeguards for the protection of their rights.

These features are inherent in the Mandates System as conceived by its authors and as entrusted to the respective organs of the League and the Member States for application. The rights of the Mandatory in relation to the mandated territory and the inhabitants have their foundation in the obligations of the Mandatory and they are, so to speak, mere tools given to enable it to fulfill its obligations. The fact is that each Mandate under the Mandates System constitutes a new international institution, the primary, overriding purpose of which is to promote "the well-being and development" of the people of the territory under Mandate.

As has already been pointed out, Ethiopia and Liberia indicated in their

<sup>6</sup> Art. 22 of the League Covenant provided:

"To those colonies and territories which as a consequence of the late war have ceased to be under the sovereignty of the States which formerly governed them and which are inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world, there should be applied the principle that the well-being and development of such peoples form a sacred trust of civilization and that securities for the performance of this trust should be embodied in this Covenant.

"The best method of giving practical effect to this principle is that the tutelage of such peoples should be entrusted to advanced nations who by reason of their resources, their experiences, or their geographical position can best undertake this responsibility, and who are willing to accept it, and that this tutelage should be exercised by them as Mandatories on behalf of the League."

With respect to South West Africa and certain South Pacific Islands Art. 22 added that they "can be best administered under the laws of the Mandatory as integral portions of its territory, subject to the safeguards above mentioned in the interests of the indigenous population." These safeguards were that the Mandatory "be responsible for the administration of the territory under conditions which will guarantee freedom of conscience or religion, subject only to the maintenance of public order and morals, the prohibition of abuses such as the slave-trade, the arms traffic and the liquor traffic, and the prevention of the establishment of fortifications or military and naval bases and of military training of the natives for other than police purposes and the defense of the territory." Annual reports were to be required, a permanent Mandates Commission established, and "the degree of authority, control, or administration to be exercised by the Mandatory" to be explicitly defined in each case by the Council if not previously agreed upon by Members of the League. See 13 A.J.I.L. Supp. 137-138 (1919).

Applications the provisions on which they founded the jurisdiction of the Court to hear and determine the dispute which they referred to it; to this the Republic of South Africa replied with a denial of jurisdiction.

The issue of the jurisdiction of the Court was raised by the Respondent in the form of four Preliminary Objections. Its submissions at the end of its written and oral statements are substantially the same, except that on the latter occasion the grounds on which the respective objections are based were summarized under each Objection, and, with reference to the submissions in the first Preliminary Objection, the Respondent introduced a modification on 22 October 1962, as a consequence of its replies to questions put to the Parties by Members of the Court. The Court will deal first with this modification.

The amended text of the First Objection reads:

"Firstly, the Mandate for South West Africa *has never been, or at any rate* is since the dissolution of the League of Nations no longer, a 'treaty or convention in force' within the meaning of Article 37 of the Statute of the Court, this Submission being advanced

(a) with respect to the Mandate as a whole, including Article 7 thereof; and

(b) in any event, with respect to Article 7 itself."

The amendment consists in the addition of the italicized words. Counsel for the Respondent made a statement as a preface to his amendment of 22 October 1962. From this statement it appears that originally the Respondent had always considered or assumed that the Mandate for South West Africa had been a "treaty or convention in itself, that is, an international agreement between the Mandatory on the one hand, and, on the other, the Council representing the League and/or its Members"; and that it had stated several times "that that proposition could be taken to be common cause as related to the period of the lifetime of the League"; but "that the alternative view might well be taken that in defining the terms of the Mandate, the Council was taking executive action in pursuance of the Covenant (which of course was a convention) and was not entering into an agreement which would itself be a treaty or convention". At the same time, the statement added: "This view, we put it no higher than a view that might be taken, would regard the Council's Declaration as setting forth a resolution of the Council, which would, like any other valid resolution of the Council, owe its legal force to the fact of having been duly resolved by the Council in the exercise of powers conferred upon it by the Covenant."

In the Court's opinion, this modified view is not well-founded for the following reasons. For its confirmation, the Mandate for South West Africa took the form of a resolution of the Council of the League but obviously it was of a different character. It cannot be correctly regarded as embodying only an executive action in pursuance of the Covenant. The Mandate, in fact and in law, is an international agreement having the character of a treaty or convention. The Preamble of the Mandate itself shows this character. The agreement referred to therein was effected by

a decision of the Principal Allied and Associated Powers including Great Britain taken on 7 May 1919 to confer a Mandate for the Territory on His Britannic Majesty and by the confirmation of its acceptance on 9 May 1919 by the Union of South Africa. The second and third paragraphs of the Preamble record these facts. It is further stated therein that "His Britannic Majesty, for and on behalf of the Government of the Union of South Africa . . . has undertaken to exercise it on behalf of the League of Nations in accordance with the following provisions". These "provisions" were formulated "in the following terms."

The draft Mandate containing the explicit terms was presented to the Council of the League in December 1920 and, with a few changes, was confirmed on 17 December 1920. The fourth and final paragraph of the Preamble recites the provisions of Article 22, paragraph 8, of the Covenant, and then "confirming the said Mandate, defines its terms as follows: . . ."

Thus it can be seen from what has been stated above that this Mandate, like practically all other similar Mandates, is a special type of instrument composite in nature and instituting a novel international regime. It incorporates a definite agreement consisting in the conferment and acceptance of a Mandate for South West Africa, a provisional or tentative agreement on the terms of this Mandate between the Principal Allied and Associated Powers to be proposed to the Council of the League of Nations and a formal confirmation agreement on the terms therein explicitly defined by the Council and agreed to between the Mandatory and the Council representing the League and its Members. It is an instrument having the character of a treaty or convention and embodying international engagements for the Mandatory as defined by the Council and accepted by the Mandatory.

The fact that the Mandate is described in its last paragraph as a Declaration [*exemplaire* in the French text] is of no legal significance. The Mandates confirmed by the Council of the League of Nations in the course of 1922 are all called instruments [*actes* in the French text], such as the French Mandate for Togoland and Cameroons, the British Mandate for the Cameroons, the Belgian Mandate for Ruanda-Urundi, etc. The character of an international practice of States and of the jurisprudence of international law are many different types

in accordance with Article 18 of the Covenant which provided: "No such treaty or international engagement shall be binding until so registered." If the Mandate was *ab initio* null and void on the ground of non-registration it would follow that the Respondent has not and has never had a legal title for its administration of the territory of South West Africa; it would therefore be impossible for it to maintain that it has had such a title up to the discovery of this ground of nullity. The fact is that Article 18 provided for registration of "Every treaty or international engagement entered into *hereafter* by any Member of the League" and the word "*hereafter*" meant after 10 January 1920 when the Covenant took effect, whereas the Mandate for South West Africa, as stated in the preamble of the instrument, had actually been conferred on and accepted by the Union of South Africa more than seven months earlier on 7-9 May 1919; and its terms had been provisionally agreed upon between the Principal Allied and Associated Powers and the Mandatory, in August 1919. Moreover, Article 18, designed to secure publicity and avoid secret treaties, could not apply in the same way in respect of treaties to which the League of Nations itself was one of the Parties as in respect of treaties concluded among individual Member States. The Mandate for South West Africa, like all the other Mandates, is an international instrument of an institutional character, to which the League of Nations, represented by the Council, was itself a Party. It is the implementation of an institution in which all the Member States are interested as such. The procedure to give the necessary publicity to the Mandates including the one under consideration was applied in view of their special character, and in any event they were published in the *Official Journal* of the League of Nations.

Since the Mandate in question had the character of a treaty or convention at its start, the next relevant question to consider is whether this treaty or convention, with respect to the Mandate as a whole including Article 7 thereof, or with respect to Article 7 itself, is still in force. The Respondent contends that it is, and this contention constitutes the essence of the First Plea. It is argued that the rights and obligations under the Mandate exist, while those rights and obligations are under the supervision by the League and



on the term "another Member of the League of Nations" in Article 7, of which paragraph 2 reads:

"The Mandatory agrees that, if any dispute whatever should arise between the Mandatory and another Member of the League of Nations relating to the interpretation or the application of the provisions of the Mandate, such dispute, if it cannot be settled by negotiation, shall be submitted to the Permanent Court of International Justice provided for by Article 14 of the Covenant of the League of Nations."

It is contended that since all Member States of the League necessarily lost their membership and its accompanying rights when the League itself ceased to exist on 19 April 1946, there could no longer be "another Member of the League of Nations" today. According to this contention, even assuming that Article 7 of the Mandate is still in force as a treaty or convention within the meaning of Article 37 of the Statute, no State has "locus standi" or is qualified to invoke the jurisdiction of this Court in any dispute with the Respondent as Mandatory.

This contention is claimed to be based upon the natural and ordinary meaning of the words employed in the provision. But this rule of interpretation is not an absolute one. Where such a method of interpretation results in a meaning incompatible with the spirit, purpose and context of the clause or instrument in which the words are contained, no reliance can be validly placed on it.

In the first place, judicial protection of the sacred trust in each Mandate was an essential feature of the Mandates System. The essence of this system, as conceived by its authors and embodied in Article 22 of the Covenant of the League of Nations, consisted, as stated earlier, of two features: a Mandate conferred upon a Power as "a sacred trust of civilisation" and the "securities for the performance of this trust". While the faithful discharge of the trust was assigned to the Mandatory Power alone, the duty and the right of ensuring the performance of this trust were given to the League with its Council, the Assembly, the Permanent Mandates Commission and all its Members within the limits of their respective authority, power and functions, as constituting administrative supervision, and the Permanent Court was to adjudicate and determine any dispute within the meaning of Article 7 of the Mandate. The administrative supervision by the League constituted a normal security to ensure full performance by the Mandatory of the "sacred trust" toward the inhabitants of the mandated territory, but the specially assigned role of the Court was even more essential, since it was to serve as the final bulwark of protection by recourse to the Court against possible abuse or breaches of the Mandate.

The *raison d'être* of this essential provision in the Mandate is obvious. Without this additional security the supervision by the League and its Members could not be effective in the last resort. For example, under Article 6 of the Mandate for South West Africa:

"The Mandatory shall make to the Council of the League of Nations an annual report to the satisfaction of the Council, containing

full information with regard to the territory, and indicating the measures taken to carry out the obligations assumed under Articles 2, 3, 4 and 5."

In actual operation the Council when satisfied with the report on the recommendation of the Permanent Mandates Commission would approve the report. If some Member of the Council had doubts on some point or points in the report, explanations would be asked from the representative of the Mandatory present. If the explanations were considered satisfactory, approval of the annual report would follow. In either case the approval meant the unanimous agreement of all the representatives including that of the Mandatory who, under Article 4, paragraph 5, of the Covenant, was entitled to send a representative to such a meeting to take part in the discussion and to vote. But if some measure proposed to the Mandatory on the recommendation of the Permanent Mandates Commission in the interest of the inhabitants of the mandated territory and within the terms of the Mandate and of Article 22 of the Covenant should be opposed by the Mandatory, it could not be adopted by the Council. Or if the Mandatory should adopt some measure in connection with its administration of the Territory notwithstanding the objection of the Permanent Mandates Commission and the Council that it was a violation of the Mandate, and should persist in carrying it out, a conflict would occur. This possibility is not a mere conjecture or hypothesis. As a matter of fact, the Respondent had more than once intimated its desire to incorporate South West Africa into the Union and the Permanent Mandates Commission of the League each time objected to it as being contrary to the Mandate; and the same idea of the Mandatory Power was also conveyed to the United Nations in 1946. If it should have attempted in the days of the League to carry out the idea contrary to paragraph 1 of Article 7, an important dispute would arise between it and the Council of the League.

Under the unanimity rule (Articles 4 and 5 of the Covenant), the Council could not impose its own view on the Mandatory. It could of course ask for an advisory opinion of the Permanent Court but that opinion would not have binding force, and the Mandatory could continue to turn a deaf ear to the Council's admonitions. In such an event the only course left to defend the interests of the inhabitants in order to protect the sacred trust would be to obtain an adjudication by the Court on the matter connected with the interpretation or the application of the provisions of the Mandate. But neither the Council nor the League was entitled to appear before the Court. The only effective recourse for protection of the sacred trust would be for a Member or Members of the League to invoke Article 7 and bring the dispute as also one between them and the Mandatory to the Permanent Court for adjudication. It was for this all-important purpose that the provision was couched in broad terms embracing "any dispute whatever . . . between the Mandatory and another Member of the League of Nations relating to the interpretation or the application of the provisions of the Mandate . . . if it cannot be settled by

negotiation". It is thus seen what an essential part Article 7 was intended to play as one of the securities in the Mandates System for the observance of the obligations by the Mandatory.

In the second place, besides the essentiality of judicial protection for the sacred trust and for the rights of Member States under the Mandates, and the lack of capacity on the part of the League or the Council to invoke such protection, the right to implead the Mandatory Power before the Permanent Court was specially and expressly conferred on the Members of the League, evidently also because it was the most reliable procedure of ensuring protection by the Court, whatever might happen to or arise from the machinery of administrative supervision.

The third reason for concluding that Article 7 with particular reference to the term "another Member of the League of Nations" continues to be applicable is that obviously an agreement was reached among all the Members of the League at the Assembly session in April 1946 to continue the different Mandates as far as it was practically feasible or operable with reference to the obligations of the Mandatory Powers and therefore to maintain the rights of the Members of the League, notwithstanding the dissolution of the League itself. This agreement is evidenced not only by the contents of the dissolution resolution of 18 April 1946 but also by the discussions relating to the question of Mandates in the First Committee of the Assembly and the whole set of surrounding circumstances which preceded, and prevailed at, the session. Moreover, the Court sees no valid ground for departing from the conclusion reached in the Advisory Opinion of 1950 to the effect that the dissolution of the League of Nations has not rendered inoperable Article 7 of the Mandate. Those States who were Members of the League at the time of its dissolution continue to have the right to invoke the compulsory jurisdiction of the Court, as they had the right to do before the dissolution of the League. That right continues to exist for as long as the Respondent holds on to the right to administer the territory under the Mandate.

The Assembly of the League of Nations met in April 1946 specially to arrange for the dissolution of the League. Long before the session important events had taken place which bore a direct influence on its course of action at the indicated session. The Charter of the United Nations with its Chapter XI on non-self-governing territories and Chapters XII and XIII on the new trusteeship system embodying principles corresponding to those in Article 22 of the Covenant on Mandates and the Mandates System entered into force in October 1945 and the United Nations began to operate in January 1946, and the General Assembly held its first session in the following February. When the Assembly of the League actually met subsequently in April of the same year, it had full knowledge of these events. Therefore before it finally passed the dissolution resolution, it took special steps to provide for the continuation of the Mandates and the Mandate System "until other arrangements have been agreed between the United Nations and the respective mandatory Powers". It was fully realized by all the representatives attending the Assembly session

that the operation of the Mandates during the transitional period was bound to be handicapped by legal technicalities and formalities. Accordingly they took special steps to meet them. For example, these special circumstances show that the assembled representatives did not attach importance to the letter of the constitutional procedure. Under the Covenant the role of the Council in the Mandates System was preponderant. But the Council held no meeting to deal with the question of what should be done with the Mandates after the League's dissolution. Instead the Assembly by a resolution of 12 April 1946 attributed to itself the responsibilities of the Council. The resolution reads:

"The Assembly, with the concurrence of all the Members of the Council which are represented at its present session: Decides that, so far as required, it will, during the present session, assume the functions falling within the competence of the Council."

On the basis of this resolution, the Assembly also approved the end of the Mandates for Syria, Lebanon and Trans-Jordan.

To provide for the situation certain to arise from the act of dissolution, and to continue the Mandates on the basis of a sacred trust, prolonged discussions were held both in the Assembly and in its First Committee to find ways and means of meeting the difficulties and making up for the imperfections as far as was practicable. It was in these circumstances that all the Mandatory Powers made declarations of their intentions relating to their respective Mandates. Each of the delegates of the Mandatory Powers present solemnly expressed their intention to continue to administer in each case the Territory: for the United Kingdom, "in accordance with the general principles of the existing mandates"; for France, "to pursue the execution of the mission entrusted to it by the League of Nations"; for New Zealand, "in accordance with the terms of the Mandate"; for Belgium, to "remain fully alive to all the obligations devolving on members of the United Nations under Article 80 of the Charter"; for Australia, "in accordance with the provision of the Mandates, for the protection and advancement of the inhabitants". The statement by the delegate of South Africa, at the second plenary meeting of the Assembly on 9 April 1946 is particularly clear. After announcing that

"... it is the intention of the Union Government, at the forthcoming session of the United Nations General Assembly in New York, to formulate its case for according South West Africa a status under which it would be internationally recognized as an integral part of the Union",

he continues:

"In the meantime, the Union will continue to administer the territory scrupulously in accordance with the obligations of the Mandate, for the advancement and promotion of the interests of the inhabitants, as she has done during the past six years when meetings of the Mandates Commission could not be held.

The disappearance of those organs of the League concerned with the supervision of mandates, primarily the Mandates Commission and the League Council, will necessarily preclude complete compliance with the letter of the Mandate. The Union Government will nevertheless regard the dissolution of the League as in no way diminishing its obligations under the Mandate, which it will continue to discharge with the full and proper appreciation of its responsibilities until such time as other arrangements are agreed upon concerning the future status of the territory."

There could be no clearer recognition on the part of the Government of South Africa of the continuance of its obligations under the Mandate for South West Africa, including Article 7, after the dissolution of the League of Nations.

It was on the basis of the declarations of the Mandatory Powers as well as on the views expressed by the other Members that the League Assembly unanimously adopted its final resolution of 18 April 1946, the last two paragraphs of which read:

"3. Recognizes that, on the termination of the League's existence, its functions with respect to the mandated territories will come to an end, but notes that Chapters XI, XII and XIII of the Charter of the United Nations embody principles corresponding to those declared in Article 22 of the Covenant of the League;

4. Takes note of the expressed intentions of the Members of the League now administering territories under mandate to continue to administer them for the well-being and development of the peoples concerned in accordance with the obligations contained in the respective Mandates, until other arrangements have been agreed between the United Nations and the respective mandatory Powers."

The Chinese delegate, in introducing the resolution in the Assembly relating to the possible effect of the League's dissolution on the problem of the Mandates from which the two passages are taken, stated:

"It was gratifying to the Chinese delegation, as representing a country which had always stood for the principle of trusteeship, that all the Mandatory Powers had announced their intention to administer the territories under their control in accordance with their obligations under the mandates system until other arrangements were agreed upon."

The French delegate in supporting the resolution said that he wished:

"to stress once more the fact that all territories under the mandate of his Government would continue to be administered in the spirit of the Covenant and of the Charter."

Professor Bailey of Australia, Rapporteur, speaking as delegate of his country, welcomed:

"the initiative of the Chinese delegation in moving the resolution, which he supported. The Australian delegation had made its position clear in the Assembly—namely, that Australia did not regard the dissolution of the League as weakening the obligations of countries administering mandates. They regarded the obligation as still in force and would continue to administer their mandated territories in

accordance with the provisions of the mandates for the well-being of the inhabitants."

The delegate of the United Kingdom made it even clearer that there was agreement by all the Mandatory Powers when he "formally seconded the resolution on behalf of his Government":

"It had been settled in consultation and agreement by all countries interested in mandates and he thought it could therefore be passed without discussion and with complete unanimity."

It is clear from the foregoing account that there was a unanimous agreement among all the Member States present at the Assembly meeting that the Mandates should be continued to be exercised in accordance with the obligations therein defined although the dissolution of the League, in the words of the representative of South Africa at the meeting, "will necessarily preclude complete compliance with the letter of the Mandate", i.e. notwithstanding the fact that some organs of the League like the Council and the Permanent Mandates Commission would be missing. In other words the common understanding of the Member States in the Assembly—including the Mandatory Powers—in passing the said resolution, was to continue the Mandates, however imperfect the whole system would be after the League's dissolution, and as much as it would be operable, until other arrangements were agreed upon by the Mandatory Powers with the United Nations concerning their respective Mandates. Manifestly, this continuance of obligations under the Mandate could not begin to operate until the day after the dissolution of the League of Nations and hence the literal objections derived from the words "another Member of the League of Nations" are not meaningful, since the resolution of 18 April 1946 was adopted precisely with a view to averting them and continuing the Mandate as a treaty between the Mandatory and the Members of the League of Nations.

In conclusion, any interpretation of Article 7 or more particularly the term therein "another Member of the League of Nations" must take into consideration all of the relevant facts and circumstances relating to the act of dissolution of the League, in order to ascertain the true intent and purpose of the Members of the Assembly in adopting the final resolution of 18 April 1946.

In further support of the finding of an agreement at the time of the dissolution of the League to maintain the *status quo* as far as possible in regard to the Mandates pending other arrangements agreed between the United Nations and the respective Mandatory Powers, it should be stated that the interval was expected to be of short duration and that in due course the different Mandates would be converted by mutual agreement into trusteeship agreements under the Charter of the United Nations. This expectation has been realized and the only exception is the Respondent's Mandate for South West Africa. In the light of this fact the finding of an agreement appears all the more justified.

To deny the existence of the agreement it has been said that Article 7 was not an essential provision of the Mandate instrument for the pro-

tection of the sacred trust of civilization. If therefore Article 7 were not an essential tool in the sense indicated, the claim of jurisdiction would fall to the ground. In support of this argument attention has been called to the fact that three of the four "C" Mandates, when brought under the trusteeship provisions of the Charter of the United Nations, did not contain in the respective Trusteeship Agreements any comparable clause and that these three were the Trusteeship Agreements for the territories previously held under Mandate by Japan, Australia and New Zealand. The point is drawn that what was essential the moment before was no longer essential the moment after, and yet the principles under the Mandates system corresponded to those under the Trusteeship system. This argument apparently overlooks one important difference in the structure and working of the two systems and loses its whole point when it is noted that under Article 18 of the Charter of the United Nations, "Decisions of the General Assembly on important questions shall be made by a two-thirds majority of the members present and voting", whereas the unanimity rule prevailed in the Council and the Assembly of the League of Nations under the Covenant. Thus legally valid decisions can be taken by the General Assembly of the United Nations and the Trusteeship Council under Chapter XIII of the Charter without the concurrence of the trustee State, and the necessity for invoking the Permanent Court for judicial protection which prevailed under the Mandates system is dispensed with under the Charter.

For the reasons stated, the First and Second Objections must be dismissed.

The Third Preliminary Objection consists essentially of the proposition that the dispute brought before the Court by the Applicants is not a dispute as envisaged in Article 7 of the Mandate—more particularly in that the said conflict or disagreement does not affect any material interests of the Applicant States or their nationals.

In support of this proposition, the Respondent contends that the word "dispute" must be given its generally accepted meaning in a context of a compulsory jurisdiction clause and that, when so interpreted, it means a disagreement or conflict between the Mandatory and another Member of the League concerning the legal rights and interests of such other Member in the matter before the Court; that "the obligations imposed for the benefit of the inhabitants would have been owed to the League on whose behalf the Mandatory undertook to exercise the Mandate" and that "League Members would then, by virtue of their membership, be entitled to participate in the League's supervision of the Mandate, but would individually, *vis-à-vis* the Mandatory, have no legal right or interest in the observance by the Mandatory of its duties to the inhabitants".

The question which calls for the Court's consideration is whether the dispute is a "dispute" as envisaged in Article 7 of the Mandate and within the meaning of Article 36 of the Statute of the Court.

The Respondent's contention runs counter to the natural and ordinary meaning of the provisions of Article 7 of the Mandate, which mentions

"any dispute whatever" arising between the Mandatory and another Member of the League of Nations "relating to the interpretation or the application of the provisions of the Mandate". The language used is broad, clear and precise: it gives rise to no ambiguity and it permits of no exception. It refers to any dispute whatever relating not to any one particular provision or provisions, but to "the provisions" of the Mandate, obviously meaning all or any provisions, whether they relate to substantive obligations of the Mandatory toward the inhabitants of the Territory or toward the other Members of the League or to its obligation to submit to supervision by the League under Article 6 or to protection under Article 7 itself. For the manifest scope and purport of the provisions of this Article indicate that the Members of the League were understood to have a legal right or interest in the observance by the Mandatory of its obligations both toward the inhabitants of the Mandated Territory, and toward the League of Nations and its Members.

Nor can it be said, as argued by the Respondent, that any broad interpretation of the compulsory jurisdiction in question would be incompatible with Article 22 of the Covenant on which all Mandates are based, especially relating to the provisions of Article 7, because Article 22 did not provide for the Mandatory's submission to the Permanent Court in regard to its observance of the Mandate. But Article 7, paragraph 2, is clearly in the nature of implementing one of the "securities for the performance of this trust", mentioned in Article 22, paragraph 1. It was embodied in the draft agreement among the Principal Allied and Associated Powers and proposed to the Council of the League by the representative of the United Kingdom as original Mandatory on behalf of South Africa, the present Mandatory for South West Africa. The right to take legal action conferred by Article 7 on Member States of the League of Nations is an essential part of the Mandate itself and inseparable from its exercise. Moreover, Article 7 reads: "The Mandatory agrees that . . .", so that there could be no doubt about the scope and effect of the provision at the time of its stipulation.

While Article 6 of the Mandate under consideration provides for administrative supervision by the League, Article 7 in effect provides, with the express agreement of the Mandatory, for judicial protection by the Permanent Court by vesting the right of invoking the compulsory jurisdiction against the Mandatory for the same purpose in each of the other Members of the League. Protection of the material interests of the Members or their nationals is of course included within its compass, but the well-being and development of the inhabitants of the Mandated territory are not less important.

The foregoing considerations and reasons lead to the conclusion that the present dispute is a dispute as envisaged in Article 7 of the Mandate and that the Third Preliminary Objection must be dismissed.

The Court will now consider the Fourth and last Preliminary Objection raised by the Respondent. In essence it consists of the proposition that if it is a dispute within the meaning of Article 7, it is not one which cannot



be settled by negotiation with the Applicants and that there have been no such negotiations with a view to its settlement. The Applicants' reply is to the effect that repeated negotiations have taken place over a period of more than ten years between them and the other Members of the United Nations holding the same views as they, on the one hand, and the Respondent, on the other, in the Assembly and various organs of the United Nations, and that each time the negotiations reached a deadlock, due to the conditions and restrictions the Respondent placed upon them. The question to consider, therefore, is: What are the chances of success of further negotiations between the Parties in the present cases for reaching a settlement?

In considering the question, it is to be noted, first, that the alleged impossibility of settling the dispute obviously could only refer to the time when the Applications were filed. In the second place, it should be pointed out that behind the present dispute there is another and similar disagreement on points of law and fact—a similar conflict of legal views and interests—between the Respondent on the one hand, and the other Members of the United Nations, holding identical views with the Applicants, on the other hand. But though the dispute in the United Nations and the one now before the Court may be regarded as two different disputes, the questions at issue are identical. Even a cursory examination of the views, propositions and arguments consistently maintained by the two opposing sides, shows that an impasse was reached before 4 November 1960 when the Applications in the instant cases were filed, and that the impasse continues to exist. The actual situation appears from a letter of 25 March 1954 from the Permanent Representative of the Union of South Africa to the Chairman of the Committee on South West Africa:

“As the terms of reference of your Committee appear to be even more inflexible than those of the *Ad Hoc* Committee the Union Government are doubtful whether there is any hope that new negotiations within the scope of your Committee's terms of reference will lead to any positive results.”

This situation remains unchanged as appears clearly from subsequent communications addressed to the Chairman of the Committee on South West Africa on 21 May 1955 and 21 April 1956.

It is immaterial and unnecessary to enquire what the different and opposing views were which brought about the deadlock in the past negotiations in the United Nations, since the present phase calls for determination of only the question of jurisdiction. The fact that a deadlock was reached in the collective negotiations in the past and the further fact that both the written pleadings and oral arguments of the Parties in the present proceedings have clearly confirmed the continuance of this deadlock, compel a conclusion that no reasonable probability exists that further negotiations would lead to a settlement.

In this respect it is relevant to cite a passage from the Judgment of the Permanent Court in the case of the *Mavrommatis Palestine Concessions* (P.C.I.J., Ser. A, No. 2, p. 13) which supports the view stated. The Court

said in respect of a similar objection advanced by the Respondent in that case to the compulsory jurisdiction under Article 26 of the Palestine Mandate, which corresponds to Article 7 of the Mandate for South West Africa:

"The true value of this objection will readily be seen if it be remembered that the question of the importance and chances of success of diplomatic negotiations is essentially a relative one. Negotiations do not of necessity always presuppose a more or less lengthy series of notes and despatches; it may suffice that a discussion should have been commenced, and this discussion may have been very short; this will be the case if a deadlock is reached, or if finally a point is reached at which one of the Parties definitely declares himself unable, or refuses, to give way, and there can be therefore no doubt that the dispute cannot be settled by diplomatic negotiation.

But it is equally true that if the diplomatic negotiations between the Governments commence at a point where the previous discussions left off, it may well happen that the nature of the latter was such as to render superfluous renewed discussion of the opposing contentions in which the dispute originated. No general and absolute rule can be laid down in this respect. It is a matter for consideration in each case."

Now in the present cases, it is evident that a deadlock on the issues of the dispute was reached and has remained since, and that no modification of the respective contentions has taken place since the discussions and negotiations in the United Nations. It is equally evident that "there can be no doubt", in the words of the Permanent Court, "that the dispute cannot be settled by diplomatic negotiations", and that it would be "superfluous" to undertake renewed discussions.

It is, however, further contended by the Respondent that the collective negotiations in the United Nations are one thing and direct negotiations between it and the Applicants are another, and that no such direct negotiations have ever been undertaken by them. But in this respect it is not so much the form of negotiation that matters as the attitude and views of the Parties on the substantive issues of the question involved. So long as both sides remain adamant, and this is obvious even from their oral presentations before the Court, there is no reason to think that the dispute can be settled by further negotiations between the Parties.

Moreover, diplomacy by conference or parliamentary diplomacy has come to be recognized in the past four or five decades as one of the established modes of international negotiation. In cases where the disputed questions are of common interest to a group of States on one side or the other in an organized body, parliamentary or conference diplomacy has often been found to be the most practical form of negotiation. The number of parties to one side or the other of a dispute is of no importance; it depends upon the nature of the question at issue. If it is one of mutual interest to many States, whether in an organized body or not, there is no reason why each of them should go through the formality and pretence of direct negotiation with the common adversary State after they have already fully participated in the collective negotiations with the same State in opposition.

For the reasons stated above, the Fourth Objection like the preceding three Objections is not well-founded and should also be dismissed.

The Court concludes that Article 7 of the Mandate is a treaty or convention still in force within the meaning of Article 37 of the Statute of the Court and that the dispute is one which is envisaged in the said Article 7 and cannot be settled by negotiation. Consequently the Court is competent to hear the dispute on the merits.

For these reasons, the COURT, by eight votes to seven, finds that it has jurisdiction to adjudicate upon the merits of the dispute.

[President Winiarski, Judges Basdevant, Sir Percy Spender and Sir Gerald Fitzmaurice jointly, Morelli, and Judge *ad hoc* van Wyk submitted dissenting opinions. Judge Spiropoulos dissented in a brief statement.

Judges Bustamante y Rivero, and Jessup, and Judge *ad hoc* Sir Louis Mbanefo concurred with the decision but submitted separate opinions.] <sup>7</sup>

*Legislative jurisdiction—National Labor Relations Act—crews of vessels owned by foreign subsidiaries of American corporations*

MCCULLOCH, CHAIRMAN, NATIONAL LABOR RELATIONS BOARD, ET AL. v. SOCIEDAD NACIONAL DE MARINEROS DE HONDURAS; McLEOD, REGIONAL DIRECTOR, NATIONAL LABOR RELATIONS BOARD, v. EMPRESA HONDURENA DE VAPORES, S. A.; NATIONAL MARITIME UNION OF AMERICA, AFL-CIO, v. EMPRESA HONDURENA DE VAPORES, S. A. 372 U. S. 10.

United States Supreme Court, February 18, 1963.\*

MR. JUSTICE CLARK delivered the opinion of the Court.

These companion cases, involving the same facts, question the coverage of the National Labor Relations Act, as amended, 61 Stat. 136, 73 Stat. 541, 29 U. S. C. § 151. A corporation organized and doing business in the United States beneficially owns seagoing vessels which make regular sailings between United States, Latin American and other ports transporting the corporation's products and other supplies; each of the vessels is legally owned by a foreign subsidiary of the American corporation, flies the flag of a foreign nation, carries a foreign crew and has other contacts with the nation of its flag. The question arising is whether the Act extends to the crews engaged in such a maritime operation. The National Labor Relations Board in a representation proceeding on the application of the National Maritime Union held that it does and ordered an election. 134 N. L. R. B. 287. The vessels' foreign owner sought to enjoin the

<sup>7</sup> It is greatly regretted that space limitations prevent reproduction, or even adequate digesting, of these separate opinions and dissenting opinions, which total 313 pages of the printed reports of the Court.

\* The Circuit Court opinion in the Empresa case is reported in 57 A.J.I.L. 134 (1963). Briefs *amici curiae* for affirmance were filed by Canada, Great Britain, Honduras, and the United States.

The Court applied the same principle as in the instant case in *Inces S.S. Co. v. International Maritime Workers Union*, 372 U.S. 24 (1963), decided the same day. Briefs *amici curiae* for reversal were filed in that case by Great Britain, Panama, Liberia, and the United States.

Board's Regional Director from holding the election, but the District Court for the Southern District of New York denied the requested relief. 200 F. Supp. 484. The Court of Appeals for the Second Circuit reversed, holding that the Act did not apply to the maritime operations here and thus the Board had no power to direct the election. 300 F. 2d 222. The N.M.U. had intervened in the proceeding, and it petitioned for a writ of certiorari (No. 93), as did the Regional Director (No. 91). Meanwhile, the United States District Court for the District of Columbia, on application of the foreign bargaining agent of the vessels' crewmen, enjoined the Board members in No. 107. 201 F. Supp. 82. We granted each of the three petitions for certiorari, 370 U. S. 915, and consolidated the cases for argument.<sup>1</sup>

We have concluded that the jurisdictional provisions of the Act do not extend to maritime operations of foreign-flag ships employing alien seamen.

## I

The National Maritime Union of America, AFL-CIO, filed a petition in 1959 with the National Labor Relations Board seeking certification under § 9 (c) of the Act, 29 U. S. C. § 159 (c), as the representative of the unlicensed seamen employed upon certain Honduran flag vessels owned by Empresa Hondurena de Vapores, S. A., a Honduran corporation. The petition was filed against United Fruit Company, a New Jersey corporation which was alleged to be the owner of the majority of Empresa's stock. Empresa intervened and on hearing it was shown that United Fruit owns all of its stock and elects its directors, though no officer or director of Empresa is an officer or director of United Fruit and all are residents of Honduras. In turn the proof was that United Fruit is owned by citizens of the United States and maintains its principal office at Boston. Its business was shown to be the cultivation, gathering, transporting and sale of bananas, sugar, cacao and other tropical produce raised in Central and South American countries and sold in the United States.

United Fruit maintains a fleet of cargo vessels which it utilizes in this trade. A portion of the fleet consists of 13 Honduran-registered vessels operated<sup>2</sup> by Empresa and time chartered to United Fruit, which vessels were included in National Maritime Union's representation proceeding. The crews on these vessels, including the officers, are recruited by Empresa in Honduras. They are Honduran citizens (save one Jamaican) and claim that country as their residence and home port. The crew is required to sign Honduran shipping articles, and their wages, terms and condition of employment, discipline, etc., are controlled by a bargaining agreement between Empresa and a Honduran union, Sociedad Nacional de

<sup>1</sup> In No. 107, appeal was perfected to the Court of Appeals for the District of Columbia Circuit, to which court we granted a writ of certiorari before judgment. [Footnotes by the Court.]

<sup>2</sup> Ten of the 13 vessels are owned and operated by Empresa. Three are owned by Balboa Shipping Co., Inc., a Panamanian subsidiary of United Fruit. Empresa acts as an agent for Balboa in the management of the latter vessels.

Marineros de Honduras. Under the Honduran Labor Code only a union whose "juridic personality" is recognized by Honduras and which is composed of at least 90% of Honduran citizens can represent the seamen on Honduran-registered ships. The N. M. U. fulfils neither requirement. Further, under Honduran law recognition of Sociedad as the bargaining agent compels Empresa to deal exclusively with it on all matters covered by the contract. The current agreement in addition to recognition of Sociedad provides for a union shop, with a no-strike-or-lockout provision, and sets up wage scales, special allowances, maintenance and cure provisions, hours of work, vacation time, holidays, overtime, accident prevention, and other details of employment as well.

United Fruit, however, determines the ports of call of the vessels, their cargoes and sailings, integrating the same into its fleet organization. While the voyages are for the most part between Central and South American ports and those of the United States, the vessels each call at regular intervals at Honduran ports for the purpose of taking on and discharging cargo and, where necessary, renewing the ship's articles.

## II

The Board concluded from these facts that United Fruit operated a single, integrated maritime operation within which were the Empresa vessels, reasoning that United Fruit was a joint employer with Empresa of the seamen covered by N. M. U.'s petition. Citing its own *West India Fruit & Steamship Co.* opinion, 130 N. L. R. B. 343 (1961), it concluded that the maritime operations involved substantial United States contacts, outweighing the numerous foreign contacts present. The Board held that Empresa was engaged in "commerce" within the meaning of § 2 (6) of the Act<sup>3</sup> and that the maritime operations "affected commerce" within § 2 (7),<sup>4</sup> meeting the jurisdictional requirement of § 9 (c) (1).<sup>5</sup> It therefore ordered an election to be held among the seamen signed on Empresa's

<sup>3</sup> 29 U. S. C. § 152 (6):

"The term 'commerce' means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country."

<sup>4</sup> 29 U. S. C. § 152 (7):

"The term 'affecting commerce' means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce."

<sup>5</sup> 29 U. S. C. § 159 (c) (1):

"Whenever a petition shall have been filed . . . the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing . . ."

Section 10 (a) of the Act, 29 U. S. C. § 160 (a), imposes the same requirement, empowering the Board to "prevent any person from engaging in any unfair labor practice . . . affecting commerce."

vessels to determine whether they wished N. M. U., Sindicato Maritimo Nacional de Honduras,<sup>6</sup> or no union to represent them.

As we have indicated, both Empresa and Sociedad brought suits in Federal District Courts to prevent the election, Empresa proceeding in New York against the Regional Director—Nos. 91 and 93—and Sociedad in the District of Columbia against the members of the Board—No. 107. In Nos. 91 and 93 the jurisdiction of the District Court was challenged on two grounds: first, that review of representation proceedings is limited by § 9 (d) of the Act, 29 U. S. C. § 159 (d), to indirect review as part of a petition for enforcement or review of an order entered under § 10 (c), 29 U. S. C. § 160 (c); and, second, that the Board members were indispensable parties to the action. The challenge based upon § 9 (d) was not raised or adjudicated in Sociedad's action against the Board members—No. 107—and the indispensable-parties challenge is of course not an issue. Sociedad is not a party in Nos. 91 and 93, although the impact of the Board order—the same order challenged in No. 107—is felt by it. That order has the effect of canceling Sociedad's bargaining agreement with Empresa's seamen, since Sociedad is not on the ballot called for by the Board. No. 107, therefore, presents the question in better perspective, and we have chosen it as the vehicle for our adjudication on the merits. This obviates our passing on the jurisdictional questions raised in Nos. 91 and 93, since the disposition of those cases is controlled by our decision in No. 107.

We are not of course precluded from reexamining the jurisdiction of the District Court in Sociedad's action, merely because no challenge was made by the parties. *Mitchell v. Maurer*, 293 U. S. 237, 244 (1934). Having examined the question whether the District Court had jurisdiction at the instance of Sociedad to enjoin the Board's order, we hold that the action falls within the limited exception fashioned in *Leedom v. Kyne*, 358 U. S. 184 (1958). In that case judicial intervention was permitted since the Board's order was "in excess of its delegated powers and contrary to a specific prohibition in the Act." *Id.*, at 188. While here the Board has violated no specific prohibition in the Act, the overriding consideration is that the Board's assertion of power to determine the representation of foreign seamen aboard vessels under foreign flags has aroused vigorous protests from foreign governments and created international problems for our Government. Important interests of the immediate parties are of course at stake. But the presence of public questions particularly high in the scale of our national interest because of their international complexion is a uniquely compelling justification for prompt judicial resolution of the controversy over the Board's power. No question of remotely comparable urgency was involved in *Kyne*, which was a purely domestic adversary situation. The exception recognized today is therefore not to be taken as an enlargement of the exception in *Kyne*.

<sup>6</sup> Sindicato, a Honduran union, had intervened in the proceeding. Sociedad was invited to intervene but declined to do so.

## III

Since the parties all agree that the Congress has constitutional power to apply the National Labor Relations Act to the crews working foreign-flag ships, at least while they are in American waters, *The Exchange*, 7 Cranch 116, 143 (1812); *Wildenhus's Case*, 120 U. S. 1, 11 (1887); *Benz v. Compania Naviera Hidalgo*, 353 U. S. 138, 142 (1957), we go directly to the question whether Congress exercised that power. Our decision on this point being dispositive of the case, we do not reach the other questions raised by the parties and the *amici curiae*.

The question of application of the laws of the United States to foreign-flag ships and their crews has arisen often and in various contexts.<sup>7</sup> As to the application of the National Labor Relations Act and its amendments, the Board has evolved a test relying on the relative weight of a ship's foreign as compared with its American contacts. That test led the Board to conclude here, as in *West India Fruit & Steamship Co., supra*, that the foreign-flag ships' activities affected "commerce" and brought them within the coverage of the Act. Where the balancing of the vessel's contacts has resulted in a contrary finding, the Board has concluded that the Act does not apply.<sup>8</sup>

Six years ago this Court considered the question of the application of the Taft-Hartley amendments to the Act in a suit for damages "resulting from the picketing of a foreign ship operated entirely by foreign seamen under foreign articles while the vessel [was] temporarily in an American port." *Benz v. Compania Naviera Hidalgo, supra*, at 139. We held that the Act did not apply, searching the language and the legislative history and concluding that the latter "inescapably describes the boundaries of the Act as including only the workingmen of our own country and its possessions." *Id.*, at 144. Subsequently, in *Marine Cooks & Stewards v. Panama S. S. Co.*, 362 U. S. 365 (1960), we held that the Norris-LaGuardia Act, 29 U. S. C. § 101, deprived a Federal District Court of jurisdiction to enjoin picketing of a foreign-flag ship, specifically limiting the holding to the jurisdiction of the court "to issue the injunction it did under the circumstances shown." *Id.*, at 372. That case cannot be regarded as limiting the earlier *Benz* holding, however, since no question as to "whether the picketing . . . was tortious under state or federal law" was either presented or decided. *Ibid.* Indeed, the Court specifically noted that the application of the Norris-LaGuardia Act "to curtail and regulate the jurisdiction of courts" differs from the application of the Taft-Hartley Act "to regulate the conduct of people engaged in labor disputes." *Ibid.*; see Comment, 69 Yale L. J. 498, 523-525 (1960).

It is contended that this case is nonetheless distinguishable from *Benz* in two respects. First, here there is a fleet of vessels not temporarily in United States waters but operating in a regular course of trade between

<sup>7</sup> See generally Comment, 69 Yale L. J. 498, 506-511 (1960); Boczek, *Flags of Convenience* (1962).

<sup>8</sup> *E. g.*, *Dalsell Towing Co.*, 137 N.L.R.B. No. 48, 50 L.R.R.M. 1164 (1962).

foreign ports and those of the United States; and, second, the foreign owner of the ships is in turn owned by an American corporation. We note that both of these points rely on additional American contacts and therefore necessarily presume the validity of the "balancing of contacts" theory of the Board. But to follow such a suggested procedure to the ultimate might require that the Board inquire into the internal discipline and order of all foreign vessels calling at American ports. Such activity would raise considerable disturbance not only in the field of maritime law but in our international relations as well. In addition, enforcement of Board orders would project the courts into application of the sanctions of the Act to foreign-flag ships on a purely *ad hoc* weighing of contacts basis.<sup>9</sup> This would inevitably lead to embarrassment in foreign affairs and be entirely infeasible in actual practice. The question, therefore, appears to us more basic; namely, whether the Act as written was intended to have any application to foreign registered vessels employing alien seamen.

Petitioners say that the language of the Act may be read literally as including foreign-flag vessels within its coverage. But, as in *Benz*, they have been unable to point to any specific language in the Act itself or in its extensive legislative history that reflects such a congressional intent. Indeed, the opposite is true as we found in *Benz*, where we pointed to the language of Chairman Hartley characterizing the Act as "a bill of rights both for *American* working men and for their employers." 353 U. S., at 144. We continue to believe that if the sponsors of the original Act or of its amendments conceived of the application now sought by the Board they failed to translate such thoughts into describing the boundaries of the Act as including foreign-flag vessels manned by alien crews.<sup>10</sup>

<sup>9</sup> Our conclusion does not foreclose such a procedure in different contexts, such as the Jones Act, 46 U. S. C. § 688, where the pervasive regulation of the internal order of a ship may not be present. As regards application of the Jones Act to maritime torts on foreign ships, however, the Court has stated that "[p]erhaps the most venerable and universal rule of maritime law relevant to our problem is that which gives cardinal importance to the law of the flag." *Lauritzen v. Larsen*, 345 U. S. 571, 584 (1953); see *Romero v. International Terminal Operating Co.*, 358 U. S. 354, 381-384 (1959); Boczek, *op. cit.*, *supra*, note 7, at 178-180.

<sup>10</sup> In 1959 Congress enacted § 14 (c) (1) of the Act, 29 U. S. C. (Supp. II) § 164 (c) (1), granting the Board discretionary power to decline jurisdiction over labor disputes with insubstantial effects, with a proviso that:

"... the Board shall not decline to assert jurisdiction over any labor dispute over which it would assert jurisdiction under the standards prevailing upon August 1, 1959." It is argued that the Board would have exerted jurisdiction over Empresa's vessels and crewmen under those "standards," as illustrated by its action in *Peninsular & Occidental Steamship Co.*, 120 N. L. R. B. 1097 (1958), about which case the Congress is presumed to have known. Aside from the fact that Congress presumably was aware also of our decision in *Benz*, the argument is unconvincing. Nothing in the language or the legislative history of the 1959 amendments to the Act clearly indicates a congressional intent to apply the Act to foreign flagships and their crews. The "standards" to which § 14 (c) (1) refers are the minimum dollar amounts established by the Board for jurisdictional purposes, and the problem to which § 14 (c) is addressed is the "no-man's land" created by *Guss v. Utah Labor Relations Board*, 353



Therefore, we find no basis for a construction which would exert United States jurisdiction over and apply its laws to the internal management and affairs of the vessels here flying the Honduran flag, contrary to the recognition long afforded them not only by our State Department<sup>11</sup> but also by the Congress.<sup>12</sup> In addition, our attention is called to the well-established rule of international law that the law of the flag state ordinarily governs the internal affairs of a ship. See *Wildenhus's Case*, *supra*, at 12; Colombos, *The International Law of the Sea* (3d rev. ed. 1954), 222-223. The possibility of international discord cannot therefore be gainsaid. Especially is this true on account of the concurrent application of the Act and the Honduran Labor Code that would result with our approval of jurisdiction. Sociedad, currently the exclusive bargaining agent of Empresa under Honduran law, would have a head-on collision with N.M.U. should it become the exclusive bargaining agent under the Act. This would be aggravated by the fact that under Honduran law N.M.U. is prohibited from representing the seamen on Honduran-flag ships even in the absence of a recognized bargaining agent. Thus even though Sociedad withdrew from such an intramural labor fight—a highly unlikely circumstance—questions of such international import would remain as to invite retaliatory action from other nations as well as Honduras.

The presence of such highly charged international circumstances brings to mind the admonition of Mr. Chief Justice Marshall in *The Charming Betsy*, 2 Cranch 64, 118 (1804), that "an act of congress ought never to be construed to violate the law of nations if any other possible construction remains . . . ." We therefore conclude, as we did in *Benz*, that for us to sanction the exercise of local sovereignty under such conditions in this "delicate field of international relations there must be present the affirmative intention of the Congress clearly expressed." 353 U. S., at 147. Since neither we nor the parties are able to find any such clear expression we hold that the Board was without jurisdiction to order the election. This is not to imply, however, "any impairment of our own sovereignty, or limitation of the power of Congress" in this field. *Lauritzen v. Larsen*, 345 U. S. 571, 578 (1953). In fact, just as we directed the parties in *Benz* to the Congress, which "alone has the facilities necessary to make fairly such an important policy decision," 353 U. S., at 147, we conclude here that the arguments should be directed to the Congress rather than to us. Cf. *Lauritzen v. Larsen*, *supra*, at 593.

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U. S. 1 (1957). See 25 N. L. R. B. Ann. Rep. 18-19 (1960); II Legislative History of the Labor-Management Reporting and Disclosure Act of 1959 (1959), 1153-1154, 1720; 105 Cong. Rec. 6548-6549, 18134.

<sup>11</sup> State Department regulations provide that a foreign vessel includes "any vessel regardless of ownership, which is documented under the laws of a foreign country." 22 CFR § 81.1 (f).

<sup>12</sup> Article X of the Treaty of Friendship, Commerce and Consular Rights between Honduras and the United States, 45 Stat. 2618 (1927), provides that merchant vessels flying the flags and having the papers of either country "shall, both within the territorial waters of the other High Contracting Party and on the high seas, be deemed to be the vessels of the Party whose flag is flown."

The judgment of the District Court is therefore affirmed in No. 107. The judgment of the Court of Appeals in Nos. 91 and 93 is vacated and the cases are remanded to that court, with instructions that it remand to the District Court for dismissal of the complaint in light of our decision in No. 107.

*It is so ordered.*

MR. JUSTICE GOLDBERG took no part in the consideration or decision of these cases.

MR. JUSTICE DOUGLAS, concurring.<sup>1</sup>

I had supposed that the activities of American labor organizations whether related to domestic vessels or to foreign ones were covered by the National Labor Relations Act, at least absent a treaty which evinces a different policy.<sup>2</sup> Cf. *Cook v. United States*, 288 U. S. 102, 118-120. But my views were rejected in *Benz v. Compania Naviera Hidalgo*, 353 U. S. 138; and, having lost that cause in *Benz*, I bow to its inexorable extension here. For the practical effect of our decision is to shift from all the taxpayers to seamen alone the main burden of financing an executive policy of assuring the availability of an adequate American-owned merchant fleet for federal use during national emergencies. See Note, Panlibhon Registration of American-Owned Merchant Ships: Government Policy and the Problem of the Courts, 60 Col. L. Rev. 711.

*Nationality—forfeiture of citizenship—departing from or remaining outside the United States during war or national emergency to avoid military service*

KENNEDY, ATTORNEY GENERAL, *v.* MENDOZA-MARTINEZ; RUSK, SECRETARY OF STATE, *v.* CORT.<sup>3</sup> 372 U. S. 144.

United States Supreme Court, February 18, 1963.

These cases involved the "grave and fundamental problem, common to both, of the constitutionality of Acts of Congress which divest an American of his citizenship for 'departing from or remaining outside of the jurisdiction of the United States in time of war or . . . national emergency for the purpose of evading or avoiding training and service' in the Nation's armed forces." See Nationality Act of 1940, § 401 (j), 58 Stat. 746 (1944), now Immigration and Nationality Act of 1952, § 349 (a) (10), 66 Stat. 163, 267, 8 U. S. C. § 1481 (a) (10).<sup>4</sup> In *Pérez v. Brownell*, 356 U. S. 44 (1958),<sup>5</sup> § 401 (e) of the Nationality Act of 1940, which imposes loss of nationality for "voting in a foreign state or participating in an election

<sup>1</sup> [This opinion applies also to No. 33, *Ingres Steamship Co., Ltd., v. International Maritime Workers*, *post*, p. 24.]

<sup>2</sup> It is agreed that Article XXII of the Treaty of Friendship, Commerce, and Consular Rights Between the United States and Honduras, 45 Stat. 2618 (1927), and Article X of the Convention with Liberia of October 7, 1938, 54 Stat. 1751, 1756, grant those nations exclusive jurisdiction over the matters here involved.

<sup>3</sup> See 56 A.J.I.L. 1107 (1962).

<sup>4</sup> See 47 A.J.I.L. Supp. 70 (1953).

<sup>5</sup> 52 A.J.I.L. 766 (1958).

or plebiscite to determine the sovereignty over foreign territory," had been upheld by a closely divided Court as a constitutional exercise of Congress' power to regulate foreign affairs. In *Trop v. Dulles*, 356 U. S. 86 (1958),<sup>6</sup> § 401 (g), which declares forfeited the citizenship of any American who is guilty of "deserting the military or naval forces of the United States in time of war, provided he is convicted thereof by court martial and as the result of such conviction is dismissed or dishonorably discharged . . .," was declared unconstitutional.

In the first case, which involved § 401 (j), Mendoza-Martinez was born in the United States in 1922 and in 1942 departed from the United States and went to Mexico solely, according to his own admission, to evade service in the armed forces of the United States. In 1946 he voluntarily returned to the United States and thereafter served a sentence of a year and a day for draft evasion. When ordered deported as an alien in 1953, he brought a declaratory judgment action seeking a declaration of his status as a citizen, of the unconstitutionality of § 401 (j) of the Nationality Act of 1940 and of the nullity of deportation orders directed against him.

In the second case, which involved § 349 (a) (10), Cort was born in the United States in 1927 and went to England. After disregarding successive draft notices in 1953, he was indicted in 1954 for violation of the Selective Service Act of 1948 by reason of his failure to report for induction. In 1959, Cort applied at the American Embassy in Prague, Czechoslovakia, for a new passport which was denied on the ground that he had, by his failure to report for induction, remained outside the country to avoid military service and thereby automatically forfeited his American citizenship by virtue of § 349 (a) (10) of the Immigration and Nationality Act of 1952. Cort thereupon had suit brought for a declaratory judgment that he is a citizen of the United States, an injunction against enforcement of § 349 (a) (10) because of its unconstitutionality and an order directing the revocation of the certificate of loss of nationality and the issuance of a United States passport to him.

In each case, the lower courts held the statutory sections in question unconstitutional. Before the Supreme Court:

The Government argues that §§ 401 (j) and 349 (a) (10) are valid as an exercise of Congress' power over foreign affairs, of its war power, and of the inherent sovereignty of the Government. Appellees urge the provisions' invalidity as not within any of the powers asserted, and as imposing a cruel and unusual punishment.

The Court, by a vote of 5 to 4, affirmed the decisions of the lower court that the challenged statutory sections were unconstitutional.

Speaking for the majority, Mr. Justice Goldberg said:

[The] issue is whether the statutes here, which automatically—without prior court or administrative proceedings—impose forfeiture of citizenship, are essentially penal in character, and consequently have deprived the appellees of their citizenship without due process of law and without according them the rights guaranteed by the Fifth and

<sup>6</sup> *Ibid.* 777.

Sixth Amendments, including notice, confrontation, compulsory process for obtaining witnesses, trial by jury, and assistance of counsel. . . .

We hold §§ 401 (j) and 349 (a) (10) invalid because in them Congress has plainly employed the sanction of deprivation of nationality as a punishment—for the offense of leaving or remaining outside the country to evade military service—without affording the procedural safeguards guaranteed by the Fifth and Sixth Amendments. . . .

On the basis of the history of the predecessor of § 401 (j) and a reading of Congress' reasons for enacting § 401 (j), Mr. Justice Goldberg concluded that the statute's primary function was to serve as an additional penalty for the special category of the draft evader who leaves the country.

While joining in the opinion of the Court, Mr. Justice Douglas and Mr. Justice Black noted that they adhered to their view, as expressed in the dissenting opinion of Mr. Justice Douglas in *Perez v. Brownell*, *supra*, that Congress lacked the power to deprive a native-born citizen of the citizenship granted him by § 1, cl. 1, of the Fourteenth Amendment. In concurring in the Court's opinion, Mr. Justice Brennan stated that legislation so profoundly destructive of individual rights, to be constitutional, must have a rational or necessary relation to a power of Congress and he could not find any such connection between the statute in question and the "war power" or the "foreign affairs power" of Congress.

Mr. Justice Stewart, with whom Mr. Justice White joined, dissented, saying:

. . . I cannot agree with the Court's major premise—that the divestiture of citizenship which these statutes prescribe is punishment in the constitutional sense of that term.

Citing *Mackenzie v. Hare*, 239 U. S. 299 (1915),<sup>7</sup> *Savorgnan v. United States*, 338 U. S. 491 (1950),<sup>8</sup> and *Perez v. Brownell*, *supra*, Mr. Justice Stewart stated:

. . . it has been established for almost 50 years that Congress under some circumstances may, without providing for a criminal trial, make expatriation the consequence of the voluntary conduct of a United States citizen, irrespective of the citizen's subjective intention to renounce his nationality, and irrespective too of his awareness that denationalization will be the result of his conduct.

He also disagreed with the Court's conclusion that in the statutes in question Congress had employed deprivation of citizenship as a penal sanction. He could find no clear proof that the prime purpose of the legislation was punitive. Rather, Congress was dealing primarily with a problem of wartime morale. While declining to decide whether the legislation in question could be sustained on the basis of the power of Congress to regulate foreign affairs, he concluded that the legislation bore a rational relationship to Congress' "war power." Nevertheless, he conceded that

<sup>7</sup> 10 A.J.I.L. 165 (1916).

<sup>8</sup> 44 *ibid.* 409 (1950).

automobile accident, against S, the driver of the automobile, joining in the action S's father, V, a consul and the owner of the automobile. On motion to dismiss the action against V for lack of jurisdiction, the District Court held that 28 U.S.C.A. Section 1351, providing for original and exclusive jurisdiction in the Federal District Courts of all actions against consuls of foreign states, gave no basis for jurisdiction. Section 1351 could not be read to extend to members of a consul's family on the analogy of diplomatic immunity, since under international law consuls, unlike diplomats, do not enjoy immunity as to suits not based on official acts within the scope of their consular duties, nor could Congress be deemed to have intended such a broad reading of the section. Furthermore, no jurisdiction could be obtained over V by virtue of the joinder of the action against S, of which the court had jurisdiction, since V was merely a proper, not a necessary, party, nor could jurisdiction be found on the theory that the action against V was ancillary to that against S.

#### *Consular immunities*

Plaintiff, a Greek national, brought an action against the Consul General of Greece, claiming that the Consul, in sending a letter to the State courts certifying as to personal status of the plaintiff in Greece, had wilfully and maliciously hindered the plaintiff from enforcing his rights to legal remedies in an action in these courts. On appeal from dismissal of the action, the court held that the Consul was clearly acting within the scope of his consular duties in certifying as to the status of a Greek national and was therefore immune from suit. *Sarelas v. Rocanas*, 311 F.2d 33 (C.C.A., 7th Cir., 1962).

#### *Foreign Claims Settlement Commission—Polish claims*

In a case under the Polish Claims Agreement of 1960, 11 U. S. Treaties 1953, T.I.A.S., No. 4545, the Commission held that claims based upon the damage, destruction or taking of property by German forces occupying Poland during World War II do not come within the scope of the Agreement. *Matter of Dominick W. Przybylinski* (Decision No. PO-669).

#### *Liechtenstein trust—no jurisdiction in English courts*

A husband transferred substantial sums to a Liechtenstein trust, established for the purpose of avoiding his wife's claim for permanent maintenance in a pending divorce suit brought by the wife in the English courts. The wife served a notice of application under The Matrimonial Causes (Property and Maintenance) Act, 1958, in Switzerland on one W., a Swiss lawyer, the sole member of the Board of Management of the trust, to set aside the dispositions made by the husband to the trust.

On W.'s appearing under protest to contest the jurisdiction of the English courts, it was held that W. was not subject to the jurisdiction of the English courts, since no order could be made which would be effective

against him, as he was neither served within the jurisdiction nor resident or domiciled in England, nor did he possess property in England, and the trust of which he was manager was, under English conflicts principles, domiciled in Liechtenstein. In the absence of express statutory exceptions, the jurisdiction of the English courts remained fundamentally territorial in nature, and general principles of private international law precluded the imposition of jurisdiction where no effective order could be made. *Wyler v. Lyons*, [1963] 2 W.L.R. 610; [1963] 1 All E. R. 821.

New states may accept or reject elements of custom as legally binding upon them, but they must make declarations as reservations on entering upon official relations with other states, if they are not to be bound. Professor Tunkin likes conventions such as that on diplomatic privileges and immunities so that customs that are to be binding may be defined precisely.

Resolutions of the General Assembly, which Sixth Committee speakers are increasingly quoting as evidence of the law, are not necessarily norms, according to Professor Tunkin. "The latter emerge only when there is present the agreement of states' wills regarding recognition of one or another rule as a norm of international law." Still, he attributes great moral and political authority to resolutions.

In closing, Professor Tunkin looks to the future. He anticipates a qualitative change in the law of proletarian internationalism. The features playing a rôle in creating a period of peaceful co-existence between "socialist" and "imperialist" states become irrelevant because aggression will be so unthinkable as to require no law of non-aggression. The law of self-determination will have passed over to the unification of nations, as happened when the ethnic minority peoples of the Russian Empire first split off from the Great Russians in 1917, only to return as the U.S.S.R. at the very end of 1922. There will be comradely respect and mutual assistance constituting a qualitative change in relations between ethnic groups. This is a vision which appeals to all, but it can be only a vision. Even among the Communist-oriented states there are moments today when union seems remote.

Professor Lisovsky in the second edition of a book that was severely criticized by his colleagues when it first appeared in 1955,<sup>1</sup> writes for economic faculties. His purpose is to provide teaching materials and not to discuss theory or develop a law of the future. In the main he adheres to his earlier definitions, but it may be significant that he has changed his formula in an opening paragraph on the special characteristic of international law from "it rests on the basis of co-existence of the world of socialism and the world of capitalism" to "it rests on the basis of elevated principles of friendship and peace between peoples and states." He then adds, in similarity with Tunkin, that state relations must rest not on the basis of dictation but on the basis of equality and mutual respect.

As a text for economists the chapter on state trading invites attention. The author has changed nothing with regard to his treatment of the law, omitting only three paragraphs and one adjective. The adjective was "sparkling" and was previously used to describe the example set by the U.S.S.R. in its efforts to strengthen economic relations with the peoples' democracies. The second edition merely cites the example. The omitted paragraphs described as the most important economic result of the second World War the collapse of a single all-embracing world market with the emergence of two markets moving in opposite directions: the new one being the democratic world market knowing no problems of supply, and contrasting with the world imperialist market suffering from supply

<sup>1</sup> See review of the first edition in 51 A.J.I.L. 135 (1957).

problems engendered by the interruption and crisis of production as well as unemployment and impoverishment of the masses.

Just as with the first edition, Professor Lisovsky has provided foreign lawyers with a convenient reference work with citations and bibliography which facilitate examination of Soviet practice and attitudes in various branches of the law. His omission of the United Nations Charter and the Statute of the International Court of Justice in the second edition seems regrettable from the point of view of Soviet students whose libraries may not always have them conveniently available, but for foreigners this change is immaterial.

JOHN N. HAZARD

*The Local Remedies Rule in International Law.* By Castor H. P. Law. Geneva: Librairie E. Droz; Paris: Librairie Minard, 1961. pp. 153.

A useful and interesting study by Dr. Law collects and systematizes concepts, judicial decisions and doctrine on the local remedies rule, considering its nature, application and exceptions. This is a thorough study in depth of source materials identifying the problems which the rule presents in practice. It is a sound contribution to the writing on this subject.

Written as one contribution in a series on International Jurisdiction, published under the direction of Professor Paul Guggenheim of the Graduate Institute of International Studies at Geneva, this study very appropriately discusses at length the *Interhandel* case. Dr. Guggenheim was Co-Agent of Switzerland in that case, so that one might speculate that this study directly or indirectly evolved from legal research undertaken in that case. But whether or not such speculation is correct, that case is central to any current examination of the local remedies rule,<sup>1</sup> and it is satisfying to examine Dr. Law's carefulness of scholarship, coupled with his discussion of differences of opinion on various specifics. His helpful bibliography, valuable in itself, rounds out the work.

The study begins with a statement and definition of the local remedies rule. In the course of this statement, which is the subject of the first chapter, the author points out the dual purpose of the rule, to allow municipal courts to do justice in their own way and to appreciate the international responsibility of their own state, and then on the international level it paves the way for the eventual settlement of the dispute (p. 18). This approach opens up issues, considered in later chapters, which arise between differing norms in an international and municipal forum. In his opening of this subject the author concludes that the rule is not meant to show which of the two legal systems prevails. "Its object is generally limited to the judicial settlement of definite cases in a procedural way." (p. 19.)

The second chapter, dealing with the functioning of the rule, considers the practice of the International Court and the cases in which there was a preliminary objection, including those in which the issue was joined to

<sup>1</sup> Lillich and Christenson, *International Claims: Their Preparation and Presentation* 96-98, "Exhaustion of Local Remedies" (Syracuse, 1962).



the merits. This chapter also raises the complicated question of the burden of proof with regard to the rule. The author does not attempt his own conclusion in the light of controversial arguments, which he outlines, but he does observe that in practice the evidentiary burden of proof has always been shared by both parties, regardless of which first comes forward with evidence (p. 57).

To this reviewer the third and fourth chapters covering the local remedies to be exhausted, and the extent of the obligation to apply the rule, contain the ideas and source material of considerable current interest and importance. Here one finds a discussion of the adequacy and sufficiency of local remedies as tests of whether they are to be exhausted. There is also a consideration of local remedies in terms of the application of municipal law and international law. It is in this context in discussing two separate claims involved in the application of the local remedies rule, one in the municipal courts, the other in the international tribunal, that the author criticizes the decision in the *Interhandel* case. Here one catches the flavor of strongly held views of the author:

In the *Interhandel* case, the Swiss government contended that the American courts do not concern themselves with the existence of a breach of international law. Under the *Trading with the Enemy Act*, the Swiss contention maintains, the American courts do not and will not (in view of research work in the Annual Digest and Reports of Public International Law) examine simultaneously customary or conventional international law. For that reason, the American courts could not examine the international responsibility of the state and that therefore local remedies are not necessary.

But this is probably not an important point. The important point seems to be the extreme difficulty or near impossibility to obtain in like circumstances under the *Trading with the Enemy Act* any satisfactory redress in conformity with the international law notion of neutral property. In other words, since only municipal law will be applied, and in view of the circumstances, any reasonable chance of success in accord with the international obligation in the local proceedings is nil. This is an appraisal of fact which should have been made by the International Court of Justice. (p. 75. Footnotes omitted.)

The fifth chapter considers related problems, including domestic jurisdiction and the Calvo Clause. There is in the sixth chapter a discussion of the rule in relation to state responsibility. This is of current importance in cases of nationalization, when the government of a foreign investor may take a position on whether or not to invoke the diplomatic remedy after considering what, if anything, it will require of the private investor looking toward invoking a domestic remedy.<sup>2</sup>

The author considers the question of when international responsibility arises in connection with the local remedies rule. After considering three

<sup>2</sup> See, for example, Department of State Memorandum: "Nationalization, Intervention or Other Taking of Property of American Nationals," March 1, 1961, reprinted in 56 A.J.I.L. 167 (1962).

theories, and the arguments *pro* and *con* as to each of them, he concludes that international responsibility imputed to a state must coincide with the illicit act (p. 141). This is one of the bases for his more general conclusion that the exhaustion of remedies rule remains, as it has been in the past, "a procedural rule of international law." He further concludes that the function of the rule is to reconcile national and international jurisdictions and to promote the interests of both in the intercourse of states (pp. 147-148).

Dr. Law's research and thinking are combined into a fresh and important contribution. The materials he has assembled are complete. The questions he raises and his discussion of them are interesting and provocative. While there are places where his writing appears to lack clarity, possibly because he is writing in a foreign language, this cannot be said to detract in any substantial way from the usefulness of his contribution. Anyone immediately concerned with a question of the exhaustion of remedies will find helpful material ready and at hand in this work.

JAMES N. HYDE

*International Law. Cases and Materials.* 2nd ed. By William W. Bishop, Jr. Boston and Toronto: Little, Brown and Co., 1962. pp. xlvii, 964. Table of Cases. Index. \$13.00.

After teaching a term from the revised edition, it is a pleasure to report that this widely used casebook has been made even more effective. Those who have not employed the earlier edition (Prentice-Hall) may first wish to read Alwyn Freeman's review in this JOURNAL.<sup>1</sup>

The new edition's variations from the original organization are few. But under the new publisher the work has been restyled, undoubtedly in order to make it "belong" to Little, Brown's "Law School Casebook Series." On the whole (and in spite of slightly smaller type) the result is considerable over-all improvement and greater ease in working with the book. A minor matter, but there is still an inordinate piling of notes upon the notes.

Of course, the major changes are substantive. There are new main cases (bringing the total to 100)<sup>2</sup> and documents;<sup>3</sup> the selections from commentators are, however, scarcely changed. Many notes and footnotes

<sup>1</sup> 48 A.J.I.L. 340-342 (1954).

<sup>2</sup> *U. S. v. Capps* (1953), *Power Authority of State of New York v. FPC* (1957), the *Nottebohm Case* (*Liechtenstein v. Guatemala*) (1955), the *Fisheries Case* (*United Kingdom v. Norway*) (1951), *N. Y. and Cuba Mail S. S. Co. v. Republic of Korea* (1955), *National City Bank v. Republic of China* (1955), *Mexico (García and Garza) v. U. S.* (1926), *El Triunfo Co. (U. S. v. Salvador)* (1922). A few cases have been shifted and a few dropped altogether.

<sup>3</sup> The *Suez Canal Convention* (1888), *Convention on the High Seas* (Art. 23) (1958), *Convention on the Continental Shelf* (1958), *Convention on Fishing and Conservation of the Living Resources of the High Seas* (1958), the "Tate Letter" (1952), *NATO Status of Forces Agreement* (1953), *U. N. General Assembly Resolution of Nov. 2, 1956* (Israeli-French-English intervention in Egypt).

are reworked or expanded.<sup>4</sup> Citations to the literature and cases reach into 1960, with a rare 1961 item. Almost 900 cases, besides the main cases, are cited. The section on Sources of International Law (pp. 22-56) has been reworked. There are several new Editorial Notes.<sup>5</sup> There are references to, and note quotations from, the American Law Institute's Restatement of the Foreign Relations Law of the United States (1959). A new subsection on "Expropriation and Nationalization of Property" has been added (pp. 677-695). The section on "Laws of Warfare" includes the new materials, especially the United States Army Field Manual 27-10 (1956) and the new Navy Manual (see pp. 800-815). The casebook again includes the section "National Law on Nationality," which, in the reviewer's opinion, merits only a Note (see esp. pp. 427-438, dealing virtually exclusively with U. S. municipal law). The sample treaty reprinted in the Appendix is now the West Germany-U. S. Treaty of Friendship, Commerce and Navigation (1954).

The recognized virtues of Bishop's *International Law* have been enhanced. It is classroom-tested, thorough and down to earth. It also manages to stimulate a measure of theoretical meditation, if not speculation. With these amplifications and revisions it becomes a most useful desk manual, and the most up-to-date.

ROBERT D. HAYTON

*Le Caractère Artificiel de la Théorie de l'Abus de Droit en Droit International Public.* By Jean-David Roulet. Neuchâtel, Switzerland: Editions de la Baconnière, 1958. pp. 172.

The author approaches the question of abuse of rights in three ways: through a comparative study of the principal European legal systems (French, Swiss, Soviet, German, Italian and English), through an analysis of various theories on the subject, both domestic and international, and, finally, by studying the different situations in which the theory of abuse of rights was actually applied or in which it should have been utilized according to some writers.

His study of comparative law leads him to the conclusion that the theory of abuse of rights is only one of several alternative techniques designed to cope with certain rigidities in legal rules. If a particular

<sup>4</sup> *E.g.*, the notes concerning codification efforts and other developments concerning territorial waters—to include the 1958 and 1960 Geneva Conferences and the work of the International Law Commission and the Inter-American Council of Jurists (pp. 487-493, 514-517, 530-531); the notes following the materials on the continental shelf and coastal fisheries (pp. 538-542, 549-550). Only a minor reworking of the Mandates-Trusteeship materials is accomplished (pp. 232-238); notes carry texts from the International Law Commission Draft Articles on Diplomatic Intercourse and Immunities (1958), but not the work or results of the 1961 Vienna Conference (pp. 596-599).

<sup>5</sup> Reciprocal Trade Agreements (and GATT) (pp. 97-98); Bricker Amendment (pp. 104-105); European Economic International Organization (pp. 259-265); "Space" (pp. 377-380); Extraterritorial Antitrust (pp. 468-471); Air Defense Identification Zones (p. 533); Suez Crisis, 1956 (p. 772).

shocking behavior is not expressly covered by a legal rule, some legal systems develop new rules prohibiting such behavior or applying to it some general rules such as good faith, equity, or requirements of justice or of public order. Only less flexible legal systems find "abuse of rights" helpful as a new way of getting around the obstacles created by positive law.

From a theoretical point of view the author is troubled by the logical difficulty that acts of legal significance are either permitted by law or prohibited by it. If an act oversteps the bounds of the permissible, it becomes prohibited; if it is prohibited, the fact that it constitutes an abuse of rights rather than some other violation of an obligation is legally immaterial. As Lord Halsbury put it in *Mayor of Bradford v. Pickles* ([1895] A.C. 587, at 594): "If it was a lawful act, however ill the motive might be, he had a right to do it. If it was an unlawful act, however good his motive might be, he would have no right to do it." Mr. Roulet thus concludes that the main characteristic of abuse of rights is that certain acts, though apparently permitted by law, nevertheless shock society because of an unanticipated misapplication (*détournement*) of a rule of law, lack of proportion between the interests involved, or clearly arbitrary character of the act. Thus, either the act itself or its consequences are considered by society as "clearly shocking," and are made illegal by the application of the theory of abuse of rights (pp. 75-76). He therefore considers this theory as purely a technical device, by means of which it is possible to condemn a particular exercise of a right without having to touch the right itself or to change the rule of law from which that right is devised.

In analyzing various practical situations in which the theory of abuse of rights was applied or could have been applied, the author finds for each situation an alternative way of dealing with it without any need for resorting to the theory of abuse of rights. According to him, international law is sufficiently dynamic, its principles flexible and its rules imprecise, to permit an international tribunal to develop an adequate rule without resorting to the dangerous and elusive theory of abuse of rights. The author thus seems to discount the need of an international judge, even more than a domestic judge, to find an adequate legal basis for a decision departing from prior understanding of the boundaries of a particular legal rule. The constant reliance by states on the vague notions of sovereignty and domestic jurisdiction and on the strict limits of their international obligations, forces a judge in many situations to invoke various general principles of international law in order to circumscribe traditional rights of states in the new world of growing interdependence. The theory of abuse of power constitutes a more precise tool in many respects than general recourse to equity and justice, and can serve an important rôle in the future development of international law. Of course, once the theory has been applied to particular abuses, a new customary rule might easily develop making further application of the theory unnecessary in future similar cases. To that extent the author is right—where there is a specific rule,

there is no room for the theory of abuse of rights; but in the development of new rules that theory can play an important rôle.

LOUIS B. SOHN

*Soviet Yearbook of International Law 1959.* Moscow: Publishing House of the Academy of Sciences of the U.S.S.R., 1960. pp. 462. 27 R.

In its second yearbook the Soviet Association of International Law seeks to extend to international law the attitudes engendered by adoption of the U.S.S.R.'s seven-year plan (1959-1965), which Professor Tunkin interprets in his introduction, in repetition of statements of Soviet leaders, to be a call to economic competition with the capitalist system, not to arms. It is a period when, to Soviet eyes, the power of the U.S.S.R. and of the socialist states becomes decisive over the power of the capitalist states, requiring the latter to accept the fact that in the creation, amendment and development of international law no state or any group of states may dictate norms of law. Development of law is now possible only by agreement. The countries of socialism have ever-increasing influence on the countries of capitalism.

This volume is designed, as have been its predecessors, to present the Soviet position on various contemporary legal problems, especially those which in Soviet eyes require revision because of the collapse of the colonial system. It repeats the Soviet thesis that a new international law is in the making, contrasting with law prior to the Russian Revolution, and that this new law is an instrument to be used in the struggle to strengthen peace.

The prevention of war is stated by Professor Tunkin to be the basic problem of our time, and he cites the resolution of the Twentieth Congress of the Communist Party to the effect that war is no longer inevitable because of the strengthening of the socialist camp. The U.S.S.R. is credited with motivating the introduction into international law of the prohibition of aggressive war and of the application of force in international relations. But war, he says, cannot be prevented by law alone. There must be disarmament. Professor Tunkin considers the cold war a colossal blow to international law because it rests on force and the premise that agreements between capitalist and socialist states are either impossible or of little value.

To amplify the position that agreements are possible, the opening article by Dr. I. I. Lukashuk presents the thesis that the U.S.S.R. has negotiated treaties to strengthen peaceful co-existence, while the United States has tried to prevent other states from concluding such treaties with the U.S.S.R. because these treaties weaken the dependence of such states upon the United States. He compares anti-Communist sentiment in the United States with Hitler's Germany and militarist Japan, and says that it is used to justify any violation of law.

Subsequent chapters discuss details: reservations to treaties, self-help, the sea, war propaganda, foreigners' rights in the U.S.S.R., and even Hugo

Grotius. Perhaps it is these details that merit special attention, if an edifice of peace is to be built through negotiation on individual themes. Regrettably, the Soviet authors cannot appreciate the extent to which mistrust of Soviet policies pervades thinking in all walks of life in the United States. Continuing confrontations provide the only means by which both sides may come to understand true motivations, at least of legal scholars, and even these efforts may be set back by political crises which probably suggest to scholars on both sides that professions of faith in law are weakly based.

JOHN N. HAZARD

*Foreign Relations of the United States. Diplomatic Papers, 1942. Vol. V: The American Republics.* (Dept. of State Pub. No. 7373.) Washington, D. C.: U. S. Government Printing Office, 1962. pp. vi, 838. Index. \$3.00.

The United States became a participant in World War II in December, 1941. The Historical Office of the Department of State has managed to publish the volumes of *Foreign Relations* for 1941 and 1942 with the exception of the four volumes relating to the American Republics. Of these, Volume V was the first to see the light, though Volume VII, 1941, was also published in December, 1962. Meetings of Consultation of Ministers of Foreign Affairs of the American Republics were held at Panama in 1939 and at Havana in 1940 with a view to concerting attitudes toward the war; and a third meeting at Rio de Janeiro January 15-28, 1942, by establishing an Emergency Advisory Committee for Political Defense, launched a wide program for curbing Axis activities in the Hemisphere. In the general records of this 1942 volume are some of the most definite espionage material to be found in official print; intimate views of blocking enemy funds in non-belligerent countries; the complications of controlling communication by radio with enemy countries in code or clear through internationally-owned lines. By the end of 1942 eleven of the American Republics were at war with the Axis states and all except Argentina had severed diplomatic relations with them. The United States and the United Kingdom joined in imposing the economic blockade on the Axis concerns in the Hemisphere, and there seems to have been no argument of consequence with any of the states concerning the proclaimed list of boycotted firms.

In addition to the general section, the 1942 Volume V sector of these records includes Argentina, Bolivia and Brazil, which declared war August 22, 1942. These countries, with Chile, were the fidgety ones of the period and their record for 1941 is not yet available, the released volume for 1941 containing the papers of the states which had declared war and were "co-operating" with the United States. The 1942 correspondence with Argentina, Bolivia and Brazil deals with purchase of their exportable surpluses and strategic materials, control of trade with respect to the enemy, shipping problems, rubber and other procurement, the elimination of Axis influence in the countries, et cetera.

The diplomatic papers in this 1942 volume are a monologue from United States files rather than a dialogue of national diplomats. Take, for instance, the negotiation and application of the agreements of the Rubber Reserve Company with Bolivia and Brazil. In the case of Bolivia, in addition to the dually signed agreement and one Bolivian note, the whole record is contained in twenty-three Department of State, United States Mission, or agency papers, many of which report Bolivian positions at various stages of the matter. In the case of Brazil, thirty-five United States papers contained four Brazilian pieces. An ordinary volume of diplomatic correspondence would run about equal in papers of the two parties; probably 95 percent of this volume is papers of United States origin. There is little or no evidence that the one-sided narrative distorts the situation in the numerous subjects that came up. By the rules the papers of both sides should have been used, so that it is assumed the negotiations were recorded usually only by the United States, either because of a sense of urgency or special concern. Except for Argentina, the American Republics shared the United States convictions with respect to the Axis states, the defense of the Hemisphere and American solidarity. One senses in these papers that some of them would have liked to have reached their decisions in collaboration with their peers, in their own way, at their own tempo.

DENYS P. MYERS

*Brutal Mandate: A Journey to South West Africa.* By Alan K. Lowenstein. Foreword by Mrs. Franklin D. Roosevelt. New York: Macmillan Co., 1962. pp. viii, 257. \$5.00.

This is not a book on international law but it may have considerable influence on the development of international law in the fields both of human rights and international supervision. The tale of the adventures of the author and two colleagues in South Africa and the South West African Mandated Territory, escaping the ubiquitous South African police and getting tape-recordings from African chiefs and others is, as Mrs. Franklin D. Roosevelt says in the foreword, "completely fascinating." The interviews and recordings give convincing evidence of "racialism" at its worst. Suppression, discrimination, and impoverishment of the Africans, the "colored," and the Indian inhabitants by the white minority of South Africa violate human rights to such an extent that it has "shocked the conscience of mankind," as indicated by repeated resolutions of the United Nations General Assembly.

The conditions in South West Africa, however, where the United Nations has an especial responsibility to enforce the Mandate which South Africa accepted after World War I, are even worse. In this inhospitable, semi-desert area, the whites, one-third German and two-thirds South African immigrants, constitute only ten percent of the population, contrasted with twenty percent of white population in the Union of South Africa, but they are even more brutal. They have isolated the natives; taken tribal lands guaranteed by South Africa when it accepted the Mandate, and reduced

the native population to virtual slavery. The evidence is so overwhelming that the United Nations Committee on South West Africa declared in 1961 that the Union "has violated its obligations under the Mandate and the Charter in relation to South West Africa," and there is "conclusive proof of the unfitness of the South African Government to continue further with the Mandate." (p. 228.)

The General Assembly's Fourth Committee, before which the author and his colleagues testified in 1959, was so impressed by the evidence that, in a resolution approved by the General Assembly, it demanded action by South Africa on certain petitions and recommended that Member states initiate action in the International Court of Justice against the Union under Article 7 of the Mandate (pp. 173 ff.). Ethiopia and Liberia, in fact, initiated such action and in December, 1962, the Court decided that it had jurisdiction.<sup>1</sup>

The author goes into the attitudes of the different parties and groups of both South Africa and the Mandated Territory on the *apartheid* issue. The Afrikaner-speaking people dominate the ruling national party, which is the backbone of support for this policy. The English-speaking population, although not opposing racialism, appears to be more influenced by world opinion and urges some modification of the *apartheid* policy. Some of the younger generation of this group, however, go even further in their sympathy for the natives and often support the liberal and progressive parties which demand gradual elimination of *apartheid*. The small Communist Party stands for more rapid achievement of equality. The natives themselves were formerly influenced by the African National Congress, of which Nobel Prize-winner Luthuli was leader, and which demands political equality, irrespective of race. They are, however, tending to support the Pan-African Congress dominated by Nkruma of Ghana, which suspects all whites and stands for African dominance in Africa.

In South West Africa the white legislative body favors integration of South West Africa as a fifth province of the Union, as desired by the Union of South Africa itself. There is, however, a considerable minority, composed of many of the German population, that wishes an independent state of South West Africa, apparently because they believe that in such a state they could dominate the native and colored population even more efficiently.

The author's prognostications are gloomy. He anticipates violence, perhaps more serious in South West than in South Africa. He agrees with the United Nations Committee

that the continuing application of the *apartheid* policy in South West Africa and the continued defiance by the South African government of the authority of the United Nations over the Mandated Territory have created such a deep-seated resentment among all Africans and such a tense situation that only intervention by the United Nations can prevent armed racial conflict. (p. 228.)

<sup>1</sup> Judgment of Dec. 21, 1962 (Preliminary Objections), [1962] I.C.J. Rep. 319; digested above, p. 640.



He pictures how white brutality and African resentment will lead to further incidents like Sharpsville, developing increased fear and suspicion among both the whites and blacks and Communist and Pan-African activities, until "there are only frustrated masses cheated of their last avenues of peaceful protest, and fanatical defenders of a dying order poised Samson-like by the pillars of their own temple" (p. 208). He thinks the situation hopeless unless the United Nations brings effective pressure (p. 217).

From the point of view of international law, the situation faces the issue of states' rights *vs.* human rights. In an age of nationalism, peace doubtless requires that each state respect the sovereign right of other states to make and enforce law within their own territories as required by international law and the United Nations Charter. But it also requires that when barbarities are so flagrant that they threaten international peace, the United Nations must intervene effectively. Because of its special responsibilities in South West Africa, such intervention is undoubtedly called for in this area.

QUINCY WRIGHT

*Internationales Privatrecht.* By L. A. Lunz. Vol. 1: *General Part.* Translated by Horst Wiemann. Berlin: VEB Deutscher Zentralverlag, 1961. pp. xi, 280.

*Lehrbuch des Internationalen Privatrechts.* By I. S. Pereterski and S. B. Krylov. From the 2nd ed. revised by Krylov and Wilkow. Translated by Horst Wiemann *et al.* Berlin: VEB Deutscher Zentralverlag, 1962. pp. x, 244.

Until more among us will have acquired the linguistic facility needed to cope with works on Eastern law, their translation into any Western language will be highly welcome. In the law of conflict of laws we now have, in addition to Réczei's Hungarian *Private International Law*<sup>1</sup> and Wiemann's *Collection of Essays*,<sup>2</sup> in Professor Wiemann's excellent German, a "general part" by the leading living Russian specialist, Professor Lunz, and a complete treatise by the late Professors Pereterski and Krylov, besides such secondary sources as are available in English.<sup>3</sup>

There are considerable differences between the general theories under-

<sup>1</sup> See review in 55 A.J.I.L. 1034 (1961).

<sup>2</sup> *Fragen des Internationalen Privatrechts* (Wiemann ed., 1958). See De Nova, book review, 13 *Diritto Internazionale* 214 (1959).

<sup>3</sup> See, e.g., Drucker, "Soviet Views of Private International Law," 4 *Int. and Comp. Law Q.* 384 (1955); Kiralfy, "A Soviet Approach to Private International Law," 4 *Int. Law Q.* 120 (1951); Pisar, "Soviet Conflict of Laws in International Commercial Transactions," 70 *Harvard Law Rev.* 593 (1957). See also Verplaetse, "Colpo d'occhio sul diritto internazionale privato russo," 16 *Diritto Internazionale* 157 (1962); Lasok, "Polish Private International Law," in Grzybowski, Helezyunski, Nagorski and Lasok, *Studies in Polish Law* (1962); and generally Grzybowski, "Reform of Civil Law in Hungary, Poland, and the Soviet Union," 10 *A. J. Comp. Law* 253 (1961).

lying the two books.<sup>4</sup> But to the foreign reader there stands out the common feature that at least three-fourths of their contents are dedicated to an often painstaking analysis of foreign doctrine. Since that doctrine, usually without documentation,<sup>5</sup> is almost generally attacked as "capitalist," a frank and thorough discussion would in a small way assist that peaceful co-existence which all three authors stress repeatedly as the primary purpose of all conflicts law.<sup>6</sup>

At the outset, the scope of such a discussion requires limitation. Some of the attacks are beyond the scope of legal analysis and should more properly be treated as pertaining to an international administrative law.<sup>7</sup> This applies particularly to the subject of expropriations,<sup>8</sup> and in general to applications of what in Soviet law is apparently considered a proper measure of retaliation (Pereterski and Krylov 62-64). Moreover, Anglo-American usage requires exclusion of the rules governing citizenship, nationality, immigration and the rights of aliens in general (*ibid.* 75-81), as well as of the law of patents, copyright and trademarks (*ibid.* 153-162) and the entire field of civil procedure, including arbitration.<sup>9</sup>

In the remaining area, the law of conflict of laws, most attacks are directed against an ulterior capitalist motivation of such innocuous acts as treaties of friendship and other conventions,<sup>10</sup> and theories, such as all pluralistic doctrines (Lunz 99); the Western use of characterization in general (*ibid.* 190, 194) and "procedural" categories in particular (*ibid.* 21); or even the designation of conflicts law as "private" (Lunz 22; Pereterski and Krylov 11-15). Most surprising to the common-law lawyer in this context is the pervasive assumption that preference for judge-made law is due to similar motivations (Lunz 61 f.; Pereterski and Krylov 34 ff.), an assumption which is even applied to such age-old doctrines as the recognition of the parties' intention in the conclusion of a contract (Pereterski and Krylov 127), or such modern doctrines as that of the *Klaxon* case (Lunz 60). These assumptions are the more surprising in view of the fact that Soviet law itself has been almost wholly non-statutory, and that even the recently codified "General Principles" will

<sup>4</sup> See, e.g., regarding the relation between public international law and conflicts law, Lunz 4-6, 23, 24, note 29, as against Krylov in Pereterski and Krylov 3 ff. See also Baade, book review, 11 A. J. Comp. Law 468, note 9 (1962), concerning a similar controversy between Wiemann and Rézei.

<sup>5</sup> See the regretful statement to this effect in Pereterski and Krylov x.

<sup>6</sup> Lunz ix, 1, 27, *et passim*; Pereterski and Krylov 9, 96. For an excellent ideological analysis, see Baade, book review, 11 A. J. Comp. Law 464 (1962). But cf. Mann, book review, 11 Int. and Comp. Law Q. 305 (1962).

<sup>7</sup> Ehrenzweig, *Treatise on the Conflict of Laws* 486, 508 (1962), hereinafter cited as Ehrenzweig.

<sup>8</sup> Lunz 193 f., 204 ff., 208, 211 ff.; Pereterski and Krylov 55 ff., 105 ff., 199 ff. See also Schütte, [1960] *Jahrbuch für Ostrecht* 111.

<sup>9</sup> Pereterski and Krylov 196-233. See also the literature cited in Ehrenzweig, *op. cit.* 539, note 26.

<sup>10</sup> Some of these are said to be improperly applied to non-signatories. Lunz 41. See also *ibid.* 78, Pereterski and Krylov 33, as to the non-recognition of international customs.

leave more discretion to the judge than American judge-made law.<sup>11</sup> Finally, some otherwise most valuable discussions on specific topics are often distorted by such statements as that a bourgeois marriage is essentially a proprietary contract designed to secure the husband's mastery over the wife's person and assets (Pereterski and Krylov 164). On the other hand, some misunderstandings, such as that of the Anglo-American concept of jurisdiction, are common among civilians of all countries (see Ehrenzweig 1-3). And we must at least enter a plea of confession and avoidance when American attitudes to divorce are criticized as "hypocritical" (Pereterski and Krylov 171; see Ehrenzweig §§ 71 ff.); when our treatment of illegitimate children is considered a blot on our law (Pereterski and Krylov 176; cf. Ehrenzweig § 142); or when undue stress is found in Western law on paternal power as against the exclusive concern for the child's welfare (Pereterski and Krylov 175 f.; see Ehrenzweig §§ 86 ff.). Serious doubts may also be entertained as to the justification of the practice of some American probate courts to deny to Soviet citizens inheritance rights on grounds of lack of reciprocity,<sup>12</sup> and to withhold funds as unlikely to reach the distributee.<sup>13</sup> When all is said and done, the fact remains that Russian scholars have begun to pay serious attention to American case law and doctrine at a time when many Continental and even English scholars still treat our law as *terra incognita*, and when, on the other hand, much of American writing continues to ignore the results of Eastern research, whose characterization as "Communist" is usually as meaningless as that of Western doctrine as "capitalist."

There are indeed many areas in which the exchange of views by scholars of both legal orbits would promise gain for both, particularly once court decisions will mutually have been made more readily available. The books here under review offer many useful clues for such an undertaking. Beginning with detailed bibliographies not readily available elsewhere,<sup>14</sup> there are historical notes, such as those regarding Russian treaty activities which reach back to the beginning of our millennium (Lunz 86; Pereterski and Krylov 181), or those regarding Dumoulin's relation to d'Argentré (Lunz 92), or the doctrine of comity (*ibid.*); and fine analytical studies following Continental tradition (Pereterski and Krylov 38 ff.), including one on the theories of *fraude à la loi* (Lunz 220-225; Pereterski and

<sup>11</sup> General Principles of Civil Law, adopted by the Supreme Soviet on Dec. 8, 1961 (effective May 1, 1962), accessible in a German translation in [1962] *Staat und Recht* 357 ff., 528 ff. It is unfortunate that these Principles could not be included in the books under review. This reviewer is the more indebted to Professor Wiemann (Berlin) for having permitted him to examine a German translation, prepared for intramural purposes, of an article by Professor Lunz that deals with the impact of the Principles on his teaching.

<sup>12</sup> See Berman, "Soviet Heirs in American Courts," 62 *Columbia Law Rev.* 257 (1962).

<sup>13</sup> See Ehrenzweig 26, note 33, 668, note 39. See the persuasive dissent of Justices Douglas and Black in *Ioannou v. New York*, 371 U. S. 30 (1962), digested in 57 *A.J.I.L.* 438 (1963).

<sup>14</sup> Lunz 31 ff., 101 ff., 256-272; Pereterski and Krylov 24-26. See also Verplaetse, cited note 3 above, at 171-175.

Krylov 59) and *renvoi*,<sup>15</sup> as well as realistic appraisals of the problems of pleading and proving foreign laws (Lunz 247, 252; Pereterski and Krylov 49-53). Moreover, we find important materials for common study in "intersocialist conflicts law," which demands separate treatment similar to our interstate law as opposed to international rules,<sup>16</sup> and which is increasingly codified in treaties (*ibid.* 129-149, 187 f.).<sup>17</sup> Many other problems will admit of common analysis, such as the shrinking rôle of public policy (Lunz 28, 200-220; Pereterski and Krylov 53-57); the allegedly general regime of the *lex situs* (Lunz 80; Pereterski and Krylov 97-100, 119); the new theorem calling for the adjustment of foreign applicable rules (Lunz 28; Ehrenzweig 347); the division of the conflicts law of succession (Pereterski and Krylov 183 f.); the characterization of heirless property;<sup>18</sup> the nationality of associations and their extraterritorial capacity (*ibid.* 83-94); as well as the many-faceted issues involving statutes of limitations (Lunz 46, 199). And there are areas that have remained uncharted in both orbits, such as the conflicts laws of torts, as to which Soviet law apparently tends toward the English solution (Pereterski and Krylov 150-152), and contracts, where Soviet law apparently tends to the *lex validitatis* (*ibid.* 123 f.; Ehrenzweig §§ 175 ff.). Most important, however, would probably be a common re-thinking of the rôle of the *lex fori*, which is now being re-evaluated in the United States (*ibid.* §§ 101 ff.) and which plays a predominant part in Soviet law.<sup>19</sup> Vested rights seem to have disappeared in that law (Lunz 44; but *cf.* Pereterski and Krylov 8 as to contracts), and the *lex fori* has occupied even such border areas as parts of the law of succession (*ibid.* 185 f., 189), including the form of wills (*ibid.* 187) or marital capacity and property (*ibid.* 166).

In conclusion the writer would like to express his regret that, unfortunately, any review of a major treatise is of necessity either limited to a mere general commendation or, "owing to the customary perversity of the

<sup>15</sup> Lunz 225-240. This discussion is marred only by the unsupported suggestion that this highly controversial doctrine (Ehrenzweig § 116) has been used by Western courts to defeat applications of Soviet law. Lunz 231. See also Pereterski and Krylov 47 ff.

<sup>16</sup> Lunz 1, 3, 29, 45 f., 54 f., 70-77, 102; Pereterski and Krylov 21. See, generally, Ehrenzweig § 6. Regarding the law of sales where reference to the law of the seller has replaced the chaos still prevailing elsewhere, see Lunz 73; Pereterski and Krylov 139 ff. See, generally, Boguslavski, "Conflict of Laws in Relations between Socialist Countries," 7 *Rev. of Contemp. Law* 260 (1960); Wiemann, "Caratteristiche sui Rapporti di Diritto Internazionale Privato fra gli Stati Socialisti," 16 *Diritto Internazionale* 274 (1962). The interstate law of the Soviet Union is governed by a series of abstract rulings of the Soviet Supreme Court of Feb. 10, 1931. Lunz 45 f. See Verplaetse, note 3 above, at 158.

<sup>17</sup> See, *e.g.*, Battifol, "Les règles de conflits de lois dans les traités conclus entre l'U.R.S.S. et les démocraties populaires," 49 *Rev. Crit. de Droit Int. Privé* 287 (1960); Drobnig, "Conflict of Laws in Recent East-European Treaties," 5 *A. J. Comp. Law* 487 (1966); *idem*, "Die Kollisionsnormen" etc., 6 *Osteuropa-Recht* 154 (1960).

<sup>18</sup> Pereterski and Krylov 190-192. Characterization in general is persuasively analyzed as the result of mere interpretation of the domestic norm. Lunz 181 ff. See also Ehrenzweig § 110.

<sup>19</sup> See, *e.g.*, Lunz 43, 46, 96; Verplaetse, note 3 above, at 170.

reviewer,"<sup>20</sup> a compilation of his disagreements. It is feared that, having avoided the first pitfall, the reviewer has not been able to avoid the second one, and that the long list of criticisms may conceal his sincere respect for two works of true scholarship.

ALBERT A. EHRENZWEIG

*Soviet Administrative Legality. The Role of the Attorney General's Office.* By Glenn G. Morgan. Stanford: Stanford University Press, 1962. pp. xii, 281. Index. \$6.00.

The Soviet Procuracy (Attorney General's Office) is perhaps the principal key to the operation of the Soviet legal system. Dr. Morgan is therefore to be congratulated on producing the first book on the subject in English. Wisely, he has confined himself to one important aspect of the Procuracy's work, namely, its supervisory powers over the observance of laws by administrative bodies. The book will be of special interest to lawyers because of a growing dissatisfaction with the limitations of judicial control over administrative abuses in countries which have witnessed a large increase in governmental powers. Such dissatisfaction has found reflection in recent years in the widespread attention which has been given in England and elsewhere to the Scandinavian *Ombudsman*, an official who fulfills many functions similar to those performed by the Soviet Procurator.<sup>1</sup>

At the same time, students of Soviet affairs should be attracted by the subject, especially in view of the neglect of it in most books on Soviet government. The Soviet Procuracy is a product of Russian history as well as of Leninist policy. Peter the Great founded the Russian Procuracy as the "eye of the Tsar," to maintain permanent and systematic supervision over the legality of the activities of the Tsar's subordinate officials. With the Russian law reform movement of the mid-19th century, the Procuracy was reduced to functions similar to those of its Western European counterparts. In 1922 Lenin revived the institution in its older form.

In recounting this history, Dr. Morgan stresses the connection between the large powers of the Procuracy and the autocratic nature both of earlier Tsarism and of modern Communism. He misses one of the main points of the connection, however, namely, that the Procuracy itself has no administrative powers other than the power to indict for crime: its principal weapons are its powers to "protest" an administrative or judicial act to higher administrative or judicial authorities and to "propose" measures for rectifying particular illegal activities. Thus the Procuracy's independence is no threat to the central authorities: indeed, its function is to call to their attention violations of laws and regulations which they themselves have enacted.

<sup>20</sup> Kalven, book review, 61 *Michigan Law Rev.* 414, 415 (1962).

<sup>1</sup> Cf. Whyatt, *The Citizen and the Administration* (London, 1961); "Ombudsman at Work," *The Economist*, June 23, 1962, p. 1222; Jägerskiöld, "Swedish Ombudsman," 109 *Univ. of Pa. Law Rev.* 1077 (1961); Cristensen, "Danish Ombudsman," *ibid.* 1100. Dr. Morgan discusses the *Ombudsman* very briefly in his Introduction.

Since much of the Soviet Procuracy's work is concerned with preventing various state agencies from usurping powers, it seems fallacious to argue, as the author does, that the Procuracy is not concerned with the protection of individual rights but only with the protection of state interests. It may well be that in protesting a local decree prohibiting the washing of dirty linen, or another local decree prohibiting kissing in evening parties to avoid contagion by venereal disease (pp. 65-66), the Procuracy was more concerned with jurisdictional questions affecting state control than with the sacred right of individuals to wash and to kiss; yet the distinction seems artificial. To cite a more important and more recent example, the successful protest of the Procuracy in 1960 against a decree of the Council of Ministers of a small autonomous republic restricting local employment to local residents, on the ground that it violated the Constitutional guarantee of the right to work (p. 145), represents a protection of both a state and an individual interest in mobility of labor. It is true, of course, that a decree of the Council of Ministers of the U.S.S.R. (or even of the R.S.F.S.R.) restricting the movement of workers into Moscow, for example, would not be subject to such protest.

From the Western point of view, the most striking feature of the Procuracy's work is the fact that it performs functions which in Western countries have traditionally been left, as the author puts it, to the courts. What is meant, of course, is resort to the courts by private individuals and groups. (The Procuracy also resorts to the courts in many instances, through its power of indictment, and indeed through its additional power to intervene in civil cases.) One should add that other official agencies in Western countries also participate in supervision of legality; in the United States, for example, such supervision is exercised by Congressional investigating committees as well as by Government attorneys. (The amount of activity of Federal and State attorneys in protesting illegalities outside of court would, I think, surprise the author.) Nor is the Procuracy the only body in the Soviet Union which investigates abuses of law either on its own motion or on complaint by a citizen; the press, Communist Party organizations, and other agencies also perform an important rôle in that respect. Yet after all this is said, the fact remains that the Procuracy plays a far larger part in systematic supervision of administrative legality than any other Soviet agency or than any official agency in the United States. It hears, investigates and reports on hundreds of thousands of citizens' complaints each year, and it often initiates investigations on its own motion.

The author considers that there is a negative side to this, in that the Procuracy is a branch of the Executive and subject to its control (pp. 3-4). Technically, this is not accurate; the Procurator General of the U.S.S.R. is appointed by the Supreme Soviet, and his organization is subordinate to no other governmental body. Of course the Procuracy, like the Supreme Soviet itself, as well as the Council of Ministers and the judiciary, is controlled by the top leadership of the Communist Party.

Therefore, as the author rightly concludes (p. 251), it would not sub-

stantially improve matters—from the standpoint of civil liberties—to shift some of the powers of Procuracy to the Soviet courts. Indeed, it would worsen matters, for in general the Procuracy is on a higher level than the courts in prestige, in quality of work, and in independence of local Party influence.<sup>2</sup>

Given a Communist regime, the Procuracy must be viewed as part of a system of checks and balances at an intermediate level; some Soviet writers have referred to it as a fourth branch of government. Despite some weaknesses,<sup>3</sup> Dr. Morgan's study of its supervisory powers should therefore be welcomed as a contribution to scholarship not only in the field of Soviet law narrowly conceived but also in the field of Soviet political institutions generally.

HAROLD J. BERMAN

*Sammlung der Deutschen Entscheidungen zum Interzonalen Privatrecht. 1954-1957* (2 vols.). Part I: Nos. 1-196. pp. x, 500; Part II: Nos. 197-407. pp. x, 755. Index. DM. 65; *1958-1959*. pp. xii, 663. Index. DM. 46. Edited by Ulrich Drobnig, Max Planck Institut für Ausländisches und Internationales Privatrecht. Berlin: Walter de Gruyter & Co.; Tübingen: J. C. B. Mohr (Paul Siebeck), 1960, 1961, 1962.

The journal of the German Institute for Foreign Law and Private International Law, the *Rabels Zeitschrift für Ausländisches und Internationales Privatrecht*, has brought out periodically volumes of collected

<sup>2</sup> At several points the author characterizes the Procuracy as lacking in professional qualifications and legal education. He cites no statistical data, but has apparently drawn on general Soviet self-criticism for this view. However, the 1955 statute on the Procuracy makes higher legal education a prerequisite for membership except in rare cases, and, indeed, the Procuracy has always attracted a large percentage of the most able Soviet lawyers. The author gives no basis for his statement that "those appointed to watch over legality at the lowest governmental levels simply have not had sufficient education or legal training to perform their tasks well" (p. 107).

<sup>3</sup> The principal weakness of the book is attributable in part to the absence of adequate statistical data and the consequent necessity to rely on secondary sources. The author in many instances has fallen into the common error of taking these sources too seriously, especially when they reveal shortcomings. It is tempting to treat every Soviet self-criticism as an admission against interest and therefore to be believed. Often, however, the self-criticism is, in the Soviet context, self-serving. Concretely, perhaps the most serious defect in Dr. Morgan's work is his reiterated assertion that the Procuracy's function of general supervision was "in abeyance" from 1929 to 1936 (Ch. 5) and again "vanished" in the war years (*cf.* p. 115). There is little evidence for this, and much evidence to the contrary in the text itself. A second defect, already referred to in the body of this review, is the reiterated assertion of a conflict between the Procuracy's subservience to state interests and its function of protecting individual rights; individual rights themselves are substantially limited under Soviet law, but within those limitations, and within the Procuracy's own limited powers of general supervision, the conflict is not apparent. Also Dr. Morgan's insistence at various points, and especially in his conclusion, that the Procuracy function of supervision is anti-democratic and that it is essentially linked with absolutism and with a primitive social order, is contradicted by the Scandinavian experience.

decisions on conflict of laws rendered by German courts. Since the last war and the division of Germany into two parts, a large number of the decisions in the conflicts field have been concerned with issues resulting from the division of Germany. It was decided to publish separately the decisions involving inter-zonal conflicts questions. A first set of two volumes with almost 600 decisions, covering the years 1945 to 1953, came out in 1956-1957; a second set of two volumes, announced above, with about 400 decisions, from the years 1954 to 1957, followed in 1960-1961; and the most recent volume, also announced, with more than 200 decisions for the years 1958 and 1959, has just come out. The editor for all the volumes has been Dr. Ulrich Drobnig, known in this country from his editorial work for the second edition of the first two volumes of Rabel, *Conflict of Laws: A Comparative Study*.

The material found in the five volumes is of great interest not limited to the conflicts specialist. It illustrates the human, social, economic, and political problems created by the division of Germany and the establishment of a socialist system in the East. The courts soon had to face the question whether to apply to inter-zonal conflicts of laws and jurisdictions the traditional German conflicts rules or to consider the two zones as still one unit and develop some other rules. Views have changed back and forth, as the decisions indicate, and the results reached have not been the same for different types of issues of law. The decisions in the most recent volume show that the doctrinal struggle of the courts is far from over.

The number of inter-zonal conflicts cases seems to have grown steadily. This is due, no doubt, in part to the fact that uniformity of law in the two zones is gradually disappearing, and in part to the massive exit of population from the East to the West, with ensuing "internationalization" of legal relationships.

The bulk of the decisions in the volumes is from courts in West Germany, including the Restitution Courts. However, the volumes also contain some decisions from courts in the East, and they will be examined with special curiosity. In some of the reported decisions political considerations dominate, but no general conclusions can be drawn from the few cases included in the volumes.

On the whole, the Powers on both sides seem to have refrained from legislating on the inter-zonal conflicts of laws, leaving it to the courts to try to make the best out of a fantastic factual and legal tangle. However, examination of the decisions on recognition of judgments reveals that West Berlin has enacted a law on this subject. Decisions from German courts located outside the West Berlin jurisdiction shall be enforced only if they do not violate constitutional principles, *bonos mores*, or the aim of existing provisions of law. The reported case law is interesting. Apparently, enforcement of decisions from Eastern courts will be denied if the judgment debtor's property was nationalized in the East without payment of compensation.

The volumes have been edited with care. Good indices facilitate their use. The decisions are reproduced without comments or annotations.



However, if the decision was annotated in the original report, the annotation can be located through given back-references. The collection contains a number of formerly unreported decisions. The volumes are an excellent supplement to the doctrinal presentations of inter-zonal conflicts law found in the leading treatises on private international law of West Germany.

KURT H. NADELMANN

### BRIEFER NOTICES

*Preventing World War III: Some Proposals.* Edited by Quincy Wright, William M. Evan and Morton Deutsch. (New York: Simon and Schuster, 1962. pp. 460. Index. \$6.95.) Each of the twenty-eight contributors to this volume had been asked to develop an "original and significant proposal which, if implemented, would lessen the chances of World War III." The result is a lively, if uneven, potpourri of ideas ranging from Riesman's delightful fantasy on "The Nylon War" and Zellig Harris' imaginative recommendation for the creation of an auxiliary world language to the more familiar proposals of Arthur Larson and Quincy Wright for the strengthening of international law and the United Nations. Many of the essays are by behavioral scientists who have naturally sought to draw upon their own disciplines for ideas applicable to international problems; in some cases this has resulted in overblown statements of the obvious and in proposals that seem remote from the facts of international life. Experience with juvenile gang rivalry, psychoanalytical therapy or game theory may be instructive in behavioral problems generally, but there is a remarkable simple-mindedness in some of the suggestions to treat international relations in those terms. Of course, this is not to suggest that behavioral scientists do not have valuable insights to contribute. The essays by Thomas Schelling, Talcott Parsons and Emile Benoit in the present volume are well worth reading, and there are stimulating ideas in several of the pieces on "psychological inspection" for disarmament (as, for example, those by Bohn, Karl Deutsch and Melman).

The rôle of law is treated mainly in the papers of Roger Fisher and Arthur Larson; both place emphasis on the conditions and realistic means of achieving a wider reliance on rules and legal procedures. While their views may be familiar to readers of this JOURNAL, their contributions should help clear up some misconceptions about law which non-lawyers tend to have. Professor Sohn contributes a paper containing a number of proposals designed to strengthen the United Nations by giving the "positive neutralists" a more important rôle; his suggestions are probably closer to realization than are any of the proposals in this book and, for that reason, as well as their own merits, they should be of particular interest to students of international organization.

OSCAR SCHACHTER

*Diplomats in International Cooperation: Stepchildren of the Foreign Service.* By Michael H. Cardozo. (Ithaca: Cornell University Press, 1962. pp. xxiv, 142. Index. \$3.50.) This volume provides a useful study through 1959 of the structures and functioning of the international organizations which emerged from the wartime agencies for international assistance and co-operation, as well as those established for the European

Recovery Program and the North Atlantic Treaty Organization. Lend-Lease, UNRRA, OECD, NATO, the European Coal and Steel Community, Euratom, the European Common Market and the national missions accredited to such undertakings, such as the SRE, the ECA country-missions, the USRO, MAAG and the U. S. Mission to the European Communities are examined in varying detail. From these experiences the author concludes that personnel assigned to represent national interests at or in those organizations must be considered more as diplomats than as delegates to international organizations, since the latter have yet to attain supranational stature, although, as he remarks, a diplomat assigned to one of them "is likely to find himself performing functions that remind him more of the work of a legislative delegate than of a traditional ambassador." The importance of these activities and the degree of specialization required for the "diplomacy of international cooperation" as the author convincingly argues, call for recognition of the specialists as the "equals of the diplomatic generalists" in respect of perquisites, privileges and career assignments"—a recognition that has yet, in his opinion, to be accorded. Less attention is devoted to the status of the permanent non-national staffs of these organizations. It is to be hoped that Professor Cardozo will carry forward the study beyond 1959 to include examination of this problem in particular and in the light of recent developments.

JOHN H. SPENCER

*Anuario Uruguayo de Derecho Internacional 1962.* (Biblioteca de publicaciones oficiales de la Facultad de Derecho y Ciencias Sociales de la Universidad de la República. Sección III—CXXI. Montevideo: República Oriental del Uruguay, 1962. iv, 399.) It is encouraging to see how the literature on international law in many forms is steadily increasing all over the world. The first *Uruguayan Yearbook on International Law*, here under review, is not just one more yearbook, but a particularly valuable enrichment of the literature. It is, as the Dean of the Montevideo Law School says in the preface, a collective effort of the professors and students of that Law School, destined to serve the teaching of this field. The structure of the *Yearbook* corresponds with this goal. There is a section of Official Documents (the joint Uruguay-Argentine Declaration concerning the outer limits of the Rio de La Plata and the Vienna Convention on Diplomatic Relations). There is a section containing decisions of the Supreme Court of Uruguay involving problems of international law. There is a university section containing interesting information on the contents and methods of what is called at the Montevideo Law School the "intensive seminar in international law." There are a students' section giving analyses by students of certain international situations and problems, and a bibliographical section containing book reviews of works on international law in Spanish, and eight articles.

The volume contains an interesting article on the international law of expropriations and nationalizations, a reprint of the paper presented by the late Professor of the Montevideo Law School Alfonsín at the *Jornadas de Buenos Aires*, which is followed by a very interesting article on the same subject by Professor Eduardo Jiménez de Aréchaga. Other articles deal with the Eighth Consultative Meeting of the Foreign Ministers of the American Republics, the judicial procedures under the Pact of Bogotá of 1948, and with the problem of regionalism and regional coercive action under the Charter of the United Nations.

While the *Yearbook* is a collective effort, the initiator who determined its content and who personally collected the materials which compose

this volume is Professor Jiménez de Aréchaga. The variety of the content, the choice of the subjects, the equal consideration given to general international law, to the law of the United Nations, to particular problems of Latin America, such as diplomatic asylum, to the law of Pan America, and particularly to the much too little studied relation between the law of the Charter of Bogotá and the Rio Treaty and the U. N. Charter—all this is certainly to his credit.

We welcome this *Uruguayan Yearbook of International Law*. We congratulate the Montevideo Law School and Professor Jiménez de Aréchaga, and we earnestly hope that this Yearbook will become a permanent institution.

JOSEF L. KUNZ

*Rezervite v Deklaratsiite za Priemane Zadülzhitel'nata Iurisdiksiia na Mezhdunarodniia Súd i Trakhnoto Vliianie vürkhu Kompetentnostta na Súda* [*Les Réserves dans les Déclarations d'Acceptance de la Jurisdiction Obligatoire de la Cour Internationale de Justice et Leur Influence sur la Compétence de la Cour*]. By Alexandre Yankov. (Sofia: Annuaire de l'Université de Sofia, Faculté de Droit, Vol. 52, 1961. pp. 145. Résumés in Russian and French.) Yankov's work is a praiseworthy attempt to present in a monographic study a comprehensive analysis of the reservations in the declarations of acceptance of the compulsory jurisdiction of the International Court of Justice. His thesis, based on Soviet concepts of international law, is that the peaceful co-existence of states of a different social and economic structure represents a safe alternative in the development of international relations in the contemporary era. The realization of peaceful co-existence requires the solution of international disputes between states by peaceful means. Direct negotiations, he considers, are the most effective; however, there are also other ways, one of which is the International Court of Justice. In his view, the administration of international justice in general and the establishment of the Court's jurisdiction in particular are based on the agreement of the parties. In other words, there exists, as an outcome of the concept of sovereignty, an incontrovertible principle of general international law that no state is obliged to submit a dispute with another state to an international tribunal. Such submission requires the agreement of the parties to the dispute. And from this principle derives another, that the jurisdiction of every international institution, including that of an international tribunal as well as the compulsory jurisdiction of the International Court of Justice, is based on the consent of the states as parties to a dispute. In the administration of international justice through the International Court, the problem of its jurisdiction occupies an important place, and the most difficult question is the jurisdiction of the Court based on the acceptance of the "optional clause" of its Statute by unilateral declarations of states, in which numerous reservations are made limiting the jurisdiction of the Court.

A valuable contribution of Yankov's work is the effort to give a more thorough analysis of the legal nature of declarations of acceptance and to systematize the great number and different types of reservations; he suggests their classification in four groups: *ratione temporis*; *ratione materiae*; *ratione personae*; and of a procedural nature. In this connection, the author devotes considerable space and effort to a criticism of the Conventionally reservation, which in practice, as he puts it, leads to a "unilateral invalidating of the optional clause, and undermining of the importance of compulsory jurisdiction" of the International Court of Justice (p. 121).

This book, which reflects the Soviet concepts of international law and is based on extensive citations of authority, is a well-written scholarly work and a profound analysis of the problems discussed.

IVAN SIPKOV

*Ogovorki v Teorii i Praktike Mezhdunarodnogo Dogovora.* By S. V. Filippov. (Moscow: Izdatel'stvo Instituta Mezhdunarodnykh Otnoshenii, 1958. pp. 102. 3 R. 60 Kop.) In this short monograph, the Soviet author deals with two quite distinct problems of international law—reservations to multilateral treaties and *clausula rebus sic stantibus*. The reason for this unusual juxtaposition seems to be a linguistic accident—in Russian, the word *ogovorka* is used to signify both “reservation” and “*clausula*.” The author, however, also seeks to justify the juxtaposition by the argument that reservations and the *clausula* are both devices by which a state's obligations under a treaty may be limited.

In the first sixty pages, the author gives a concise but informative account of the problem of reservations. Like all Soviet writers, he mentions the political implications of the topic, noting that a political struggle may often be seen behind a reservation. He argues in moderate terms for the present Soviet position on the permissibility and effect of reservations (see U. N. Doc. E/CN.7/AC. 3/9, September 11, 1958, p. 81, to which the author does not refer), which is very close to the so-called Pan American rule, but fails to note that this position represents a retreat from that taken in 1950–1951, when the Soviet Government apparently espoused the view that a ratification or accession with a reservation was effective even with respect to an objecting party.

Much less adequate is the author's treatment of the doctrine of *rebus sic stantibus*, to which he devotes only some forty pages. He misinterprets Hyde's position as one of categorical denial of the doctrine, and confuses the latter with the principle of impossibility of performance. The author's own position is not formulated with complete clarity, but he seems to take the view that a state may unilaterally denounce a treaty if its continued performance is impossible or threatens the state's vital interests. He stresses the applicability of the doctrine to situations in which a state undergoes revolutionary change, and refers to it as a powerful weapon in the struggle against “the chains of colonialism.” (p. 75.)

O. J. LISSITZYN

*Völkerrechtliche Schiedsinstanzen für Einzelpersonen und ihr Verhältnis zur Innerstaatlichen Gerichtsbarkeit. Eine Untersuchung der Praxis seit 1945.* By Hans-Joachim Hallier. (Max-Planck-Institut für Ausländisches Öffentliches Recht und Völkerrecht, Beiträge zum ausländischen öffentlichen Recht und Völkerrecht, No. 35. Cologne: Carl Heymanns Verlag KG, 1962. pp. xvi, 147. DM. 25.) This short volume is a useful addition to the literature on the opportunities for individuals to have their causes decided by arbitral tribunals applying rules of international law. In a sense the volume is a commentary upon certain parts of the author's collection of treaties and other materials published in 1961. While the present work purports to be based upon practice since World War II, it does not ignore earlier practices, particularly those of the Mixed Arbitral Tribunals. One welcomes an author's sense of the roots of his subject, particularly when his undertaking includes an effort to identify trends away from classical doctrines. A bit of disappointment may be felt that much of the study covers well-traveled ground, but perhaps this feeling originates in the bias with which one approaches the book, e.g., upon what

subjects one hopes will be discussed in relation to the impact of international arbitration of individuals' causes, however technically garbed, upon a state's internal jurisdiction. Appreciative as one must be for having his attention called to such less well-known instances allowing individuals to seek remedies, as the Moselle Commission arrangements and the postwar arrangements for Germany, it is hard to escape the feeling that the basic question of what solid advances, if any, have been made on behalf of individuals gets lost both in technicalities and in an overly organized style that sometimes produces two or three-sentence sections, with important material in longer footnotes. But one can put up with literary shortcomings for the sake of a guide to matters that one might choose to pursue further and to the related literature.

WESLEY L. GOULD

*The Legal Status of Foreigners in the U.S.S.R.* By M. Boguslavsky and A. Rubanov. (Translated from the Russian by Julius Katzer. Moscow: Foreign Languages Publishing House, 1961. pp. 123.) The present study is a translation into English of the first Russian edition of a booklet published in 1959 and, for this occasion, according to the introduction, "the authors have made a number of amendments in the text." The changes are minor, however, and mainly consist of a few additions noting the most recent developments, and some explanatory passages for the enlightenment of the foreign reader.

If one discounts the usual number of standard denunciations of "imperialism" to be encountered here and there in the course of the analysis, particularly in the early chapters, and the uniform tone of uncritical praise of all things Soviet which has now become mandatory equipment for all Soviet scholars, the monograph proves to be a useful brief survey of the question of the formal status of aliens in the Soviet Union in the light of Soviet domestic legislation and sundry international agreements concluded by the U.S.S.R. addressed specifically to this problem or indirectly touching upon it. The examination of the operation of these laws in actual practice, however, is at best cursory and, needless to say, is always limited to instances which present the Soviet record in a favorable light. Most of the examples are drawn from current practice and nothing at all is said of that period of the recent past when extra-judicial repression and arbitrary police methods were widespread and did not discriminate, or discriminated very little, between citizens and non-citizens unfortunate enough to attract the unwelcome attention of the regime.

One particular matter is given considerable emphasis throughout, in line with the official attitude and the authors' personal research interests—the question of the right of foreigners to inherit under Soviet law. The issue seems to be quite a sore point with the Russians today, and Boguslavsky and Rubanov repeatedly go out of their way to stress the existence of such a right, to illustrate it with appropriate citation of examples and to denounce "bourgeois" courts, mostly those of the United States, and especially those of California, which fail to recognize this fact and refuse to allow reciprocal inheritance by Soviet citizens of property willed to them and located in those countries.

In 1962, a second revised and supplemented Russian edition of the study was brought out, which takes into account the relevant legislation and international agreements of the U.S.S.R. in effect as of April 1, 1962, has a score of pages more than the first version, and contains a number of new details and a coverage of the latest developments in this field.

On the whole, then, this is a handy introduction to a subject which is

gaining in importance in view of the ever broadening area of contact between the U.S.S.R. and the outside world, but must be used with care and discrimination, since it confines itself largely to formal description in glowing terms of the applicable statutes and gives very little insight into the sphere of the practical enforcement of these legal provisions. Unhappily, it is the latter aspect of Soviet law which, all too often, has been more than questionable.

GEORGE GINSBURGS

*Central Banking Legislation.* A Collection of Central Bank, Monetary and Banking Laws. Selected and annotated by Hans Aufricht. (Washington, D. C.: International Monetary Fund, 1961. pp. xxii, 1012. Index. \$10.00.) This volume presents Central Banking legislation and selected monetary laws of 21 countries divided into three groups. The first group consists of the United Kingdom and the Commonwealth countries of Australia, Canada, the Federation of Rhodesia and Nyasaland, and the Union of South Africa. The second group consists of the eight Asian countries of Burma, Ceylon, India, Indonesia, Japan, Korea, Pakistan and the Philippines. The third group consists of eight Central American and Caribbean countries, namely, Costa Rica, Cuba, Dominican Republic, El Salvador, Guatemala, Honduras, Mexico and Nicaragua.

As the late Dr. Per Jacobsson, Managing Director of the International Monetary Fund, points out in the preface, this volume represents a cross section of both the traditional and the most recent attitudes on the legal techniques employed for the purpose of regulating money and credit. The massive task of collecting, translating and editing this material has been successfully achieved by Dr. Aufricht, thereby placing at the disposal of the practitioner and student an invaluable tool in this relatively little known but highly important area of international law. For each country, Dr. Aufricht has assembled the Central Banking Laws, the most pertinent monetary laws, the Bretton Woods legislation (Ratification of membership in the International Monetary Fund and the International Bank for Reconstruction and Development), and excellent bibliographical notes, invaluable to the researcher.

It is hoped that future volumes will incorporate the Central Banking Laws of the industrial European and the larger South American countries. Consideration might also be given to a loose-leaf edition for the use of the practitioner who wishes to keep the study up to date and account for the constant changes occurring in this field. While, obviously, a collection of documents of this kind is intended primarily to serve as a ready reference for Central Banking legislation, it also presents an interesting study of comparative law and the varied methodology utilized by countries in dealing with their monetary systems. The volume's utility should, therefore, not be restricted to bankers, practitioners and international civil servants, but should prove valuable to students, teachers and others interested in comparative law and international finance.

ARNOLD H. WEISS

*Lezioni di Diritto Internazionale Privato.* 3rd ed. By Rolando Quadri. (Naples: Liguri, 1961. pp. 337.) We often do not wish to realize the decisive impact legal education has had on the development of the law. How much the Harvard revolution of case teaching has contributed to the current fragmentation and automation crisis of American law remains to be determined. Another less dramatic but significant example of the law school's influence on the legal process is the present state of conflicts

law in the very country in which that discipline originated one thousand years ago: That Italian code and court law has reached little beyond sterile dogma may be largely due to the fact that the great majority of Italian treatises in this field have been limited to "general parts" and to the regrettable insistence of Italian law schools upon teaching conflicts law as a mere adjunct to full-fledged courses of public international law.

The book under review promises to become the first break-through to a more realistic approach. To be sure, the author, himself an outstanding specialist in public international law, has chosen to proceed to a third edition of his "Lectures" without attempting to produce the sorely needed "special part." Again we must be satisfied with four chapters on "underlying concepts and considerations," "the foundation and the nature of conflicts law," its "object" and public policy. But the book is replete with references to foreign literature on many specific problems. Moreover, only constant preoccupation with such problems can support such brilliant and unorthodox arguments as that against the desirability of codification in our field (pp. 48, 102, 182-207). One may hope that Quadri's complete treatise will utilize some of those experiences of American practice to which Italian writers have been given access by De Nova's admirable work.<sup>1</sup>

ALBERT A. EHRENZWEIG

*Die Internationalisierung von Territorien: Darstellung und Rechtliche Analyse.* By Raimund Beck. (*Untersuchungen zur Auswärtigen Politik*, Vol. 2. Stuttgart: W. Kohlhammer Verlag, 1962. pp. 120. DM. 13.80.) In this monograph the author seeks to achieve four goals: first, a determination as to whether the term "internationalized territory" has acquired an established meaning in international law; second, if so, a description of its characteristics; third, the motives for internationalization; and finally, the reasons for the failure of international regimes. To fulfill this task, territories which at one time or another were internationalized (Tangier, Saar, Danzig), as well as plans and proposals for internationalizing other areas (e.g., Trieste, Jerusalem, Antarctica), are examined from an historical and analytical perspective. Distinctions are drawn between internationalized entities and other subjects of international law, such as sovereign states, protectorates, condominiums, mandates and trusteeships, and the suggestion is offered that the term "internationalized territory" or "internationalization" as applied to territory be introduced into the field of international law as a new and specific concept. The feature which Dr. Beck finds common to all international regimes is the exercise of governmental power by an international organ either independent of, or in conjunction with, local officials and, subject to one or two exceptions, the vesting of sovereignty in an international body or organ.

Such a view, however, does not indicate clearly and adequately that the international system is familiar with various degrees of internationalization. Indeed, an international regime may be said to exist in instances in which the international administration, instead of being of a general and complete nature, is limited to certain specified functions. Illustrative of such a situation was the authority granted to the European Commission of the Danube to plan and execute below Isatscha the works necessary for clearing the mouths of the Danube and the neighboring parts of the sea from impediments and obstructions and to promulgate navigation and

<sup>1</sup> De Nova's writings on American law are too numerous to be listed in this note. For a selection of references, see Ehrenzweig, *Conflict of Laws* 751 (1962) (Index of authors).

police regulations for the lower Danube. Or again, the Cape Spartel Lighthouse, constructed at the expense of the Moroccan Government, maintained with funds contributed by the other contracting parties to the 1865 Convention, and administered by an International Commission, which could establish rules necessary for the operation and supervision of this part of Sherifian territory, but was not empowered to perform acts which impaired the proprietary and sovereign rights of the Sultan, may be cited.

Although the work is in parts sketchy and although some of the statements are questionable—for example, the view that the small percentage of Saarlanders voting for the League of Nations regime in the plebiscite of 1935 proved that the regime did not coincide with the wishes of the population, without taking account of the agitation fomented by Nazi Germany—this is nonetheless a useful study, all the more so since the literature in this area is relatively scant.<sup>1</sup>

GUENTER WEISSBERG

*The German Exodus: A Selective Study on the Post-World War II Expulsion of German Populations and Its Effects.* By Geza Charles Paikert. (Publications of the Research Group for European Migration Problems, XII. The Hague: Martinus Nijhoff, 1962. pp. x, 97. Index. Gld. 8.50.) This is a brief study of the causes, course and effects of the expulsion of German ethnic minorities from East-Central and Eastern Europe toward the end of and following the second World War. On the basis of considerable factual material, the author provides a good description of that mass exodus and of the motives of the "great flight," traces the subsequent fate of the refugees, the progress of their resettlement in West Germany and their socio-economic integration there, assesses their rôle in Germany's economic recovery and their impact on its socio-cultural geography. While there is much of value in the raw data presented in the booklet, the usefulness of the study is badly marred by the overtly partisan tone of the analysis and conclusions: the approach is distinctly, and quite uncritically, pro-German throughout, and, by the same token, it is uniformly anti-Soviet and unduly critical of the policies and attitudes of the wartime and postwar Polish and Czech leadership and of Western "complicity" in the expulsion plans. The actual picture, however, is definitely not that black and white, nor is the implied solution of widespread repatriation of the refugees and expellees to their former homelands by common consent of all parties concerned of much help, since it is not very likely to materialize in the foreseeable future, given their respective disagreement on the matter of today's political and economic conditions in the area in question.

To the readers of this JOURNAL, two chapters may be of particular interest. In one, Dr. Paikert undertakes to examine the legal basis of the expulsion—the Potsdam Agreement—and in the other, to judge the expulsion in the light of the "universal norms of law." Unfortunately, the analysis is thoroughly confused, the juridical argumentation is deplorably weak and the author's exertions on behalf of the thesis that the expulsion program was, from the very start, completely contrary to and flagrantly violative of international law, and his conclusions to that effect, strike at least this reader as altogether unconvincing.

GEORGE GINSBURGS

<sup>1</sup> See also Mëir Ydit, *Internationalised Territories from the "Free City of Cracow" to the "Free City of Berlin"* (1961).



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ELEANOR H. FINCH

## OFFICIAL DOCUMENTS

### PERMANENT SOVEREIGNTY OVER NATURAL RESOURCES

RESOLUTION ADOPTED BY THE UNITED NATIONS GENERAL ASSEMBLY AT ITS  
1194TH PLENARY MEETING, DECEMBER 14, 1962<sup>1</sup>

*The General Assembly,*

*Recalling* its resolutions 523 (VI) of 12 January 1952 and 626 (VII) of 21 December 1952,

*Bearing in mind* its resolution 1314 (XIII) of 12 December 1958, by which it established the Commission on Permanent Sovereignty over Natural Resources and instructed it to conduct a full survey of the status of permanent sovereignty over natural wealth and resources as a basic constituent of the right to self-determination, with recommendations, where necessary, for its strengthening, and decided further that, in the conduct of the full survey of the status of the permanent sovereignty of peoples and nations over their natural wealth and resources, due regard should be paid to the rights and duties of States under international law and to the importance of encouraging international co-operation in the economic development of developing countries,

*Bearing in mind* its resolution 1515 (XV) of 15 December 1960, in which it recommended that the sovereign right of every State to dispose of its wealth and its natural resources should be respected,

*Considering* that any measure in this respect must be based on the recognition of the inalienable right of all States freely to dispose of their natural wealth and resources in accordance with their national interests, and on respect for the economic independence of States,

*Considering* that nothing in paragraph 4 below in any way prejudices the position of any Member State on any aspect of the question of the rights and obligations of successor States and Governments in respect of property acquired before the accession to complete sovereignty of countries formerly under colonial rule,

<sup>1</sup> Res. 1803 (XVII), U.N. General Assembly, 17th Sess., Official Records, Supp. No. 17 (A/5217), p. 15.

Concerning the position of the United States with respect to this resolution, see article by Stephen M. Schwebel in 49 A.B.A.J. 463 (May, 1963); see also Hyde, "Permanent Sovereignty over Natural Wealth and Resources," 50 A.J.I.L. 854 (1956).

*Noting* that the subject of succession of States and Governments is being examined as a matter of priority by the International Law Commission,

*Considering* that it is desirable to promote international co-operation for the economic development of developing countries, and that economic and financial agreements between the developed and the developing countries must be based on the principles of equality and of the right of peoples and nations to self-determination,

*Considering* that the provision of economic and technical assistance, loans and increased foreign investment must not be subject to conditions which conflict with the interests of the recipient State,

*Considering* the benefits to be derived from exchanges of technical and scientific information likely to promote the development and use of such resources and wealth, and the important part which the United Nations and other international organizations are called upon to play in that connexion,

*Attaching* particular importance to the question of promoting the economic development of developing countries and securing their economic independence,

*Noting* that the creation and strengthening of the inalienable sovereignty of States over their natural wealth and resources reinforces their economic independence,

*Desiring* that there should be further consideration by the United Nations of the subject of permanent sovereignty over natural resources in the spirit of international co-operation in the field of economic development, particularly that of the developing countries,

## I

*Declares* that:

1. The right of peoples and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interest of their national development and of the well-being of the people of the State concerned.

2. The exploration, development and disposition of such resources, as well as the import of the foreign capital required for these purposes, should be in conformity with the rules and conditions which the peoples and nations freely consider to be necessary or desirable with regard to the authorization, restriction or prohibition of such activities.

3. In cases where authorization is granted, the capital imported and the earnings on that capital shall be governed by the terms thereof, by the national legislation in force, and by international law. The profits derived must be shared in the proportions freely agreed upon, in each case, between the investors and the recipient State, due care being taken to ensure that there is no impairment, for any reason, of that State's sovereignty over its natural wealth and resources.

4. Nationalization, expropriation or requisitioning shall be based on grounds or reasons of public utility, security or the national interest which are recognized as overriding purely individual or private interests, both domestic and foreign. In such cases the owner shall be paid appropriate compensation, in accordance with the rules in force in the State taking such measures in the exercise of its sovereignty and in accordance with international law. In any case where the question of compensation gives rise to a controversy, the national jurisdiction of the State taking such measures shall be exhausted. However, upon agreement by sovereign States and other parties concerned, settlement of the dispute should be made through arbitration or international adjudication.

5. The free and beneficial exercise of the sovereignty of peoples and nations over their natural resources must be furthered by the mutual respect of States based on their sovereign equality.

6. International co-operation for the economic development of developing countries, whether in the form of public or private capital investments, exchange of goods and services, technical assistance, or exchange of scientific information, shall be such as to further their independent national development and shall be based upon respect for their sovereignty over their natural wealth and resources.

7. Violation of the rights of peoples and nations to sovereignty over their natural wealth and resources is contrary to the spirit and principles of the Charter of the United Nations and hinders the development of international co-operation and the maintenance of peace.

8. Foreign investment agreements freely entered into by or between sovereign States shall be observed in good faith; States and international organizations shall strictly and conscientiously respect the sovereignty of peoples and nations over their natural wealth and resources in accordance with the Charter and the principles set forth in the present resolution.

## II

*Welcomes* the decision of the International Law Commission to speed up its work on the codification of the topic of responsibility of States for the consideration of the General Assembly;<sup>1</sup>

## III

*Requests* the Secretary-General to continue the study of the various aspects of permanent sovereignty over natural resources, taking into account the desire of Member States to ensure the protection of their sovereign rights while encouraging international co-operation in the field of economic development, and to report to the Economic and Social Council and to the General Assembly, if possible at its eighteenth session.

<sup>1</sup> Official Records of the General Assembly, 17th Sess., Supp. No. 9 (A/5209), pars. 67-69.

## PEOPLE'S REPUBLIC OF CHINA-PAKISTAN

AGREEMENT ON THE BOUNDARY BETWEEN CHINA'S SINKIANG AND THE  
CONTIGUOUS AREAS<sup>1</sup>

*Signed at Peking March 2, 1963; in force March 2, 1963*

The Government of the People's Republic of China and the Government of Pakistan,

Having agreed, with a view to ensuring the prevailing peace and tranquillity on the border, to formally delimit and demarcate the boundary between China's Sinkiang and the contiguous areas, the defense of which is under the actual control of Pakistan, in a spirit of fairness, reasonableness, mutual understanding and mutual accommodation, and on the basis of Ten Principles as enunciated in the Bandung Conference;

Being convinced that this would not only give full expression to the desire of the peoples of China and Pakistan for developing good neighborly and friendly relations, but also help safeguard Asian and world peace;

Have resolved for this purpose to conclude the present Agreement and appointed as their respective plenipotentiaries, the following:

Marshal Chen Yi, Minister for Foreign Affairs, for the Government of the People's Republic of China,

Zulfikar Ali Bhutto, Minister of External Affairs, for the Government of Pakistan,

Who, having mutually examined their full powers, found them to be in good and due form, have agreed upon the following:

## ARTICLE ONE

In view of the fact that the boundary between China's Sinkiang and the contiguous areas, the defense of which is under the actual control of Pakistan, has never been formally delimited, the two Parties agree to delimit it on the basis of the traditional customary boundary line, including natural features, and in a spirit of equality, mutual benefit, and friendly cooperation.

## ARTICLE TWO

I. In accordance with the principle expounded in Article One of the present Agreement, the two Parties have fixed, as follows, the alignment of the entire boundary line between China's Sinkiang and the contiguous areas, the defense of which is under the actual control of Pakistan.

(1) Commencing from its northwestern extremity at Height 5630 meters (a peak, the reference co-ordinates of which are approximately Longitude

<sup>1</sup> From a text in English, supplied through the courtesy of the Embassy of Pakistan, Washington, D. C.

74° 34' E and Latitude 37° 03' N), the boundary line runs generally eastward and then southeastward along the main watershed between the tributaries of the Tashkurgan River of the Tarim River system on the one hand and the tributaries of the Hunza River of the Indus River system on the other hand, passing through the Kilik Daban (Dawan), the Mintaka Daban (Pass), the Kharchanai Daban (named on the Chinese map only), the Kutejilga Daban (named on the Chinese map only), and the Parpik Pass (named on the Pakistan map only), and reaches the Khunjerab (Yutr) Daban (Pass).

(2) After passing through the Khunjerab (Yutr) Daban (Pass), the boundary line runs generally southward along the above mentioned main watershed up to a mountain top south of the Daban (Pass), where it leaves the main watershed to follow the crest of a spur lying generally in a southeasterly direction, which is the watershed between the Akjilga River (a nameless corresponding river on the Pakistan map on the one hand, and the Taghdumbash (Oprang River) and the Keliman Su (Oprang Jilga) on the other hand. According to the map of the Chinese side, the boundary line, after leaving the southeastern extremity of this spur, runs along a small section of the middle line of the bed of the Keliman Su to reach its confluence with the Kelechin River. According to the map of the Pakistan side, the boundary line, after leaving the southeastern extremity of this spur, reaches the sharp bend of the Shakagam or Muztagh River.

(3) From the aforesaid point, the boundary line runs up the Kelechin River (Shakagam or Muztagh River) along the middle line of its bed to its confluence (reference co-ordinates approximately Longitude 76° 02' E and Latitude 36° 26' N) with the Sorbulak Daria (Shimshal River or Braldu River).

(4) From the confluence of the aforesaid two rivers, the boundary line, according to the map of the Chinese side, ascends the crest of a spur and runs along it to join the Karakoram Range main watershed at a mountain-top (reference co-ordinates approximately Longitude 75° 54' E and Latitude 36° 15' N), which on this map is shown as belonging to the Shorbulak Mountain. According to the map of the Pakistan side, the boundary line from the confluence of the above mentioned two rivers ascends the crest of a corresponding spur and runs along it, passing through Height 6520 meters (21,390 feet) till it joins the Karakoram Range main watershed at a peak (reference co-ordinates approximately Longitude 75° 57' E and Latitude 36° 03' N).

(5) Thence, the boundary line, running generally southward and then eastward, strictly follows the Karakoram Range main watershed which separates the Tarim River drainage system from the Indus River drainage system, passing through the East Mustagh Pass (Muztagh Pass, the top of the Chogri Peak (K2), the top of the Broad Peak, the top of the Gasherbrum Mountain (8068) Indirakoli Pass (named on the Chinese map only) and the top of the Teram Kangri Peak, and reaches its southeastern extremity at the Karakoram Pass.

II. The alignment of the entire boundary line, as described in Section I

of this Article, has been drawn on the 1/one million scale map of the Chinese side in Chinese and the 1/one million scale map of the Pakistan side in English, which are signed and attached to the present Agreement.\*

III. In view of the fact that the maps of the two sides are not fully identical in their representation of topographical features, the two Parties have agreed that the actual features on the ground shall prevail, so far as the location and alignment of the boundary described in Section I is concerned; and that they will be determined as far as possible by joint survey on the ground.

#### ARTICLE THREE

The two Parties have agreed that:

I. Wherever the boundary follows a river, the middle line of the river bed shall be the boundary line; and that

II. Wherever the boundary passes through Daban (Pass), the water-parting line thereof shall be the boundary line.

#### ARTICLE FOUR

I. The two Parties have agreed to set up, as soon as possible, a Joint Boundary Demarcation Commission. Each side will appoint a Chairman, one or more members and a certain number of Advisers and technical staff. The Joint Boundary Commission is charged with the responsibility, in accordance with the provisions of the present Agreement, to hold concrete discussions on and carry out the following tasks jointly:

(1) To conduct necessary surveys of the boundary area on the ground, as stated in Article Two of the present Agreement, so as to set up boundary markers at places considered to be appropriate by the two Parties and to delineate the boundary line on the jointly prepared accurate maps.

(2) To draft a Protocol setting forth in detail the alignment of the entire boundary line and location of all the boundary markers and prepare and get printed detailed maps to be attached to the Protocol with the boundary line and the location of the boundary markers shown on them.

II. The aforesaid Protocol, upon being signed by the representatives of the Governments of the two countries, shall become an Annex to the present Agreement, and the detailed maps shall replace the Attached Maps to the present Agreement.

III. Upon the conclusion of the above-mentioned Protocol, the tasks of the Joint Commission shall be terminated.

#### ARTICLE FIVE

The two Parties have agreed that any dispute concerning the boundary which may arise after the delimitation of the boundary line actually existing between the two countries shall be settled peacefully by the two sides through friendly consultations.

\* Omitted here.

## ARTICLE SIX

The two Parties have agreed that after the settlement of the Kashmir dispute between Pakistan and India, the sovereign authority concerned will re-open negotiations with the Government of the People's Republic of China, on the boundary, as described in Article Two of the present Agreement, of Kashmir, so as to sign a Boundary Treaty to replace the present Agreement.

Provided that in the event of that sovereign authority being Pakistan, the provisions of this Agreement and of the aforesaid Protocol shall be maintained in the formal Boundary Treaty to be signed between Pakistan and the People's Republic of China.

## ARTICLE SEVEN

The Present Agreement shall enter into force on the date of its signature.

Done in duplicate in Peking on the second day of March 1963, in the Chinese and English language, both texts being equally authentic.

[Signatures omitted.]

GOVERNMENT OF THE FRENCH REPUBLIC—  
ALGERIAN NATIONAL LIBERATION FRONT

DECLARATIONS CONCERNING ALGERIA<sup>1</sup>

*Evian, March 19, 1962*

## GENERAL DECLARATION

The French people, by the referendum of January 8, 1961, recognized the right of the Algerians to choose by means of a consultation of direct and universal suffrage their political destiny in relation to the French Republic.

The negotiations that took place at Evian from March 7 to March 18, 1962, between the Government of the French Republic and the F.L.N. [Algerian National Liberation Front] reached the following conclusions:

A cease-fire is concluded. Military operations and the armed struggle will come to an end on March 19 throughout the Algerian territory.

The guarantees relative to the application of self-determination and the organization of public powers in Algeria during the transition period have been defined in common agreement.

The formation, after self-determination, of an independent and sovereign state appearing to conform to the realities of the Algerian situation, and in these conditions, cooperation between France and Algeria corresponding

<sup>1</sup> France, 94 Journal Officiel 3019 (1962). The above is a translation of the official French texts, prepared by the Press and Information Service of the French Embassy and furnished through the courtesy of the French Embassy.

The Cease-Fire Agreement in Algeria and the Decrees on the Organization of the Referendum on Self-Determination and on the Provisional Organization of Public Powers in Algeria have been omitted.



to the interests of the two countries, the French Government considers, together with the F.L.N., that the solution of the independence of Algeria in cooperation with France is the one which corresponds to this situation.

The Government and the F.L.N. have therefore defined this solution, in common agreement, in the declarations which will be submitted to the approval of the electors at the time of the self-determination vote.

## CHAPTER I

### ORGANIZATION OF PUBLIC POWERS DURING THE TRANSITION PERIOD AND SELF-DETERMINATION GUARANTEES

A. The self-determination consultation will permit the electors to make known whether they want Algeria to be independent and in that case whether they want France and Algeria to cooperate in the conditions defined by the present declarations.

B. This consultation will take place throughout the Algerian territory, that is to say, in the fifteen following departments: Algiers, Batna, Bône, Constantine, Médéa, Mostaganem, Oases, Oran, Orléansville, Saïda, Saoura, Sétif, Tiaret, Tizi-Ouzou, Tlemcen.

The results of the different voting offices will be totaled and proclaimed for the whole territory.

C. The freedom and the genuineness of the consultation will be guaranteed in conformity with the regulations fixing the conditions for the self-determination consultation.

D. Until self-determination has been realized, the organization of public powers in Algeria will be established in accordance with the regulations which accompany the present declaration.

A Provisional Executive and a court of public law and order shall be set up.

The French Republic shall be represented in Algeria by a High Commissioner.

These institutions, in particular the Provisional Executive, will be installed as soon as the cease-fire comes into force.

E. The High Commissioner will be the custodian of the powers of the Republic in Algeria, in particular in matters of defense, security and the maintenance of law and order in the last resort.

F. The Provisional Executive will, in particular, be responsible for:

- Assuring the conduct of Algeria's own public affairs. It will direct the administration of Algeria and will have the task of admitting Algerians to positions in the various branches of this administration;
- Maintaining public law and order. For this purpose, it will have police services and a security force under its authority;
- Preparing and implementing self-determination.

G. The court of public law and order will consist of an equal number of European and Moslem judges.

H. The full exercise of individual and public liberties will be re-established within the shortest possible time.

I. The F.L.N. will be considered a legal political body.

J. Persons interned both in France and Algeria will be released within a maximum period of twenty days from the date of the cease-fire.

K. An amnesty will be proclaimed immediately. Detained persons will be released.

L. Persons in refuge abroad will be able to return to Algeria. Commissions sitting in Morocco and Tunisia will facilitate this return.

Persons who have been relocated will be able to return to their regular place of residence.

The Provisional Executive will take the first social, economic and other measures aimed at assuring the return of these people to a normal life.

M. The self-determination vote will take place within a period of not less than three months and not exceeding six months. The date will be fixed on proposal of the Provisional Executive within the two months following its installation.

## CHAPTER II

### INDEPENDENCE AND COOPERATION

If the solution of independence and cooperation is adopted, the contents of the present declarations will be binding on the Algerian State.

#### A—Independence of Algeria

*I—The Algerian State* will exercise its full and complete sovereignty both internally and externally. This sovereignty will be exercised in all spheres, in particular in defense and foreign affairs.

The Algerian State will freely establish its own institutions and will choose the political and social regime which it deems to be most in conformity with its interests. On the international level, it will define and implement in full sovereignty the policy of its choice.

The Algerian State will subscribe unreservedly to the Universal Declaration of Human Rights and will base its institutions on democratic principles and on equality of political rights between all citizens without discrimination of race, origin or religion. It will, in particular, apply guarantees recognized for citizens of French civil status.

#### *II—Individual Rights and Liberties and Their Guarantees*

##### *1. Common provisions*

No one shall be subject to police or legal measures, to disciplinary sanctions or to any discrimination on account of:

—Opinions expressed at the time of events that occurred in Algeria before the day of the self-determination vote;

—Acts committed at the time of these same events before the day of the cease-fire proclamation.

No Algerian shall be forced to leave Algerian territory or be prevented from leaving it.

*2. Provisions concerning French citizens of ordinary civil status*

a) Within the framework of Algerian legislation on nationality, the legal situation of French citizens of ordinary civil status shall be regulated according to the following principles:

For a period of three years from the day of self-determination, French citizens of ordinary civil status:

—Born in Algeria and giving proof of ten years of permanent and regular residence on Algerian territory on the day of self-determination;

—Or giving proof of ten years of permanent and regular residence on Algerian territory on the day of self-determination and whose father or mother was born in Algeria and fulfills or could have fulfilled the conditions for exercising civil rights;

—Or giving proof of twenty years of permanent and regular residence on Algerian territory on the day of self-determination,

Will enjoy, by right, Algerian civil rights and will be considered therefore as French nationals exercising Algerian civil rights,

French nationals exercising Algerian civil rights cannot simultaneously exercise French civil rights.

At the end of the above-mentioned three-year period, they shall acquire Algerian nationality by an application for registration or confirmation of their registration on the voters' lists. Failing this application, they shall enjoy the benefits of a resident aliens convention.

b) In order to assure, during a three-year period, to French nationals exercising Algerian civil rights, and at the end of this period, in a permanent way, to Algerians of French civil status, the protection of their person and their property and their normal participation in Algerian life, the following measures are provided for:

They will have a just and genuine part in public affairs. In the assemblies, their representation shall correspond to their actual numbers. In the various branches of the civil service, they will be assured of fair participation.

Their participation in the municipal life of Algiers and Oran will be the subject of special provisions.

Their property rights will be respected. No dispossession measures will be taken against them without their being granted fair compensation previously agreed upon.

They will receive guarantees appropriate to their cultural, linguistic and religious particularities. They will retain their personal status, which will be respected and enforced by Algerian courts comprised of magistrates of the same status. They will use the French language within the assemblies and in their relations with the public authorities.

An association for the safeguard of their rights will contribute to the protection of the rights which are guaranteed to them.

A Court of Guarantees, an institution of internal Algerian law, will be responsible for seeing that these rights are respected.

#### B—Cooperation Between France and Algeria

The relations between the two countries will be founded, in mutual respect of their independence, on the reciprocal exchange of benefits and the interests of the two parties.

Algeria shall guarantee the interests of France and the rights acquired by individuals and legal entities under the conditions fixed by the present declarations. In exchange, France will grant Algeria her technical and cultural assistance and will contribute privileged financial aid for its economic and social development.

1. For a period of three years, which may be renewed, France's aid will be fixed in conditions comparable to and at a level equivalent to those of the programs now under way.

Having in mind respect for Algeria's independence with regard to commerce and customs, the two countries will determine the different fields in which commercial exchanges will benefit from preferential treatment.

Algeria will belong to the franc area. It will have its own monetary unit and its own currency assets. Freedom of transfers will exist between France and Algeria under conditions compatible with the economic and social development of Algeria.

2. In the existing Departments of the Oases and of the Saoura, the development of the wealth of the subsoil will be carried out according to the following principles:

a) French-Algerian cooperation will be ensured by a technical body for Saharan cooperation. This body will be composed of equal numbers from both sides. Its role will be, in particular, to develop the infrastructure necessary for the exploitation of the subsoil, to give advice on draft bills and regulations relative to mining, to examine requests concerning the granting of mining titles. The Algerian State will issue the mining titles and will enact mining legislation in full sovereignty;

b) French interests will be assured in particular by:

—The exercise, in accordance with the regulations of the Saharan petroleum code, such as it exists at present, of the rights attached to mining titles granted by France;

—Preference being given, in the case of equal offers, in the granting of new mining titles, to French companies, in accordance with the terms and conditions provided for in Algerian mining legislation;

—Payment in French francs for Saharan hydrocarbons up to the amount of the supply needs of France and other countries of the franc area.

3. France and Algeria will develop their cultural relations.

Each of the countries shall be able to set up on the territory of the

other a University and Cultural Bureau whose establishments will be open to all.

France will lend her aid in the training of Algerian technicians.

French personnel, in particular teachers and technicians, will be placed at the disposal of the Algerian Government by agreement between the two countries.

### CHAPTER III

#### SETTLEMENT OF MILITARY QUESTIONS

If the solution of the independence of Algeria and of cooperation between Algeria and France is adopted, military questions will be settled according to the following principles:

—The French forces, whose numbers will gradually be reduced as of the cease-fire, will be withdrawn from the frontiers of Algeria when self-determination is realized. Their total force will be reduced to 80,000 men within a period of 12 months from the time of self-determination. The repatriation of these forces will have to be completed by the end of a second twenty-four-month period. Military installations will be correspondingly evacuated;

—Algeria shall lease to France the use of the Mers-el-Kébir base for a fifteen-year period, which may be renewed by agreement between the two countries;

—Algeria shall also grant France the use of a number of military airfields, the terrains, sites and installations necessary to her.

### CHAPTER IV

#### SETTLEMENT OF LITIGATION

France and Algeria will resolve differences that may arise between them by means of peaceful settlement. They will have recourse either to conciliation or to arbitration. Failing agreement by these procedures, each of the two States shall be able to have recourse directly to the International Court of Justice.

### CHAPTER V

#### CONSEQUENCES OF SELF-DETERMINATION

Upon the official announcement provided for in Article 27 of the statutes of self-determination, the instruments corresponding to these results will be drawn up.

If the solution of independence and cooperation is adopted:

—The independence of Algeria will immediately be recognized by France;

—The transfer of jurisdiction will be realized forthwith;

—The regulations set forth in the present general declaration and declarations accompanying it will come into force at the same time.

The Provisional Executive will organize, within three weeks, elections for the designation of the Algerian National Assembly, to which it will hand over its powers.

## DECLARATION OF GUARANTEES

### PART ONE

#### GENERAL PROVISIONS

##### 1. Personal Safety

No one may be harassed, sought after, prosecuted, convicted or be subject to penal sentence, disciplinary sanction or any discrimination whatsoever, for acts committed in connection with political events that occurred in Algeria before the day of the proclamation of the cease-fire.

No one may be harassed, sought after, prosecuted, convicted or be subject to penal sentence, disciplinary sanction or any discrimination whatsoever, for words or opinions expressed in connection with political events that occurred in Algeria before the day of the voting on self-determination.

##### 2. Freedom of movement between Algeria and France

Barring a court ruling, any Algerian holding an identity card shall have freedom of movement between Algeria and France.

Algerians leaving Algerian territory with the intention of establishing themselves in another country may take their personal property outside Algeria.

They may, without restriction, dispose of their real estate and transfer the capital derived therefrom under the conditions provided for by the Declaration of Principles Concerning Economic and Financial Cooperation. Their pension rights shall be respected under the conditions provided for in this same declaration.

### PART TWO

#### CHAPTER I

##### Exercise of Algerian Civil Rights

Within the framework of Algerian legislation on nationality, the legal situation of French citizens of ordinary civil status shall be regulated in accordance with the following principles:

For a period of three years from the day of self-determination, French citizens of ordinary civil status:

—Born in Algeria and giving proof of ten years of permanent and regular residence on Algerian territory on the day of self-determination;

—Or giving proof of ten years of permanent and regular residence on Algerian territory on the day of self-determination, and whose father

or mother was born in Algeria and fulfills or could have fulfilled the conditions for exercising civil rights;

—Or giving proof of twenty years of permanent and regular residence on Algerian territory on the day of self-determination,

Will enjoy, by right, Algerian civil rights and will be considered therefore as French nationals exercising Algerian civil rights.

French nationals exercising Algerian civil rights cannot simultaneously exercise French civil rights.

At the end of the above-mentioned three-year period, they shall acquire Algerian nationality by an application for registration or confirmation of their registration on the voters' lists. Failing this application, they shall enjoy the benefits of a resident aliens convention.

## CHAPTER II

### Protection of the Rights and Liberties of Algerian Citizens of Ordinary Civil Status

In order to assure to Algerians of ordinary civil status the protection of their person and their property and their harmonious participation in Algerian life, the measures enumerated in the present chapter are provided.

French nationals exercising Algerian civil rights under the conditions provided for in Chapter I hereinabove shall benefit from these same measures.

1. Algerians of ordinary civil status shall enjoy the same treatment and the same guarantees in law and in fact as other Algerians. They shall be subject to the same duties and to the same obligations.

2. The rights and liberties defined by the Universal Declaration of Human Rights shall be guaranteed to Algerians of ordinary civil status. In particular, no discriminatory measures may be taken against them on account of their language, their culture, their religion, or their personal status. These characteristic features shall be recognized and must be respected.

3. Algerians of ordinary civil status shall for five years be exempt from military service.

4. Algerians of ordinary civil status shall have a just part in the conduct of public affairs, both as concerns the general affairs of Algeria and those of local communities, public establishments and public enterprises.

Within the framework of a single electoral college common to all Algerians, Algerians of ordinary civil status shall enjoy the right to vote and to be elected to office.

5. Algerians of ordinary civil status shall be justly and genuinely represented in all the assemblies of a political, administrative, economic, social and cultural nature.

a) In the assemblies of a political nature and in the assemblies of an administrative nature (regional, general and municipal councils), their representation may not be less than their number in relation to the population. To this end, in each election district, a certain number of

seats to be filled will be reserved—according to the proportion of Algerians of ordinary civil status in this district—for Algerian candidates of this status, regardless of what voting method is selected.

b) In the assemblies of an economic, social and cultural nature, their representation must take into account their moral and material interests.

6. a) The representation of Algerians of ordinary civil status in the municipal assemblies will be proportionate to their number in the district under consideration.

b) In all communes where there are more than 50 Algerians of ordinary civil status and where these persons, notwithstanding the application of the provisions of Article 5 hereinabove, shall not be represented in the municipal assembly, a special assistant shall be appointed who will be called upon to sit in this assembly with an advisory voice.

At the end of the municipal elections, the Algerian candidate of ordinary civil status who receives the greatest number of votes shall be proclaimed special assistant.

c) Without prejudice to the principles convened upon in paragraph a) hereinabove, during the four years that will follow the vote on self-determination, the cities of Algiers and Oran will be administered by municipal councils, whose president or vice president will be chosen from Algerians of ordinary civil status.

During this same period, the cities of Algiers and Oran shall be divided into municipal districts whose number will be not less than 10 for Algiers and not less than 6 for Oran.

In the districts where the proportion of Algerians of ordinary civil status exceeds 50 per cent, the authority placed at the head of the district shall belong to this category of citizens.

7. A just proportion of Algerians of ordinary civil status will be assured in the various branches of the civil service.

8. Algerians of ordinary civil status shall have the right to exercise their non-Koranic personal status until the promulgation in Algeria of a civil code, in the drafting of which they will take part.

9. Without prejudice to the guarantees established by the regulations relative to the participation of Algerians of ordinary civil status in the civil service, the following specific guarantees shall be provided in judicial matters with regard to the composition of the Algerian judiciary body:

A. Whatever may be the future organization of the judiciary in Algeria, it will in all cases include, as regards Algerians of ordinary civil status:

- A two-level court system, applying to examining courts as well;
- A jury in criminal matters;
- Traditional means of appeal: to the Court of Cassation and petition for mercy.

B. In addition, throughout Algeria:

a) All civil and criminal courts before which an Algerian of ordinary civil status must appear will necessarily comprise an Algerian judge of the same status.



Moreover, if the tribunal entertaining jurisdiction includes a jury, one third of the jurors will be Algerians of ordinary civil status;

b) In all criminal courts under a single judge before which an Algerian of ordinary civil status shall appear and in which the judge is not an Algerian of the same status, the single judge will be assisted by an assessor who will be chosen from Algerians of ordinary civil status and will have an advisory voice;

c) All litigation concerned exclusively with the personal status of Algerians of ordinary civil status will be brought before a court comprising a majority of judges having this status;

d) In all courts in which the presence of one or several judges of ordinary civil status is required, these judges may be replaced by French judges detailed for the purpose of technical cooperation.

10. Algeria shall guarantee freedom of conscience and the freedom of the Catholic, Protestant and Jewish faiths. It shall assure to these faiths freedom of organization, practice and instruction as well as the inviolability of their places of worship.

11. a) Official texts shall be published or made known in the French language at the same time as in the national language. The French language shall be used in relations between the Algerian public services and Algerians of ordinary civil status. The latter shall have the right to use the French language notably in political, administrative and judicial matters.

b) Algerians of ordinary civil status shall be free to choose between the various educational establishments and types of education.

c) Algerians of ordinary civil status, as all other Algerians, shall be free to open and to operate educational establishments.

d) Algerians of ordinary civil status will be able to attend the French sections that Algeria will organize in its educational establishments of all kinds in conformity with the provisions of the Declaration of Principles Concerning Cultural Cooperation.

e) The part allotted by Algerian radio and television to broadcasts in the French language must correspond to the importance that is acknowledged to this language.

12. There will be no discrimination established with regard to property belonging to Algerians of ordinary civil status, in particular with regard to requisitioning, nationalization, agrarian reform and taxation. All dispossession measures will be subject to fair compensation previously agreed upon.

13. Algeria will not establish any discrimination with regard to access to employment. There will be no restrictions established on access to any profession, save requirements of competence.

14. Freedom of association and freedom to belong to labor unions shall be guaranteed. Algerians of ordinary civil status shall have the right to create associations and labor unions and to belong to the associations and labor unions of their choice.

## CHAPTER III

## Association for the Safeguard of Rights

Algerians of ordinary civil status shall belong, until the statutes come into force, to an association for the safeguard of their rights recognized as serving the public interest and governed by Algerian law.

The purpose of the Association shall be:

- To go to law, including before the Court of Guarantees, in order to defend the individual rights of Algerians of ordinary civil status, in particular the rights enumerated in the present declaration;
- To intervene before the public authorities;
- To administer cultural and welfare establishments.

The Association shall be directed, until the approval of its statutes by the competent Algerian authorities, by a managing board of nine members, one third to be named by representatives of religious and intellectual activities, one third by the magistrature and one third by members of the bar.

The managing board shall be assisted by a secretariat responsible to it; it may open offices in various localities.

The Association shall not be either a political party or group. It shall not concur in the expression of the vote.

The Association will be constituted as soon as the present declaration enters into force.

## CHAPTER IV

## Court of Guarantees

Litigation shall be referred, upon the request of any interested Algerian party, to the Court of Guarantees.

This Court shall be composed of:

- Four Algerian magistrates, of whom two shall be of ordinary civil status, appointed by the Algerian Government;
- A presiding magistrate appointed by the Algerian Government on the proposal of the four magistrates.

The Court may validly deliberate when a minimum of three out of five members are present.

It may order inquiries to be held.

It may repeal any regulatory text or individual decision that is contrary to the Declaration of Guarantees.

It may decide on any measures of compensation.

Its decisions shall be final.

## PART THREE

## FRENCH PERSONS RESIDING IN ALGERIA AS ALIENS

French persons, with the exception of those who shall enjoy Algerian civil rights, will be protected by a resident aliens convention in conformity with the following principles:

1. French nationals will be able to enter and leave Algeria provided they hold either a French national identity card or a French passport that is valid.

They will be able to move freely in Algeria and to establish their residence in the place of their choice.

French nationals residing in Algeria who will leave Algerian territory with a view toward establishing themselves in another country may take their personal property, dispose of their real estate and transfer their capital, under the conditions provided for in Section III of the Declaration of Principles Concerning Economic and Financial Cooperation and to retain the right to pension allowances acquired in Algeria, under the conditions provided for in the Declaration of Principles Concerning Economic and Financial Cooperation.

2. French nationals on Algerian territory will be entitled to equal treatment with nationals with regard to:

- The enjoyment of civil rights in general;
- Free access to all professions along with the rights necessary to practice them effectively, in particular that of conducting and establishing businesses;
- The benefits of relief and social security legislation;
- The right to acquire and to dispose of the ownership of all personal property and real estate, the right to administer it and the right to have use of it; subject to the provisions concerning agrarian reform.

3. a) French nationals on Algerian territory will enjoy all the liberties set forth in the Universal Declaration of Human Rights.

b) French persons shall have the right to use the French language in all their relations with the courts and the public authorities.

c) French persons may open and operate private educational and research establishments in Algeria, in conformity with the provisions in the Declaration of Principles Concerning Cultural Cooperation.

d) Algeria shall open its educational establishments to French persons. The latter may request to pursue the education offered in the sections provided for in the Declaration of Principles Concerning Cultural Matters.

4. The persons, property and interests of French nationals will be placed under the protection of laws, which will be substantiated by free access to the courts. They will be exempt from depositing in advance security for costs or damages.

5. No arbitrary or discriminatory measures will be taken against the vested property, interests and rights of French nationals. No one may be deprived of his rights, without fair compensation previously agreed upon.

6. The personal status of French nationals, including the inheritance system, will be governed by French law.

7. Algerian legislation will eventually determine the civil and political rights granted to French nationals on Algerian territory as well as the conditions of their admission to public office.

8. French nationals may participate within the framework of Algerian legislation in the activities of labor unions, associations for the protection of professional rights and organizations representing economic interests.

9. Civil and trading companies established under French law whose head office is in France and which have or will have economic activity in Algeria will enjoy on Algerian territory all the rights, defined by the present text, to which a legal entity is entitled.

10. French nationals will be able to obtain on Algerian territory administrative concessions, authorizations and permissions and will be allowed to make public contracts under the same conditions as Algerian nationals.

11. French nationals on Algerian territory may not be subject to duties, taxes or levies, under whatever denomination, different from those collected from Algerian nationals.

12. Subsequent provisions will be made with a view to curbing fiscal evasion and avoiding double taxation. French nationals will benefit on Algerian territory, under the same conditions as Algerian nationals, from all provisions making the State or public organizations responsible for compensation of damages suffered by persons or property.

13. No deportation measures against a French national deemed to be dangerous to the public order will be effected without the French Government having been informed beforehand. Except for absolute emergencies, ascertained by a decision, stating the grounds on which it rests, a sufficient time period will be allowed to the person concerned to settle his or her pressing affairs.

His or her property and interests will be safeguarded, under the responsibility of Algeria.

14. Supplementary provisions will be the subject of a subsequent agreement.

#### DECLARATION OF PRINCIPLES CONCERNING ECONOMIC AND FINANCIAL COOPERATION

##### PREAMBLE

Cooperation between France and Algeria in economic and financial matters shall be founded on a contractual basis in accordance with the following principles:

1. Algeria shall guarantee French interests and the vested rights of individuals and legal entities;

2. France shall undertake in return to grant Algeria her technical and cultural assistance and to make to its economic and social development a preferential contribution that is justified by the extent of French interests existing in Algeria;

3. In the framework of these reciprocal commitments, France and Algeria will maintain privileged relations, particularly as regards trade and currency.

## TITLE I

FRENCH CONTRIBUTION TO THE ECONOMIC AND SOCIAL DEVELOPMENT  
OF ALGERIA

## ARTICLE 1

In order to make a lasting contribution to the continuity of the economic and social development of Algeria, France will continue her technical assistance and preferential financial aid. For an initial period of three years, renewable, this aid will be fixed in conditions comparable to and at a level equivalent to those of programs now under way.

## ARTICLE 2

French financial and technical aid will apply notably to the study, execution or financing of the public or private investment projects presented by the competent Algerian authorities; to the training of Algerian cadres and technicians; and to the assignment of French technicians. It will also apply to the transitional measures to be taken to facilitate the resumption of work by the regrouped populations.

The aid may take the form, as the case may be, of allowances in kind, loans, contributions or participations.

## ARTICLE 3

The competent Algerian and French authorities will act in concert to ensure the full effectiveness of the aid and its allocation to the purposes for which it was granted.

## ARTICLE 4

The terms and conditions of cooperation in administrative, technical and cultural matters shall be the subject of special provisions.

## TITLE II

## TRADE

## ARTICLE 5

Within the framework of the principle of Algeria's independence with regard to trade and customs, trade with France, founded on the basis of the reciprocity of benefits and interests of the two parties, will be covered by a special statute corresponding to the terms of cooperation between the two countries.

## ARTICLE 6

This statute will specify:

- The institution of preferential tariffs or the absence of duties;
- Marketing facilities on French territory for Algerian surplus production, through the organization of markets for certain products, especially with regard to price conditions;

- Restrictions on the free movement of goods, justified in particular by the development of the national economy, the protection of public health and the suppression of fraud;
- Provisions for air and sea navigation between the two countries with a view to fostering the development and full use of the two flags.

#### ARTICLE 7

Algerian nationals residing in France, particularly workers, will have the same rights as French nationals, with the exception of political rights.

### TITLE III

#### MONETARY RELATIONS

#### ARTICLE 8

Algeria will belong to the franc area. Its relations with this area will in addition be defined contractually on the basis of the principles laid down in Articles 9, 10 and 11 hereinafter.

#### ARTICLE 9

Transactions related to conversion of Algerian currency into French currency and vice versa, and transfers between the two countries, shall be made on the basis of official parities recognized by the International Monetary Fund.

#### ARTICLE 10

Transfers to France will be free. The total volume and rate of operations must nevertheless take into account the essential requirements of the economic and social development of Algeria, as well as Algeria's total receipts in francs, drawn notably from the financial aid granted by France.

For the application of these principles and with a view to protecting Algeria from the effects of speculation, France and Algeria will act in concert in a joint commission comprising the monetary authorities of the two countries.

#### ARTICLE 11

The agreements concerning monetary cooperation between France and Algeria will notably specify:

- The terms and conditions of transferring the privilege of issue; the conditions for the exercise of this privilege during the period that will precede the establishment of the Algerian Bank of Issue; and the facilities necessary for the functioning of this Bank;
- The relations between this Bank of Issue and the Bank of France as regards the conditions of Algeria's participation in the currency pool; the individualization and the initial foreign currency drawing rights; the granting of contingent additional currency allocations; the regula-

tions covering Algerian assets in French francs corresponding to the right to draw on foreign currency; and the possibilities of overdraft in French francs;

- The conditions for the establishment of common regulations with regard to transactions negotiated in currencies other than those of the franc area.

#### TITLE IV

##### GUARANTEES OF VESTED RIGHTS AND PREVIOUS COMMITMENTS

##### ARTICLE 12

Algeria will ensure without any discrimination the free and peaceful enjoyment of patrimonial rights acquired on its territory before self-determination. No one will be deprived of these rights without fair compensation previously agreed upon.

##### ARTICLE 13

Within the framework of agrarian reform, France will grant Algeria specific aid with a view to the repurchase in whole or in part of property rights held by French nationals.

On the basis of a repurchase plan drawn up by the competent Algerian authorities, the terms and conditions of this aid will be determined by agreement between the two countries, so as to reconcile the execution of the Algerian social and economic policy with the normal spreading out of the financial assistance provided by France.

##### ARTICLE 14

Algeria shall confirm all the rights attached to mining or transport titles granted by the French Republic for the exploration, exploitation or transport of liquid or gaseous hydrocarbons and other mineral substances of the thirteen northern Algerian departments; the regulations governing these titles will continue to be the series of provisions applicable on the date of the cease-fire.

The present article shall concern all the mining or transport titles issued by France before self-determination; after the cease-fire, however, there will be no issue of new exclusive permits for research in areas that have not as yet been allocated, unless the areas in question have been put up for new bidding by a notification published prior to this date in the "Journal Officiel" of the French Republic.

##### ARTICLE 15

Vested rights obtaining on the date of self-determination, with regard to retirement or invalidity pensions secured from Algerian organizations, shall be guaranteed.

These organizations will continue to ensure the payment of retirement or invalidity pensions; their final takeover as well as the terms and conditions of their ultimate repurchase will be determined by common agreement between the Algerian and the French authorities.

Retirement or invalidity pension rights obtained from French organizations shall be guaranteed.

#### ARTICLE 16

Algeria will facilitate the payment of pensions owed by France to veterans and retired persons. It will authorize the competent French services to pursue the exercise of their activities on Algerian territory with regard to payments and the care and treatment of the disabled.

#### ARTICLE 17

Algeria shall guarantee to French companies established on its territory, as well as to companies in which the majority of the capital is held by French individuals or French legal entities, the normal exercise of their activities in conditions excluding any discrimination to their detriment.

#### ARTICLE 18

Algeria shall assume the obligations and enjoy the rights contracted in its name or in that of Algerian public establishments by the competent French authorities.

#### ARTICLE 19

Public real estate in Algeria will be transferred to the Algerian State, excepting, with the agreement of the Algerian authorities, the premises deemed necessary for the normal functioning of temporary or permanent French services.

Public establishments of the State or companies belonging to the State and responsible for the administration of Algerian public services will be transferred to Algeria. This transfer will concern patrimonial funds allotted to the administration of these public services as well as to the liabilities pertaining thereto. Special agreements will determine the conditions in which these transfers will be carried out.

#### ARTICLE 20

Barring a future agreement between France and Algeria, the credits and debts drawn up in francs, existing on the date of self-determination, between individuals or legal entities in public or private law, shall be considered payable in the currency of the place where the contract was concluded.



**DECLARATION OF PRINCIPLES ON COOPERATION FOR THE EXPLOITATION  
OF THE WEALTH OF THE SAHARAN SUBSOIL**

**PREAMBLE**

1. Within the framework of Algerian sovereignty, Algeria and France shall undertake to cooperate with each other to ensure the continuity of efforts for the exploitation of the wealth of the Saharan subsoil;

2. Algeria shall inherit from France her rights, prerogatives and obligations, as a public power granting concessions in the Sahara, for the application of the mining and petroleum legislation, taking into account the provisions under Title III of the present declaration;

3. Algeria and France shall undertake, each on its own behalf, to observe the principles of cooperation set forth hereinabove and to respect and ensure respect of the application of the provisions hereinafter:

**TITLE I**

**LIQUID AND GASEOUS HYDROCARBONS**

**A. Guarantee of Vested Rights and of Their Prolongation**

Par. 1.—Algeria shall confirm all the rights attached to the mining and transport titles granted by the French Republic in pursuance of the Saharan petroleum code.

The present paragraph shall apply to all the mining and transport titles granted by France before self-determination; after the cease-fire, however, there will be no issue of new exclusive permits for exploration in areas that have not as yet been allocated, unless the areas in question have been put up for new bidding by a notification published prior to this date in the "Journal Officiel" of the French Republic.

a) The term "mining and transport titles" must be understood to mean primarily:

1. Prospecting authorizations;
2. Exclusive exploration permits, known as H permits;
3. Temporary exploitation authorizations;
4. Exploitation concessions and their corresponding covenants;
5. Approvals of equipment projects for the transportation of hydrocarbons and the corresponding transportation authorizations.

b) The term "Saharan petroleum code" must be understood to mean the series of provisions of all kinds applicable, at the time of the cease-fire, to the exploration, exploitation and transportation of hydrocarbons produced in the departments of the Oases and the Saoura and in particular to the transportation of these hydrocarbons to the terminal points on the coast.

Par. 2.—The rights and obligations of the persons holding the mining and transport titles referred to in Par. 1 above and of the individuals or legal entities which are associated with them in protocols, agreements or

contracts, approved by the French Republic, are those defined by the Saharan petroleum code and by the present provisions.

Par. 3—The right of the holder of mining titles and his associates to transport or arrange for the transportation by pipelines, under normal economic conditions, of his production of liquid or gaseous hydrocarbons to the points where they are refined or loaded and to see that they are exported is applicable, with regard to the determination of the layout of the pipelines, in accordance with the recommendations of the "Agency." (See Title III.)

Par. 4—The right of the concessionary and of his associates, within the framework of their own commercial organization or the organization of their choice, to sell and dispose freely of the production, i.e., to sell, trade or use it in Algeria or for export, shall apply provided that the requirements of Algerian domestic consumption and local refining have been met.

Par. 5—The rates of exchange and the currency parities applicable to all commercial or financial transactions must be in accordance with the official parities recognized by the International Monetary Fund.

Par. 6—The provisions of the present title shall be applicable without distinction to all persons holding mining or transport titles and to their associates, whatever the legal nature, origin or distribution of their capital and irrespective of any condition of nationality of the persons or of the locality of the head office.

Par. 7—Algeria will refrain from any measure likely to make more costly or stand in the way of the exercise of the rights guaranteed above, taking into account normal economic conditions. It will not infringe upon the rights and interests of the stockholders, shareholders or creditors of persons holding mining or transport titles, of their associates, or of enterprises acting for their account.

#### B. Guarantees for the Future (New Mining or Transport Titles)

Par. 8—During a period of six years, dating from the entry into force of the present provisions, Algeria will give preference to French companies with regard to research and exploitation permits in the case of equal offers for areas that have not as yet been allocated or have again become available. The applicable regulations will be those defined by existing Algerian legislation, French companies, however, remaining subject to the Saharan petroleum code referred to in Par. 1 hereinabove, as regards mining titles covered by the guarantee of vested rights.

The term "French companies," as it is used in the present paragraph, must be understood to mean those companies whose control is in fact assured by French individuals or legal entities.

Par. 9—Algeria shall refrain from any discriminatory measures to the detriment of French companies and their associates in the exploration, exploitation or transportation of liquid or gaseous hydrocarbons.

### C. Common Provisions

Par. 10—Purchasing and sales transactions for the export of hydrocarbons from the Sahara, intended directly or through technical exchange for the supply of France and the other countries of the franc area, shall be settled in French francs.

The export of Saharan hydrocarbons outside the franc area shall carry the right for Algeria to draw on foreign currency, up to the amount of the net profit in currency resulting from these transactions; the agreements on monetary cooperation, referred to in Article 11 of the Declaration of Principles on Economic and Financial Cooperation, will specify the practical terms and conditions for the application of this principle.

## TITLE II

### OTHER MINERAL SUBSTANCES

Par. 11—Algeria shall confirm all the rights attached to the mining titles granted by the French Republic for mineral substances other than hydrocarbons; the regulations governing these titles will remain those of the series of provisions applicable on the date of the cease-fire.

The present paragraph shall apply to all mining titles granted by France before self-determination; after the cease-fire, however, there will be no issue of new exclusive permits for research in areas that have not yet been allocated, unless the areas in question have been put up for new bidding by a notification published prior to this date in the "Journal Officiel" of the French Republic.

Par. 12—French companies may submit claims for new permits and concessions under the same conditions as other companies; they will enjoy treatment as favorable as that accorded to the latter companies for the exercise of the rights deriving from these mining titles.

## TITLE III

### THE TECHNICAL AGENCY FOR THE EXPLOITATION OF THE WEALTH OF THE SAHARAN SUBSOIL

Par. 13—The rational exploitation of the wealth of the Saharan subsoil shall be entrusted, under the conditions defined in the following paragraphs, to a Franco-Algerian technical agency, hereinafter called the "Agency."

Par. 14—Algeria and France shall be the joint founders of the Agency which will be set up as soon as the present declarations of principles enter into effect.

The Agency shall be administered by a board to be composed of an equal number of representatives from the two founder countries. Each of the members of the board, including the chairman, shall have one vote.

The board shall deliberate on all the activities of the Agency. De-

cisions concerning the following shall be taken by means of a two-thirds majority:

—The appointment of the chairman and of the director general;

—The estimated expenditures referred to in Par. 16 hereinafter.

Other decisions shall be taken by an absolute majority vote.

The chairman of the board and the director general must be chosen so that one is of Algerian nationality and the other of French nationality.

The board shall determine the respective competences of the chairman and of the director general.

Par. 15—The Agency shall have legal status and financial autonomy.

It shall have at its disposal administrative and technical services, with priority being given in the composition of these services to the founder countries.

Par. 16—The Agency shall be responsible for promoting the rational exploitation of the wealth of the subsoil; in this respect, it shall in particular be responsible for the development and maintenance of the infrastructure necessary for mining activities.

To this end, the Agency shall each year draw up a draft program of expenditures, studies, maintenance of equipment and new investments, which it shall submit for approval to the two founder countries.

Par. 17—The role of the Agency in mining matters shall be defined as follows:

1. Texts of a legislative or regulatory nature concerning mining or petroleum regulations shall be enacted by Algeria on recommendation of the Agency;

2. The Agency shall examine the applications for mining titles and the rights deriving from these titles. Algeria shall decide upon the proposals of the Agency and shall grant mining titles;

3. The Agency shall assure the administrative supervision of companies holding permits or concessions.

Par. 18—The expenditures of the Agency shall include:

—Operational expenditures;

—Expenditures for the maintenance of existing facilities and equipment;

—Expenditures for new equipment.

The resources of the Agency shall be provided by contributions by the member States determined in proportion to the number of votes which they hold on the board.

However, for a three-year period dating from self-determination, which period may eventually be renewed, these resources will be supplemented by an additional contribution by Algeria which will be not less than 12% of the receipts from petroleum taxation.

#### TITLE IV

##### ARBITRATION

Notwithstanding any provisions to the contrary, all litigation or disputes between the public authorities and the holders of rights guaranteed by

Title I-A hereinabove shall be dealt with, in the first and last resort, by an international court of arbitration whose organization and functioning will be based on the following principles:

- Each of the parties shall appoint an arbitrator and the two arbitrators will nominate a third arbitrator who will preside over the court of arbitration; failing agreement on the nomination of this arbitrator, the President of the International Court of Justice will be asked to make this appointment at the request of the first mover;
- The court of arbitration shall pronounce judgment by a majority vote;
- Recourse to this court shall constitute a stay;
- Sentence shall be enforceable on the territory of both parties without proceedings to enforce judgment in the other country; it shall be recognized as lawfully enforceable outside these territories during the three days following pronouncement of judgment.

## DECLARATION OF PRINCIPLES CONCERNING CULTURAL COOPERATION

### TITLE I

#### COOPERATION

##### ARTICLE 1

France shall undertake, to the best of her ability, to place at the disposal of Algeria the necessary means for helping it to develop education, vocational training and scientific research in Algeria.

Within the framework of cultural, scientific and technical assistance, France will place at the disposal of Algeria—for purposes of education, control of studies, organization of examinations and competitive examinations, the functioning of the administrative services, and research—the teaching personnel, technicians, specialists and research workers which it may need.

This personnel will have all the facilities and moral guarantees necessary for the fulfillment of its task; it will be governed by the provisions of the Declaration of Principles on Technical Cooperation.

##### ARTICLE 2

Each of the two countries may set up on the territory of the other educational establishments and university institutes in which instruction will be given in accordance with its own programs, schedules and teaching methods and will be sanctioned by their own diplomas; admission to these schools will be open to nationals of both countries.

France will retain a certain number of educational establishments in Algeria. The list of buildings and the conditions of their distribution between France and Algeria will be the subject of a special agreement.

The programs in these establishments will include the teaching of the Arabic language in Algeria and of the French language in France. The

terms and conditions of control by the country in which the establishment is located will be the subject of a special agreement.

The setting up of an educational establishment in one or the other country will be subject to prior notification, enabling the authorities of either country to set forth their observations and suggestions in order to reach as great a degree of agreement as possible on the terms and conditions of setting up the establishment in question.

The establishments opened by each country will be attached to a university and cultural bureau.

Each country will facilitate in every respect the task of the services and persons responsible for the administration and control of the establishments of the other country functioning on its territory.

### ARTICLE 3

Each country will open its public educational establishments to pupils and students of the other country.

In localities where the number of pupils warrants such a measure, each country will organize, within its own school establishments, sections in which instruction will be given in accordance with the programs, schedules and methods practiced in the public educational system of the other country.

### ARTICLE 4

France will place at the disposal of Algeria the necessary means for helping it to develop its higher education and scientific research and to provide in these domains education of a quality equivalent to the corresponding education provided by French universities.

In the Algerian universities, Algeria will organize, to the best of its abilities, instruction in basic subjects commonly provided in French universities, under similar conditions with respect to programs, length of study and examinations.

### ARTICLE 5

The degrees and teaching diplomas granted in Algeria and in France, under the same conditions with respect to programs, length of study and examinations, shall be valid by right in both countries.

The equivalence of grades and diplomas granted in Algeria and in France under different conditions with respect to programs, length of study or examinations, will be determined by means of special agreements.

### ARTICLE 6

Nationals of each of the two countries, individuals or legal entities may open private educational establishments on the territory of the other country, subject to the observation of the laws and regulations concerning

public order, morality, hygiene, conditions regarding diplomas and any other conditions that might be agreed upon by common accord.

#### ARTICLE 7

Each country will facilitate the access of nationals of the other country to the educational and research establishments under its authority, by the organization of training courses and all other suitable means, and by the granting of scholarships or research fellowships or of loans on trust, which will be granted to the persons concerned through the intermediary of the authorities of their own country, after consultation between the responsible authorities of both countries.

#### ARTICLE 8

Each of the two countries will ensure on its territory to the members of the teaching profession, in both public and private schools, of the other country the respect of academic freedom and traditional immunities of educational institutions.

### TITLE II

#### CULTURAL EXCHANGES

#### ARTICLE 9

Each of the two countries will facilitate the entry, circulation and distribution on its territory of all the instruments of expression of thought originating in the other country.

#### ARTICLE 10

Each of the two countries will encourage on its territory the study of the language, history and civilization of the other country, facilitate the work undertaken in this field and the cultural activities organized by the other country.

#### ARTICLE 11

The terms and conditions of technical assistance to be furnished by France to Algeria with regard to radio, television and motion pictures will be settled at a future date by common agreement.

### TITLE III

#### ARTICLE 12

The aid provided for with respect to economic and financial cooperation shall be applicable to the areas referred to in the present declaration.

## DECLARATION OF PRINCIPLES CONCERNING TECHNICAL COOPERATION

## ARTICLE 1

France shall undertake:

a) To lend Algeria her assistance with regard to technical documentation and to assure to the Algerian services the regular communication of information in the fields of study, research and experimentation;

b) To place at the disposal of Algeria, to the extent of the means available, services and missions for study, research or experimentation, with a view either to carrying out specific projects on behalf of the latter, according to its directives, or to conducting studies, participating in the fulfillment of projects or contributing to the creation or reorganization of a service;

c) To give applicants presented by the Algerian authorities and approved by the French authorities wide access to French educational and training establishments and to organize for their benefit advanced courses and accelerated educational and training programs, in training schools, in specialized centers and in the public services;

d) To place at the disposal of Algeria, to the extent of the means available, civil servants of French nationality who will give assistance in technical and administrative matters.

## ARTICLE 2

In order to maintain the continuity of service and to facilitate the organization of technical cooperation, the Algerian authorities shall undertake:

—To transmit to the French Government the lists of French civil servants whose duties they intend to terminate, as well as the list of posts that they wish to assign to French civil servants;

—Not to proceed with the discharge of French civil servants in active service on the day of self-determination without first having transmitted the above-mentioned lists to the French Government and having notified the persons concerned under conditions of prior notice to be determined by a supplementary agreement.

## ARTICLE 3

French civil servants, with the exception of those enjoying Algerian civil rights, who are in active service on the day of self-determination and whose duties the Algerian authorities do not intend to terminate shall be considered as being at the disposal of the Algerian authorities, for purposes of technical cooperation, unless these civil servants express a wish to the contrary.

## ARTICLE 4

Upon the presentation of the lists referred to in Article 2, a summary statement of the posts that the French Government shall agree to fill will be drawn up by common agreement. It may be revised every two years.



The civil servants referred to in Article 3 and the civil servants recruited by Algeria in accordance with Article 1, Par. d), will be placed at the disposal of the Algerian authorities for a period established in principle at two years.

However, the Algerian authorities will have the right to transfer the civil servants back to the services of their own Government at any time under conditions of formal notice and term of notice to be specified by supplementary agreements.

The French authorities may, by means of individual measures, terminate the assignment of French civil servants under conditions that shall not impair the efficient functioning of the services.

#### ARTICLE 5

The French civil servants placed at the disposal of the Algerian authorities shall, in the exercise of their duties, be subject to the Algerian authorities. They may not be able to request or receive orders from any authorities other than the Algerian authorities, to which they will be responsible by reason of the duties that will be entrusted to them. They may not take part in any political activity on Algerian territory. They must refrain from any action of a nature likely to be injurious to the material and moral interests of either the Algerian or the French authorities.

#### ARTICLE 6

The Algerian authorities shall render to all the French civil servants the aid and protection that they grant to their own civil servants. They shall guarantee these French civil servants the right to transfer their remuneration to France under the conditions provided in the Declaration of Principles Concerning Economic and Financial Cooperation.

These French civil servants may not incur any administrative penalty other than being returned for a specified reason to their own Government. They may not be transferred without their consent in writing.

#### ARTICLE 7

The terms and conditions of application of the above principles shall be the subject of supplementary agreements. The latter will, among other things, regulate, according to the status of these civil servants, the conditions of their remuneration and the division between France and Algeria of the financial expenses connected with the transportation of the civil servant and his family, any possible allowances, and the State contribution to social security and retirement pensions.

### DECLARATION OF PRINCIPLES CONCERNING MILITARY QUESTIONS

#### ARTICLE 1

Algeria shall lease to France the use of the naval air base of Mers-el-Kébir for a 15-year period from the time of self-determination. This

lease shall be renewable by agreement between the two countries.

The territory on which the Mers-el-Kébir base is located shall be recognized by France as Algerian territory.

#### ARTICLE 2

The boundaries of the Mers-el-Kébir base shall be defined in accordance with the map annexed to the [original of the] present declaration.

Around the periphery of the base, Algeria agrees to grant to France, at the points specified on the annexed map and situated in the communes of El Ançor, Bou Tlélis and Misserghin as well as on Habibas and Plane Islands, the installations and facilities necessary for the operation of the base.

#### ARTICLE 3

The Lartigue airfield and the Arbal installations, the perimeter of which is defined on the map annexed to the [original of the] present declaration, shall be considered a period of three years as being part of the Mers-el-Kébir base and will be subject to the same regulations.

After the Bou-Sfer airfield is put into service, the Lartigue airfield may be used as an alternate field when weather conditions so require.

The construction of the Bou-Sfer airfield will be effected within a period of three years.

#### ARTICLE 4

For a period of five years France will have the use of the sites on which are located the installations of In Ekker, Reggane and the Colomb-Béchar-Hamaguir complex, whose area is defined on the plan annexed [to the original text], as well as of the corresponding local technical stations.

The temporary measures that shall be required for the operation of the installations outside their limits, in particular with regard to land and air traffic, will be taken by the French services in agreement with the Algerian authorities.

#### ARTICLE 5

Facilities for air communications will be placed at the disposal of France under the following conditions:

- For a five-year period at the Colomb-Béchar, Reggane and In-Amguel airfields. These fields will subsequently be transformed into civilian airfields, where France will retain technical facilities and landing rights;
- For a five-year period at the Bône and Boufarik airfields, where France will have technical facilities as well as landing, refueling and repair rights; both countries will agree upon the facilities that will subsequently be granted at these two fields.

## ARTICLE 6

The military installations listed hereinabove will under no circumstances be used for aggressive purposes.

## ARTICLE 7

The strength of the French forces will be progressively reduced starting with the cease-fire.

The result of this reduction will be to decrease the strength of the forces to 80,000 within a period of twelve months from the date of self-determination. The repatriation of these forces must be completed by the end of a second 24-month period. Until the end of this second period, France will have facilities at her disposal in the areas that will be necessary for the regroupment and movement of French forces.

## ARTICLE 8

The annex attached hereto shall be an integral part of the present declaration.

## ANNEX

*With regard to Mers-el-Kébir:*

## ARTICLE 1

The rights granted to France at Mers-el-Kébir shall include the use of the soil and subsoil, the territorial waters of the base and the air space above it.

## ARTICLE 2

Only French military aircraft shall have freedom of movement in the air space above Mers-el-Kébir, where the French authorities shall assure the regulation of air traffic.

## ARTICLE 3

On the Mers-el-Kébir base, the civilian population shall be administered by the Algerian authorities in all matters not concerning the use and operation of the base.

The French authorities shall exercise all the powers necessary for the use and operation of the base, in particular with regard to defense, security, and the maintenance of law and order insofar as it shall directly concern defense and security.

They shall assure the policing and movement of all land, air and sea craft. Police tasks shall be assured by the military police.

## ARTICLE 4

The establishment of new residents on the territory of the base may be the subject of necessary restrictions, by agreement between the French authorities and the Algerian authorities.

If circumstances so require, the evacuation of all or part of the civilian population may be ordered by the Algerian authorities at the request of France.

## ARTICLE 5

Any individual who shall disturb the peace, insofar as it may endanger the defense and security of the base, shall be handed over by the French authorities to the Algerian authorities.

## ARTICLE 6

Freedom of movement on the routes that interconnect the installations situated on the periphery of the base and connect these installations with the Mers-el-Kébir base shall be assured under all circumstances.

## ARTICLE 7

The French authorities may rent and purchase on the base any movable and immovable property that they deem necessary.

## ARTICLE 8

The Algerian authorities will take, upon the request of the French authorities, the requisition or dispossession measures deemed necessary for the activity and operation of the base. These measures will be subject to fair compensation previously agreed upon, payable by France.

## ARTICLE 9

The Algerian authorities will take measures to ensure the water and electricity supply for the base under all circumstances, as well as the use of the public utilities.

## ARTICLE 10

The Algerian authorities shall prohibit outside the base any activity liable to jeopardize the utilization of this base and shall take, in conjunction with the French authorities, all appropriate measures to ensure the security of the base.

*With regard to sites:*

## ARTICLE 11

At the sites referred to in Article 4 of the Declaration of Principles, France shall maintain such personnel and installations and keep such technical equipment and matériel as are necessary to her.

## ARTICLE 12

At the Reggane, Colomb-Béchar and In-Amguel airfields, the French authorities may maintain such personnel and keep such technical supplies, installations, equipment and matériel as they deem necessary.

## ARTICLE 13

Any unauthorized person or any person disturbing the peace at the sites and airfields referred to hereinabove shall be handed over to the Algerian authorities by the French authorities.

*With regard to air facilities:*

## ARTICLE 14

France shall dispose of radar equipment at Reghaïa and Bou-Zizi. This radar equipment shall be used to ensure the safety of general air navigation, both civil and military.

## ARTICLE 15

The Algerian authorities shall ensure the external security of the airfields mentioned in the second paragraph of Article 5 of the Declaration of Principles and shall, if need be, take appropriate measures outside the airfields to ensure the efficient functioning of the installations.

## ARTICLE 16

French military aircraft shall have the use, in conformity with the regulations for general traffic, of the air space interconnecting the airfields that France shall be entitled to use.

## ARTICLE 17

The French and Algerian meteorological services shall cooperate in giving each other mutual assistance.

*With regard to land traffic facilities:*

## ARTICLE 18

The organized units of the French forces and all matériel, as well as detached members of these forces, shall be free to move by land between all points where these forces shall be stationed, by means of the existing railroads or roads in Algeria.

Large-scale movements will be made with the agreement of the Algerian authorities.

*With regard to maritime traffic facilities:*

ARTICLE 19

French Government vessels transporting military personnel and matériel will have access to certain Algerian ports. The terms and methods of application will be settled by the two Governments.

ARTICLE 20

The access of French warships to Algerian roadsteads and ports will be the subject of subsequent agreements.

*With regard to telecommunications:*

ARTICLE 21

France shall have the exclusive right to operate the telecommunications facilities of the Mers-el-Kébir base and of the French installations located at the airfields and at the sites referred to in Article 4 of the Declaration. She will negotiate the assignments of frequencies directly with the International Telecommunications Union.

ARTICLE 22

The French forces may utilize for their communications the telegraph and telephone circuits of Algeria, in particular the telecommunications infrastructure:

- Oran to Bône, with relay stations of Chréa, Sétif, Kef-el-Akkal and Bou-Zizi;
- Oran to Colomb-Béchar, with the relay stations of Saïda, Mécheria and Aïn-Sefra.

Subsequent agreements will determine the conditions for the utilization of the corresponding technical installations.

*With regard to the status of the armed forces in Algeria:*

ARTICLE 23

For the application of the present statute, the following categories shall be designated "Members of the French Armed Forces":

- a) Military personnel of the three armed forces on active duty, in transit or on leave in Algeria;
- b) Civilian personnel employed, on a statutory or contractual basis, by the French armed forces, exclusive of Algerian nationals;
- c) Dependents of the persons referred to hereinabove.

ARTICLE 24

Members of the French armed forces shall enter and leave Algeria upon the presentation of the following documents only:

- A national or military identity card, or passport;
  - For civilian persons, an identity card and proof of being attached to the French armed forces.
- They shall have freedom of movement in Algeria.

#### ARTICLE 25

Organized units and detachments shall be required to wear uniforms. The dress of individual members outside of military quarters shall be the subject of subsequent regulations.

Members of the armed forces on detachment shall be authorized to carry a visible weapon.

*With regard to judicial provisions:*

#### ARTICLE 26

Violations of the law committed by members of the armed forces, either while on duty or inside the French installations, or not involving Algerian interests, in particular as regards public order, shall come within the competence of French military jurisdiction. The French authorities may take into custody the alleged perpetrators of such violations.

#### ARTICLE 27

Personnel of Algerian nationality who commit violations of the law inside the installations shall be handed over forthwith to the Algerian authorities for the purpose of being tried.

#### ARTICLE 28

Any violation of the law not referred to in Article 26 hereinafter shall come within the jurisdiction of the Algerian courts.

Both Governments, however, may waive the use of their right of jurisdiction.

#### ARTICLE 29

Members of the French armed forces who are brought before the Algerian courts and whose detention is deemed necessary shall be incarcerated in penal establishments appertaining to the French military authorities, who shall have them appear at the request of the Algerian judicial authorities.

#### ARTICLE 30

In cases of *flagrante delicto*, members of the French armed forces shall be apprehended by the Algerian authorities and shall be turned over forth-

with to the French authorities for the purpose of being tried, insofar as the latter exercise jurisdiction over the persons concerned.

#### ARTICLE 31

Members of the French armed forces prosecuted in an Algerian court shall have the right to the guarantees of fair legal proceedings sanctioned by the Universal Declaration of Human Rights and by the practice of democratic states.

#### ARTICLE 32

The French State will make just compensation for any damages that may be caused by the armed forces and members of these forces in the course of duty, where this has been duly ascertained. In case of dispute, the two Governments will have recourse to arbitration.

Subject to the provisions of the preceding paragraph, the Algerian courts shall have jurisdiction in civil actions brought against members of the armed forces. The French authorities shall lend their assistance to the Algerian authorities upon their request, in order to ensure the enforcement of the decisions of the Algerian courts in civil cases.

*With regard to the provisions in economic and financial matters:*

#### ARTICLE 33

The French armed forces and the members of these forces may obtain locally goods and services that are necessary to them, under the same conditions as Algerian nationals.

#### ARTICLE 34

The French military authorities may have an army postal service and a military paymaster's office.

#### ARTICLE 35

Fiscal provisions will be settled by subsequent agreements.

#### DECLARATION OF PRINCIPLES CONCERNING THE SETTLEMENT OF DIFFERENCES

France and Algeria will settle differences that may arise between them by peaceful means. They will have recourse either to conciliation or to arbitration. Failing agreement on these procedures, each of the two States may refer the matter directly to the International Court of Justice.



## UNITED STATES

SECTION 620 OF THE FOREIGN ASSISTANCE ACT OF 1961<sup>1</sup>

AS AMENDED BY

SECTION 301(d) OF THE FOREIGN ASSISTANCE ACT OF 1962<sup>2</sup>

\* \* \* \* \*

(c) No assistance shall be provided under this chapter to the government of any country which is indebted to any United States citizen or person for goods or services furnished or ordered where (i) such citizen or person has exhausted available legal remedies, which shall include arbitration, or (ii) the debt is not denied or contested by such government, or (iii) such indebtedness arises under an unconditional guaranty of payment given by such government, or any predecessor government, directly or indirectly, through any controlled entity: *Provided*, That the President does not find such action contrary to the national security.

\* \* \* \* \*

(e) The President shall suspend assistance to the government of any country to which assistance is provided under this chapter when the government of such country or any governmental agency or subdivision within such country on or after January 1, 1962—

(1) has nationalized or expropriated or seized ownership or control of property owned by any United States citizen or by any corporation, partnership, or association not less than 50 per centum beneficially owned by United States citizens, or

(2) has imposed or enforced discriminatory taxes or other exactions, or restrictive maintenance or operational conditions, which have the effect of nationalizing, expropriating, or otherwise seizing ownership or control of property so owned,

and such country, government agency or government subdivision fails within a reasonable time (not more than six months after such action or after August 1, 1962, whichever is later) to take appropriate steps, which may include arbitration, to discharge its obligations under international law toward such citizen or entity, including equitable and speedy compensation for such property in convertible foreign exchange, as required by international law, or fails to take steps designed to provide relief from such taxes, exactions, or conditions, as the case may be, and such suspension shall continue until he is satisfied that appropriate steps are being taken and no other provision of this chapter shall be construed to authorize the President to waive the provisions of this subsection.

<sup>1</sup> Public Law 87-195, approved Sept. 4, 1961, 75 Stat. 424, 444.

<sup>2</sup> Public Law 87-565, approved Aug. 1, 1962, 76 Stat. 255, 22 U.S.C. § 2370.

Concerning the suspension of aid to Ceylon under the provisions of this Act, see 48 Dept. of State Bulletin 328 (1963), and Government statements on United States suspension of assistance to Ceylon, 2 International Legal Materials 386-394 (1963).

\* \* \* \* \*

(g) Notwithstanding any other provision of law, no monetary assistance shall be made available under this chapter to any government or political subdivision or agency of such government which will be used to compensate owners for expropriated or nationalized property and, upon finding by the President that such assistance has been used by any government for such purpose, no further assistance under this chapter shall be furnished to such government until appropriate reimbursement is made to the United States for sums so diverted.

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Volume 17, No. 2     Spring 1963

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THE JURISPRUDENCE OF THE WORLD COURT:  
THIRTY-EIGHTH YEAR (1959)

BY LEO GROSS

*Of the Board of Editors*

## INTRODUCTION

In the first study devoted to the World Court, Manley Hudson was largely concerned with the formal steps leading to its establishment and its organization. He placed the Court in historical perspective by linking it with the fruitless efforts at the 1907 Hague Peace Conference to set up a Permanent Court of Arbitral Justice. He was not overly optimistic as to the future of the new Court, saying that "of course, the real test of the reception of the Court by the peoples of the world will come in the action of their governments as disputes arise."<sup>1</sup> He was concerned about the co-existence of two courts: the new Court and the Permanent Court of Arbitration, which has its roots in the 1899 Hague Peace Conference. Will the new Court "be generally utilized, in preference to arbitration before tribunals of the Permanent Court of Arbitration and tribunals independently set up by special agreement"?<sup>2</sup>

Hudson noted with satisfaction that the reception of the new Court among lawyers, including those in the United States, was good and he quoted with approval the words of Sir Ernest Pollock: "May we not as lawyers regard the establishment of an International Court of Justice as an advance in the science which we pursue?"<sup>3</sup> Writing a year later, Hudson could afford to be more affirmative and sanguine about the Court:

... such has been its progress in two years that the court now appears to be one of the established institutions in our international life. The Foreign Offices have begun to regard it as a sort of international fixture. It is fast accumulating a record of achievement indispensable to the international law of the future, and the court now bids fair to be permanent in influence as in name.\*

He went on to point out that if the docket of the Court was not crowded, one could take comfort from the history of the Supreme Court of the United States which did not have a contested case until its sixth term.

Returning to the problem of the co-existence of the two courts, he found satisfaction in the fact "that since the court was created, no question has been referred to a tribunal of the Permanent Court of Arbitration, though various special arbitrations have been arranged."<sup>5</sup>

<sup>1</sup> "The First Year of the Permanent Court of International Justice," 17 A.J.I.L. 15-28, at 26 (1923). <sup>2</sup> *Ibid.*

<sup>3</sup> *Ibid.* at 27.

<sup>4</sup> "The Second Year of the Permanent Court of International Justice," 18 A.J.I.L. 1-87, at 1 (1924).  
<sup>5</sup> *Ibid.*

<sup>8</sup> *Ibid.*

With his usual acumen Hudson discerned the significance of the Court's advisory function. Far from joining the ranks of its detractors, he demonstrated, first, that giving advisory opinions was no novelty in the Anglo-American legal system and, next, that "the court is performing a judicial function when it gives advisory opinions to the Council of a League of fifty-four nations."<sup>6</sup>

The Court, at its inception, was off to a promising start. Hudson noted that the nine opinions handed down in the first two years had met with "general satisfaction" and that they dealt with "vexed questions of international law." The states concerned accepted the opinions of the Court. He was quite hopeful:

The influence of the court has been steadily growing. With forty-seven signatories to the protocol under which it exists, with lawyers everywhere viewing its record with satisfaction and hope, the court promises a fulfilment of the world's long-cherished desire.<sup>7</sup>

Hudson never lost faith in the Court and its vital, if modest, rôle in international relations. The Court has indeed become a fixture of our life; its jurisprudence, though sparse, has continued to grow in significance and deserves more than ever the close attention of international lawyers.

Manley Hudson continued the annual survey of the Court even after his election to the bench on October 8, 1936, until 1959, when the last of his contributions appeared. This is not the occasion to evaluate his work as a faithful chronicler of the Court over nearly four decades. Suffice it to recall Philip C. Jessup's words:

His annual articles in the AMERICAN JOURNAL OF INTERNATIONAL LAW on the work of the Court are the studies of a jurist who was a master of the Court's law and procedure and who rendered a great service by following every development with the utmost care and with ready criticism when criticism was due.<sup>8</sup>

The invitation of the Board of Editors to resume and continue Manley Hudson's annual review of the Court's work is a great honor to one of his former students, and a great responsibility. It will be no easy task to come up to his exacting standards of scholarship, precision of language, and fair critical evaluation. The task is made more difficult as a hiatus of several years has occurred. Every effort will be made to catch up with the Court's jurisprudence. Some variations in organization, method and analysis will be inevitable. No two jurists view the Court in an identical manner. It remains for the writer to bespeak the indulgence of the reader and to express the hope that his surveys will be found serviceable.

During the year under review, the Court gave three judgments, two on preliminary objections and one on merits. Of the former, one, the *Interhandel* case, was the subject of extensive comment and analysis both in this JOURNAL as well as elsewhere.<sup>9</sup> It was therefore deemed reasonable to omit it from this survey.

<sup>6</sup> *Ibid.* at 25, 29.

<sup>7</sup> *Ibid.* at 37.

<sup>8</sup> "Manley Hudson, 1886-1960," 54 A.J.I.L. 603-604, at 604 (1960).

<sup>9</sup> *Interhandel Case (Switzerland v. U. S.)*, [1959] I.C.J. Rep. 6. A digest of the opinion appeared in this JOURNAL, Vol. 53, pp. 671-687 (1959). For an analysis of

## CASE CONCERNING THE AERIAL INCIDENT OF JULY 27, 1955

This case was before the Court in three phases: the principal phase was concerned with the claim of Israel, application of October 9, 1957, against Bulgaria; the second, with the claim of the United Kingdom against Bulgaria, and the third, with the United States claim against Bulgaria. As will be shown, the second and third claims were withdrawn after the Court declared itself without competence in the first phase. Although the United States claim was withdrawn in 1960, it will be discussed here briefly, as it arose out of the same facts.

1. *Israel v. Bulgaria*

The facts of the case were not in controversy. An Israeli civil aircraft, 4X-AKC, on a flight from Vienna (Austria) to Lydda (Israel), strayed from its course, penetrated Bulgarian territory on July 27, 1955, and was shot down by aircraft of the Bulgarian anti-aircraft defense forces. The plane crashed and the 7-man crew and the 51 passengers of various nationalities were killed. Israel claimed compensation in the amount of \$2,559,688.65 for the loss "incurred by the persons whose cause is being adopted." With respect to the submission that Bulgaria violated international law in destroying the Israeli aircraft, the Israeli Government stated "that a declaration by the Court regarding the international responsibility of Bulgaria . . . would be sufficient satisfaction and that it was waiving any further claim to reparation."<sup>10</sup>

It is interesting to note that the Israeli Government had expressed its regrets for the violation of Bulgarian sovereignty committed involuntarily and accidentally by its aircraft and that "in the interests of a speedy settlement the Government of Israel was prepared to waive its claim for damages directly suffered by the Israel Government."<sup>11</sup> In its application

the Court's opinion see Briggs, "Interhandel: The Court's Judgment of March 21, 1959, on the Preliminary Objections of the United States," *ibid.* 547-564. For other comments on the case and its earlier phase see: Hudson, "The Thirty-Sixth Year of the World Court," 52 *ibid.* at 4 f. (1958); Briggs, "Towards the Rule of Law!" 51 *ibid.* at 519 (1957); Jacoby, "Towards the Rule of Law!" 52 *ibid.* 10 ff. (1958); Briggs, "The United States and the International Court of Justice," 53 *ibid.* 307 ff. (1959); Simmonds, "The Interhandel Case," 10 Int. and Comp. Law Q. 495-547 (1961); Charles De Visscher, "L'Affaire de l'Interhandel devant la Cour Internationale de Justice," 63 Rev. Gén. de Droit Int. Public 413-433 (1959); Jillson, note, 58 Mich. Law Rev. 467 (1960); note, 1960 Duke Law J. 73.

<sup>10</sup> Case concerning the Aerial Incident of July 27, 1955 (*Israel v. Bulgaria*), Preliminary Objections, Judgment of May 28, 1959, [1959] I.C.J. Rep. 127 at 130; digest in 53 A.J.I.L. 923-937 (1959). See also, on this case, Cafisch, "Recent Judgment of the International Court of Justice in the Case concerning the Aerial Incident of July 27, 1955, and the Interpretation of Article 86(5) of the Statute of the Court," 54 A.J.I.L. 855 (1960); note, 1960 Duke Law J. 240; Conac, "L'Affaire relative à l'Incident Aérien du 27 juillet 1955 entre Israël et la Bulgarie devant la Cour Internationale de Justice," 64 Rev. Gén. de Droit Int. Public 711 (1960).

<sup>11</sup> Note Verbale of Feb. 14, 1956, from the Israel Legation in Sofia to the Bulgarian Ministry for Foreign Affairs. I.C.J. Pleadings, Aerial Incident of 27 July 1955 (*Israel v. Bulgaria*; *United States of America v. Bulgaria*; *United Kingdom v. Bulgaria*), p. 17 (cited hereinafter as Pleadings). The damages were described as

the Israeli Government reinstated its claim for "moral and material reparation,"<sup>12</sup> only to waive it to the extent observed above, in its memorial.<sup>13</sup> It would seem that the international delict which Israel alleged was committed by Bulgaria consisted, not in Bulgaria's action to enforce its sovereignty, but rather in the manner in which that sovereignty was enforced. Although this aspect of the case was not material to the proceedings, which were confined to only one of several Bulgarian preliminary objections, it may be of general interest, in view of aerial incidents, to quote the following passage from the Israel memorial:

In this petition the Government of Israel is asking the Court to hold that in the circumstances the opening of fire on 4X-AKC on 27 July 1955 by units of the Bulgarian armed forces, resulting in the complete destruction of 4X-AKC, constitutes a violation of international law. The degree of violence used was quite out of proportion to any possible threat to Bulgaria which 4X-AKC may have presented. . . . An excess of force is reprehensible in itself and would be so even without the admission by the Bulgarian Government that in so acting its armed forces manifested haste . . . and had not taken all measures necessary to constrain the aircraft to land. . . . That being so, the opening of fire on 4X-AKC was in breach of international law, and Bulgaria is accordingly obliged to make reparation therefor.

The basis of this contention is the rule that when measures of force are employed to protect territorial sovereignty, whether on land, on sea or in the air, their employment is subject to the duty to take into consideration the elementary obligations of humanity, and not to use a degree of force in excess of what is commensurate with the reality and the gravity of the threat (if any). In all systems of law, including international law, this is the test for measuring the degree of violence which may justifiably be used to protect rights recognized by the law, and particularly the degree of violence used when performing acts by their very nature dangerous.<sup>14</sup>

It is also interesting, though equally not germane, that Bulgaria countered Israel's claim for compensation by submitting that, even if the persons concerned may have been Israeli nationals, "the damage in respect of which it seeks reparation was for the most part suffered by non-Israeli companies."<sup>15</sup> The Government of Israel briefly opposed several objections to this contention, arguing *inter alia* that, "as between States parties

---

arising from the Bulgarian action against the aircraft and the expenses incurred as a result of this action.

<sup>12</sup> Pleadings at 6. The extent of the government's claim is detailed *ibid.* at 112.

<sup>13</sup> *Ibid.* at 116.

<sup>14</sup> Pleadings at 84. The admissions referred to by the Israeli Government resulted from a Bulgarian commission of inquiry and were adopted in the Note Verbale of Aug. 4, 1955, from the Bulgarian Ministry for Foreign Affairs to the Israeli Legation in Sofia, *ibid.* at 13. The Israeli Government construed these admissions as "binding and conclusive in themselves." *Ibid.* at 100. See also memorial of the United Kingdom, *ibid.* at 358 f., and generally, Lissitzyn, "The Treatment of Aerial Intruders in Recent Practice and International Law," 47 A.J.I.L. 559-589 (1953).

<sup>15</sup> [1959] I.C.J. Rep. at 131 f. and 183. Cf. also Pleadings at 132. For the oral statement by Professor Cot, *cf. ibid.* at 438 ff.

to the present dispute such (insurance) contracts and arrangements are *res inter alios acta*," and did not affect Israel's claim for reparation for the destruction of the aircraft "at the hands of the Bulgarian armed forces acting *jure imperii*." <sup>16</sup>

Israel, in its application, invoked the compulsory jurisdiction of the Court under Article 36 of the Statute on the basis of its own Declaration of October 3, 1956, replacing the previous Declaration of September 4, 1950, on the one hand, and the Bulgarian Declaration of July 29, 1921, on the other. Bulgaria having filed preliminary objections to the jurisdiction of the Court, the Court by order of December 17, 1958, suspended the proceedings on the merits. Both parties elected, in accordance with Article 31, paragraph 3, to appoint judges *ad hoc*. Israel chose Mr. Justice Goitein of its Supreme Court, and Bulgaria chose Mr. Jaroslav Zourek (Czechoslovakia), a member of the United Nations International Law Commission.

Of the five Bulgarian Preliminary Objections only the first was the subject of the Court's Judgment of May 26, 1959. As amended, it requested the Court to declare itself without jurisdiction to adjudicate upon the Israel application relating to the aerial incident of July 27, 1955, in the following terms:

The Declaration of August 12th, 1921, by which the Kingdom of Bulgaria had accepted the compulsory jurisdiction of the Permanent Court of International Justice . . . ceased to be in force on the dissolution of the Permanent Court, pronounced by the Assembly of the League of Nations on April 18th, 1946;

. . . that Declaration was therefore no longer in force on the date on which the People's Republic of Bulgaria became a party to the Statute of the International Court of Justice; and . . . it cannot accordingly be regarded as constituting an acceptance of the compulsory jurisdiction of the International Court of Justice, by virtue of Article 36, paragraph 5, of the Statute of that Court. . . <sup>17</sup>

With respect to the Bulgarian First Preliminary Objection, Israel asked for its dismissal on the following grounds:

(a) The jurisdiction of the Court in this case is dominated by Article 36, paragraph 5, of the Statute and by the declarations of both Parties accepting the compulsory jurisdiction;

(b) Article 36, paragraph 5, of the Statute of the Court is clear and there is no difficulty in giving effect to it;

(c) Article 36, paragraph 5, lays down the rule that all declarations made under Article 36 of the Statute of the Permanent Court of International Justice and which were still in force on 24 October 1945, the date of entry into force of the Charter, shall be deemed as between the parties to the present Statute to be acceptances of the compulsory jurisdiction of this Court for the period which they still had to run on 24 October 1945 and in accordance with their own terms;

<sup>16</sup> Pleadings at 159. See also *ibid.* at 520, 524, 532-535.

<sup>17</sup> [1959] L.O.J. Rep. at 132. In its original form this objection was as follows: "Article 36, paragraph 5, of the Statute of the International Court of Justice is inapplicable in regard to the People's Republic of Bulgaria." *Ibid.* at 131.

(d) Article 36, paragraph 5, applies to all States parties to the present Statute whenever they become parties to it;

(e) As is recognized in the Bulgarian Preliminary Objection, the Bulgarian Declaration of 1921 was in force on 24 October 1945; it has since neither expired in accordance with its own terms, nor has it been withdrawn and, therefore, as between Israel and Bulgaria, both parties to the present Statute, it is still in force as acceptance of the compulsory jurisdiction of this Court;

(f) The operation of Article 36, paragraph 5, is quite independent of extrinsic actions and events, and in particular is not affected by the dissolution of the Permanent Court of International Justice, an event which in fact was contemplated when the present Statute was drawn up and Article 36, paragraph 5, inserted into it;

(g) Accordingly, this Objection is unfounded.<sup>18</sup>

The Court upheld by twelve votes to four the First Bulgarian Preliminary Objection and declared itself without jurisdiction to adjudicate upon the dispute.<sup>19</sup>

Vice President Zafrullah Khan wrote a brief declaration, Judges Badawi and Armand-Ugon wrote separate opinions, Judges Sir Hersch Lauterpacht, Wellington Koo and Sir Percy Spender appended a joint dissenting opinion, and Judge *ad hoc* Goitein also submitted a dissenting opinion.

The Court appears to have adopted from the outset a purpose or object-oriented approach and was, like Bulgaria, less concerned with the text of the clause on which Israel as well as the dissenting judges relied. For the sake of convenience the reasoning of the Court may be divided into two parts: in the first will be considered the question to which states paragraph 5 was intended to apply, that is, the range of this clause *ratione personae*, and in the second, the question to which declarations was paragraph 5 intended to apply, that is, the range of this clause *ratione materiae*.<sup>20</sup>

#### a. Range of Article 36, Paragraph 5, *Ratione Personae*

The first question to which the Court addressed itself was whether Article 36, paragraph 5, of the Statute was applicable to Bulgaria and to its Declaration of 1921. The Declaration was as follows:

On behalf of the Government of the Kingdom of Bulgaria, I recognize, in relation to any other Member or State which accepts the same obligation, the jurisdiction of the Court as compulsory, *ipso facto* and without any special convention, unconditionally.<sup>21</sup>

The fifth paragraph of Article 36 of the Statute is in the following terms:

Declarations made under Article 36 of the Statute of the Permanent Court of International Justice and which are still in force shall be deemed, as between the parties to the present Statute, to be acceptances of the compulsory jurisdiction of the International Court of Justice

<sup>18</sup> Oral Argument by Mr. Rosenne (Israel), Pleadings at 535 f.

<sup>19</sup> [1959] I.C.J. Rep. at 146.

<sup>20</sup> The distinction was made by the Bulgarian Advocate, Professor Cot, in oral argument. Pleadings at 392.

<sup>21</sup> [1959] I.C.J. Rep. 127.

for the period which they still have to run and in accordance with their terms.<sup>22</sup>

The Court started from the proposition that there was a basic difference between states represented at the San Francisco Conference, which drew up the Charter with the Statute, and states which were not so represented but which might be admitted subsequently. Looking at the purpose of paragraph 5, the Court found that it was adopted in anticipation of the dissolution of the old and the creation of the new Court, and was intended to perform a dual operation: first, to preserve old declarations "with immediate effect as from the entry into force of the Statute," and, secondly, to transfer them to the new Court.<sup>23</sup> Non-signatory states could not be affected by this accord between signatories, their declarations without their consent could not be prevented from lapsing on the dissolution of the old Court, and accordingly they could not be transferred to the new Court. The authors of the Charter could have made an offer to non-signatory states, but no such offer was made. The Court said:

Thus to restrict the application of Article 36, paragraph 5, to States signatories of the Statute is to take into account the purpose for which this provision was adopted.<sup>24</sup>

If nothing had been done, the old declarations would have lapsed upon the dissolution of the Permanent Court and a retrogressive step would have been taken in the development of compulsory adjudication, unless new declarations were made forthwith upon the establishment of the new Court, an event which apparently was not anticipated at San Francisco. Instead,

it was sought to provide for this transitory situation by a transitional provision and that is the purpose of Article 36, paragraph 5. By its nature and by its purpose, that transitional provision is applicable only to the transitory situation it was intended to deal with, which involved the institution of a new Court just when the old Court was being dissolved. The situation is entirely different when, the old Court and the acceptance of its compulsory jurisdiction having long since disappeared, a State becomes a party to the Statute of the new Court: there is then no transitory situation to be dealt with by Article 36, paragraph 5.<sup>25</sup>

The Court found some confirmation for its view that paragraph 5 was only concerned with signatory states in the preparatory work of the San Francisco Conference.<sup>26</sup> It seems reasonably clear, however, that what the Court was essentially concerned about was to preserve the consensual character of its jurisdiction in general and of its compulsory jurisdiction in

<sup>22</sup> The French text, which played a significant rôle in argument, is as follows:

"5. Les déclarations faites en application de l'article 36 du Statut de la Cour permanente de Justice internationale pour une durée qui n'est pas encore expirée seront considérées, dans les rapports entre parties au présent Statut, comme comportant acceptation de la juridiction obligatoire de la Cour internationale de Justice pour la durée restant à courir d'après ces déclarations et conformément à leurs termes."

<sup>23</sup> [1959] I.C.J. Rep. 127 at 137.

<sup>24</sup> *Ibid.* at 139.

<sup>25</sup> *Ibid.*

<sup>26</sup> *Ibid.* at 140-141.

particular. The Court sought and found this consent in the signature and ratification of the Charter by those states which were affected by Article 36, paragraph 5:

But when, as in the present case, a State has for many years remained a stranger to the Statute, to hold that that State has consented to the transfer, by the fact of its admission to the United Nations, would be to regard its request for admission as equivalent to an express declaration by that State as provided for by Article 36, paragraph 2, of the Statute. It would be to disregard both that latter provision and the principle according to which the jurisdiction of the Court is conditional upon the consent of the respondent, and to regard as sufficient a consent which is merely presumed.<sup>27</sup>

b. *Range of Article 36, Paragraph 5, Ratione Materiae*

In the second part of its reasoning the Court addressed itself to the Israeli construction according to which, as stated by the Court, Article 36, paragraph 5, covers "a declaration made by a State, which had not participated in the San Francisco Conference, which is not a signatory of the Statute and only became a party thereto much later." However, this part of the Court's reasoning is introduced with the following statement:

Even if it should be assumed that Article 36, paragraph 5, is not limited to the declarations of signatory States, the terms of that provision make it impossible to apply it to the Bulgarian Declaration of 1921.<sup>28</sup>

Having thus formulated the conclusion which would follow from its examination of the Israeli contentions even before entering upon this examination, the Court proceeded to consider whether the conditions laid down in paragraph 5 of Article 36 for the transfer of declarations made with respect to the Permanent Court to the new Court were satisfied, and whether accordingly the Bulgarian Declaration must "be deemed . . . to be an acceptance of the compulsory jurisdiction of the International Court of Justice." Insofar as the states which participated in the Conference are concerned, the Court saw no difficulty in giving effect to the provision, for: "This constituted a new obligation which was, doubtless, no more onerous than the obligation which was to disappear but it was nevertheless a new obligation."<sup>29</sup> Turning to the time factor, the Court found that no date was determined for the transfer, that is, for the birth of this new obligation: it could be the date of signature or the date of entry into force of the Charter. Neither date could apply to a state stranger to the Charter, such as Bulgaria was until her admission on December 14, 1955. By that time the Statute of the Permanent Court had disappeared along with that Court, the legal basis for Bulgaria's Declaration had ceased to exist, and "thus, the Bulgarian Declaration had lapsed and was no longer in force."<sup>30</sup>

The words in Article 36, paragraph 5, "which are still in force" ("*pour une durée qui n'est pas encore expirée*"), do not specify a date precisely.

<sup>27</sup> *Ibid.* at 142.

<sup>28</sup> *Ibid.*

<sup>29</sup> *Ibid.* at 143.

<sup>30</sup> *Ibid.*



Bulgaria "was not privy" to either the signature or the entry into force of the Charter. The Court said on this crucial point:

. . . it would be permissible to have reference to those dates in respect of the application of Article 36, paragraph 5, only if that provision had referred thereto expressly or by necessary implication; nothing of the kind is stated or implied in the text.<sup>31</sup>

It is submitted that the reason for this statement is again, as throughout the Court's Judgment, the absence of Bulgaria from the San Francisco Conference, for obviously, in spite of the lack of a precise date in Article 36, paragraph 5, it could and did apply to states which, having participated in the Conference, signed and ratified the Charter. It follows also from the Court's reasoning up to this point that it could have applied to any state which, although it did not participate in the Conference, was admitted while its declaration was still in force, that is, before it lapsed in consequence of the dissolution of the Permanent Court. What is not clear is whether Article 36, paragraph 5, would have covered the declaration of a state which participated in the Conference and signed the Charter but ratified it only after the dissolution of the Court. From the following reasoning it would seem that this would be so, although Article 36, paragraph 5, is silent on this point in the sense of not limiting its scope specifically or by necessary implication to participants in the Conference and signatories of the Charter.<sup>32</sup>

The Court states that Article 36, paragraph 5, expresses no intent to preserve the declarations which were "in existence" at the time of signature or entry into force of the Charter, "regardless of the moment when a State having made a declaration became a party to the Statute." The nub of the Court's reasoning appears in the following:

Such a course would have involved the suspending of a legal obligation, to be revived subsequently: it is scarcely conceivable in respect of a State which was a stranger to the drafting of Article 36, paragraph 5. There is nothing in this provision to show any intention of adopting such an exceptional procedure. If there had been such an intention, it should have been expressed by a direct clause providing for the preservation of the declaration, followed by a provision for its subsequent re-entry into force as from the moment of admission to the United Nations: nothing of the kind is expressed in the Statute.<sup>33</sup>

The interpretation which the Court rejects as far as a state "stranger to the drafting of Article 36, paragraph 5" is concerned, appears impliedly as tenable as regards a state which was "privy" to the drafting. How-

<sup>31</sup> *Ibid.* at 144.

<sup>32</sup> In a *reductio ad absurdum* of the Bulgarian contention, the joint dissenting opinion points out that Art. 36, par. 5, might have been completely frustrated if the Permanent Court had been dissolved prior to entry into force of the Charter, with the effect of invalidating all declarations which were in force at the time of the drafting of the Charter. [1959] I.C.J. Rep. at 167. The Court did not consider this fatal flaw inherent in the Bulgarian contention, nor does it seem to have been noticed by Israel.

<sup>33</sup> *Ibid.* at 144.

ever, although the requirement of consent at the time of drafting seems very much in evidence in the Court's reasoning, in final analysis it is the time element which is established as decisive. For the Court, Article 36, paragraph 5, contains two conditions: (1) that the state having made the declaration should be a party to the Statute; and (2) that the declaration should still be in force. But

Since the Bulgarian Declaration had lapsed before Bulgaria was admitted to the United Nations, it cannot be said that, at that time, the declaration was still in force. The second condition stated in Article 36, paragraph 5, is therefore not satisfied in the present case.<sup>34</sup>

The Court thus adopted the Bulgarian position in its essential aspects. This position, in all its variations, consisted of two arguments: one, that the Bulgarian Declaration was attached to the Statute of the Permanent Court like "a branch is to the tree" and therefore, when the tree was cut down on April 18, 1946, the branch fell with the tree.<sup>35</sup> The words in paragraph 5 of Article 36, "which are still in force," were interpreted accordingly as referring to the validity of the Bulgarian Declaration as dependent upon the existence of the Permanent Court and its Statute. The Declaration, having lost its validity with the demise of the old Court, could not have been revived by or in consequence of Bulgaria's entry into the United Nations in 1955. To argue otherwise is tantamount to saying that in joining the United Nations Bulgaria accepted the compulsory jurisdiction of the Court by reviving its old Declaration and modifying it in the sense that henceforth it would apply to the International Court of Justice rather than to the old Court, which no longer existed. That Bulgaria's entry into the United Nations would have this consequence required an express stipulation, for it limited its sovereignty, and limitations upon sovereignty cannot be presumed.<sup>36</sup>

The second argument, a variation of the consensual point, related to the powers of the San Francisco Conference: the Conference could and did impose obligations on the participating states; it could not impose any obligation on a state which, to use the Court's language "was not privy" to it. More particularly it could not, without the consent of such a state, preserve or modify a Declaration which is "contractual and consensual" in nature.<sup>37</sup>

The Israeli position, as indicated above, was based entirely on a strict interpretation of Article 36, paragraph 5, emphasizing more strongly its French rather than its English version, whereas Bulgaria preferred the English to the French version. In the French version the words "which are still in force" appear as "*pour une durée qui n'est pas encore expirée.*" As construed by Israel, Article 36, paragraph 5, encompassed all declarations and was intended to encompass all declarations the validity of which had not yet expired at the critical date. This date was October 24, 1945, when the Charter entered into force. It was common ground that the

<sup>34</sup> *Ibid.*

<sup>36</sup> *Ibid.* at 418.

<sup>35</sup> Pleadings at 383, 388, 393.

<sup>37</sup> *Ibid.* at 549.

Bulgarian Declaration was still in force on that day, and therefore automatically and objectively the competence of the old Court devolved on the new Court.<sup>38</sup> Neither the phrase quoted nor the concluding words of Article 36, paragraph 5 ("for the period which they still have to run and in accordance with their terms"), refer to, or permit the introduction of, an extrinsic factor such as the anticipated dissolution of the Permanent Court. Accordingly, if a declaration was in force on October 24, 1945, and had, in accordance with its terms, not expired pursuant to Article 36, paragraph 5, it became operative "as between the parties to the present Statute" on the date when Bulgaria became a party to the present Statute, that is, on the day of its admission to the United Nations, December 14, 1955.

In the submission of Israel, Article 36, paragraph 5, established a legal fiction: declarations made with respect to the old Court and which are still in force "shall be deemed" to be acceptances of the compulsory jurisdiction of the new Court. This was one of the ways, perhaps the principal one, in which Israel, without resorting to notions such as preserving, reviving, or modifying the terms of old declarations, construed their binding force. Israel recognized that the binding force of such declarations must be based on the consent of the states concerned. This consent was given by some states at the time of signature and ratification of the Charter and by others at the time of their admission to the United Nations. In applying for admission to the United Nations, Bulgaria, pursuant to Article 4, paragraph 1, agreed to accept "the obligations contained in the present Charter," including those provided for in the Statute of the Court which is an integral part of the Charter. The obligation expressed in paragraph 5 of Article 36 is one of these obligations.<sup>39</sup>

Inasmuch as the Bulgarian Declaration of 1921 was not limited in point of time and therefore had not expired at the time of Bulgaria's admission to the United Nations, it was to be deemed an acceptance of the compulsory jurisdiction of the International Court of Justice. Israel argued, *inter alia*, that it was open to Bulgaria to withdraw her Declaration at any time and that, failing to do so, the Declaration fell under the sway of Article 36, paragraph 5.<sup>40</sup> Bulgaria, apart from contending that the Declaration, having lapsed, could not be withdrawn, countered with the argument that it could not have been withdrawn, on the ground that this right was not reserved in the Declaration.<sup>41</sup> Israel admitted the existence of doctrinal controversy on this matter but persisted that Bulgaria had not even at-

<sup>38</sup> *Ibid.* at 142, 475. The notion of devolution was borrowed from Kaeckenbeeck, 70 Hague Academy Recueil des Cours 212 (1947).

<sup>39</sup> Pleadings at 462, 469, 578. For the Bulgarian rebuttal, see *ibid.* at 542-545.

<sup>40</sup> *Ibid.* at 144. It may be noted in passing that Bulgaria, in support of the contention that its 1921 Declaration had lapsed, referred to the fact that the Yearbook of the I.C.J. did not include Bulgaria in the list of states still bound by old declarations. *Ibid.* at 129. Israel rejected this argument, saying that the Yearbook prepared by the Registry "is not evidence for the validity or even the existence of instruments conferring or purporting to confer jurisdiction on the Court." *Ibid.* at 149.

<sup>41</sup> *Ibid.* at 400, 414, 415.

tempted to withdraw its Declaration.<sup>42</sup> This point was not considered by the Court<sup>43</sup> and it is not clear what its relevance was. Prior to its admission to the United Nations or after its admission, a communication purporting to withdraw its 1921 Declaration could presumably have been addressed to the Secretary General of the United Nations, but there is no basis for doubting the good faith of Bulgaria in considering its Declaration to have lapsed. Apart from this, it is doubtful whether a withdrawal would not have been open to challenge. The fiction, to use Israel's construction, established in Article 36, paragraph 5, provides that old acceptances shall be deemed to be acceptances of the new Court "for the period for which they still have to run and in accordance with their terms." As the right to terminate or withdraw the Declaration was not reserved, it is at least doubtful whether such termination or withdrawal would have been compatible with the "terms" of the Bulgarian Declaration.<sup>44</sup>

The joint dissenting opinion of Judges Lauterpacht, Wellington Koo and Spender, which is substantially longer and more elaborate than the Judgment itself, deals with three points: first, the Bulgarian contention that the words "which are still in force" refer to the existence of the Permanent Court, and therefore that declarations lapsed with the dissolution of the Permanent Court; secondly, the assumption of the Court that Article 36, paragraph 5, applied only to original Members of the United Nations; and thirdly, the question whether its own interpretation and, by the same token, that of Israel, were reasonable. Regarding the first point, the joint dissenting opinion holds that the Bulgarian contention is incompatible with both the ordinary meaning of the words "still in force," as well as with the object of paragraph 5 of Article 36. It leans, as did Israel, more heavily on the French text, but finds that both phrases refer, in their ordinary connotation, to the element of the expiration of time—not to termination as the result of an extraneous event such as the dissolu-

<sup>42</sup> *Ibid.* at 484, 497. For further Bulgarian and Israeli statements on this, see *ibid.* at 553 f., 581, 584. The point was also made by the United States in its observations, *ibid.* at 813, 320.

<sup>43</sup> It is, however, mentioned without elaboration in the joint dissenting opinion and in the dissenting opinion of Judge *ad hoc* Goitein. [1959] I.C.J. Rep. at 189-190, 202, 204.

<sup>44</sup> In a somewhat different context the joint dissenting opinion declares: "Admittedly, an international obligation may cease to exist for reasons other than lapse of time; it may, for instance, terminate because of the fulfilment of its object, denunciation in a manner provided in the instrument, or its dissolution by mutual agreement." [1959] I.C.J. Rep. at 162. This observation may well have a bearing on the point, that is, on the question whether legally Bulgaria could have unilaterally withdrawn her Declaration. See also Anand, *Compulsory Jurisdiction of the International Court of Justice* 176 ff.

It may be noted that Judges Badawi and Armand-Ugon considered that Bulgaria's Declaration was not covered by Art. 36, par. 5, precisely because it was made for an indefinite duration. As construed by them, the concluding words of that paragraph presupposed only declarations made for a definite period of time. [1959] I.C.J. Rep. at 150 and 154. For a decisive rebuttal of this view, see joint dissenting opinion, *ibid.* at 192-194.

tion of the Permanent Court.<sup>45</sup> Further support for this interpretation is found in the uncontested meaning given to similar terms in Article 36, paragraph 1 ("treaties or conventions in force"), and Article 37 ("treaty or convention in force").<sup>46</sup> It has never been claimed that the dissolution of the Permanent Court had any impact on those two clauses, and there was no reason to assume that the draftsmen of the Charter used the same language in a different sense in Article 36, paragraph 5.<sup>47</sup> The joint dissenting opinion did not consider, as was urged by Israel, that October 24, 1945, was the critical date. The words "still in force" could equally well be attached to the date on which the particular declarant state became a Member of the United Nations, that is, in the case of Bulgaria, on December 14, 1955.<sup>48</sup>

Considering the object of the clause, the joint dissenting opinion, agreeing with Israel, concludes that the draftsmen of the Charter wanted to preserve to the greatest possible extent the progress achieved in establishing compulsory jurisdiction. They were concerned in finding a suitable formula precisely because the dissolution of the Permanent Court was anticipated, and they were determined to prevent the termination of existing declarations as a consequence of the dissolution of the Court.<sup>49</sup> The three judges had no difficulty in agreeing partly with Bulgaria that: "Undoubtedly, they [i.e., the declarations] lapsed so far as the Permanent Court was concerned; they did not lapse so far as the present Court is concerned." In their view

The governing principle underlying paragraph 5 is that of automatic succession of the International Court of Justice in respect of the engagements undertaken by reference to the Statute of the Permanent Court, the dissolution of which was clearly envisaged and anticipated.<sup>50</sup>

Adverting to the Bulgarian contention that a dead declaration could not be revived, the joint dissenting opinion stated that

there are obvious limits to the analogy between the death of a person and the cessation of the operation of a legal provision. Nothing can revive the dead; a short paragraph in a treaty can instill new and vigorous life into a treaty or provision of it whose operation is suspended or which had ceased to exist. . . . Legal intercourse between States—as between individuals—abounds in examples of a contractual provision being dormant, and its operation suspended, pending the accomplishment of an event by an act of a party or some extraneous occurrence.<sup>51</sup>

<sup>45</sup> [1959] I.C.J. Rep. at 163. For the evaluation of the five languages of the Charter see *ibid.* 161-162.

<sup>46</sup> *Ibid.* at 163.

<sup>47</sup> *Ibid.* at 164, 171, 180, 181.

<sup>48</sup> *Ibid.* at 164.

<sup>49</sup> "The intention of paragraph 5 which used the words 'shall be deemed . . . to be acceptances' is to cut clear through any cobweb of legal complications and problems which might arise in this connection." *Ibid.* at 168.

<sup>50</sup> *Ibid.* See also p. 173 for a statement of the importance attached to the subject of succession in international organizations.

<sup>51</sup> *Ibid.* at 169. The concrete example given is that of the impact of war on some treaties.

Bulgaria brought to life its 1921 Declaration by freely accepting in its application for admission to membership the Statute of the Court, including Article 36, paragraph 5. She thus "supplied the consensual basis of a declaration of acceptance of the compulsory jurisdiction of the new Court."<sup>52</sup>

With reference to the second point, that is, that part of the Court's Judgment according to which the operation of Article 36, paragraph 5, is limited to original Members of the United Nations, the joint dissenting opinion could find no basis for it either in the Charter, in general principles of international law, in the legislative history of that clause or in the literature.<sup>53</sup> The Court, it will be recalled, was concerned with the consensual requirement for the operation of Article 36, paragraph 5. It had no difficulty, of course, in this connection with the states which signed and ratified the Charter. The joint dissenting opinion, aware of the Court's preoccupation with this requirement, is permeated with affirmations that, in adhering to the Charter on the basis of an application in which it formally accepted all the obligations of the Charter as required by Article 4, paragraph 1, of the Charter, Bulgaria had given "her consent to the jurisdiction of the Court as confirmed and continued by that provision," namely, Article 36, paragraph 5.<sup>54</sup> Of more general and enduring character, because it relates to the general law of international organization, is the following weighty statement which for this reason deserves to be quoted in full:

In our opinion there is no legal basis for the assertion that, while the original Members of the United Nations could bind themselves in the matter of the transfer of the declarations under paragraph 5 of Article 36 of the Statute, they could not bind other States subsequently adhering to the Charter. It is of the very essence of the Charter that its provisions—all its provisions—bind States which adhere to the Charter subsequent to its coming into force. If Article 36 had provided unconditionally for the obligatory jurisdiction of the Court—and not merely for the maintenance of existing declarations in accordance with their terms—it would be binding not only upon original Members but also upon all States subsequently adhering. It would not be *res inter alios acta* in relation to those States. That proposition is too fundamental to require elaboration. We consider it imperative that in deciding any particular controversy, which may be of a passing character, no countenance should be given to general propositions such as that there is a difference, with regard to any obligations of the Charter, between original Members and others; or that any provision of the Charter can be *res inter alios acta* in relation

<sup>52</sup> *Ibid.* at 170.

<sup>53</sup> *Ibid.* at 175 ff. The literature in question consisted of Judge Manley O. Hudson's article, "The Twenty-Fifth Year of the World Court," 41 A.J.I.L. 1-19, at 10 (1947). This article figured prominently in the argument of both Israel and Bulgaria. It may be noted that, as stated in the joint dissenting opinion, the limitation of Art. 36, par. 5, to original Members was not invoked by Bulgaria and not argued by the parties, although it is the alternative basis for the judgment of the Court. *Cf. ibid.* at 170, 175, 186.

<sup>54</sup> *Ibid.* at 186; but see also 177, 182, 187.

to States subsequently adhering; or that the obligations of a judicial settlement must be interpreted by reference to standards more exacting than the interpretation of other obligations of the Charter.<sup>55</sup>

Turning now to the final point, the question whether its interpretation of Article 36, paragraph 5, meets the requirement of reasonableness,<sup>56</sup> the joint dissenting opinion starts with the proposition that "the test of reasonableness must itself be applied in a reasonable way."<sup>57</sup> The test itself "follows from the ever present duty of States to act in good faith," and therefore applies both ways, that is, against the state making a claim and the state resisting a claim. So far as Bulgaria, the state resisting the claim, is concerned, the three dissenting judges declared:

There is nothing manifestly unreasonable in itself in invoking in 1956 the Bulgarian Declaration of 1921—a declaration which in 1945 was given a new potential lease of life in the Statute of the Court and which was confirmed by the entry of Bulgaria into the United Nations in 1955 and, in the preceding years, by her repeated affirmation of the intention to be bound by the resulting obligations.<sup>58</sup>

The Bulgarian Declaration of 1921 was the last of the declarations to which the transitional clause could apply, and therefore it was contended that, having substantially though not fully achieved its objective, it would be unreasonable to subject Bulgaria to it. On this the three dissenting judges made two comments. In the first place,

It matters little to that State—in the present case the applicant State—that most or all other parties have already benefited from it and acted upon it. Unless the interested State has been guilty of negligence or bad faith in pursuing its legal rights, it is entitled to expect that the treaty will be given effect.<sup>59</sup>

Israel's application did not fall under any of these qualifications.

The second comment, also relating to Israel's application, was based on the nature of the right to which the test of reasonableness is to be applied. On the one hand, there are substantive claims the invocation of which "causes unfair hardship or which, through an abusive reliance upon a legal right, puts in jeopardy important interests of the defendant State." On the other hand, there are claims, such as Israel's, which call for adjudication upon a controversy in accordance with international law. With reference to this the joint dissenting opinion significantly observed:

A State ought not to be deemed to be acting improperly if in reliance—even if it be rigid reliance—upon a valid instrument it asks the Court to declare its competence to administer international law. It is only in most exceptional circumstances that a demand, based on a valid treaty, for the exercise of the primary function of the Court

<sup>55</sup> *Ibid.* at 176. See also particularly, with reference to the last point, the forceful statement at 187.

<sup>56</sup> The joint dissenting opinion found it necessary to discuss this requirement because "of some considerations underlying the Judgment of the Court." *Ibid.* at 188.

<sup>57</sup> *Ibid.* at 189.

<sup>58</sup> *Ibid.* at 190.

<sup>59</sup> *Ibid.* at 191.

to administer justice based on law can be held to be unreasonable. These exceptional circumstances may include the operation of the rule of extinctive prescription after a prolonged period of inaction on the part of the applicant State. No such ground has been invoked here.<sup>60</sup>

Whatever one may think of the relative persuasiveness of the Bulgarian and Israeli arguments, or of the Court's reasoning in upholding Bulgaria's Preliminary Objection and the reasoning of the joint dissenting opinion in rejecting it, one can hardly be of two minds as to which (the Court's or the joint dissenting opinion) is the more elaborate in its depth and more instructive in its comprehensiveness and thoroughness with which the arguments *pro* and *con* were presented, related to their sources and incisively analyzed.

## 2. *United Kingdom v. Bulgaria*

The United Kingdom Government instituted proceedings against Bulgaria by an application dated November 19, 1957, on behalf of five victims, four of whom were British subjects and one, a Swedish citizen, the wife of a British subject.<sup>61</sup> The jurisdiction of the Court was derived from the United Kingdom Declaration of April 18, 1957, and the Bulgarian Declaration of 1921 accepting the compulsory jurisdiction of the Permanent Court, which

became effective as to the jurisdiction of the International Court of Justice, by virtue of Article 93(1) of the Charter of the United Nations and Article 36(5) of the Statute of the Court, on the date of Bulgaria's admission to membership of the United Nations.<sup>62</sup>

Thus the United Kingdom, so far as the Bulgarian Declaration is concerned, adopted the same construction as that advanced by Israel. However, in addition and alternatively,

the United Kingdom Government hereby submits specifically and unconditionally to the jurisdiction of the Court for all the purposes of the present dispute, and invokes Bulgaria's unconditional acceptance of the Court's compulsory jurisdiction, effective in the manner described in the preceding paragraph.<sup>63</sup>

The first part of this statement could be construed as an offer of *forum prorogatum* which, of course, was open to the British Government, and which it would have been open to Bulgaria to accept or reject. The latter part in which an attempt is made to hold Bulgaria to its unconditional Declaration of 1921 is more difficult to understand. It is hardly compatible with the concept of *forum prorogatum*, the essence of which is voluntary consent on the part of both states.<sup>64</sup> The clue to this attempted

<sup>60</sup> *Ibid.* at 191-192. Several instances are cited in support of the argument that in the past the Court has applied the test of reasonableness "as a motive not for defeating but for upholding its jurisdiction."

<sup>61</sup> Pleadings at 35, 332.

<sup>62</sup> *Ibid.* at 36.

<sup>63</sup> *Ibid.* and 331.

<sup>64</sup> Rosenne, *The International Court of Justice* 284 (1957).



alternative basis of compulsory jurisdiction, which is unconditional, may be precisely the conditional character of the April 18, 1957, United Kingdom Declaration. According to this, the United Kingdom reserved disputes

relating to any question which, in the opinion of the Government of the United Kingdom, affects the national security of the United Kingdom or any of its dependent territories. . . .<sup>65</sup>

This is as self-judging and automatic a reservation as the United States' Connally Amendment. And the reason for the alternative basis of jurisdiction may well have been the desire to head off the "boomerang" effect which such reservations are bound to provoke when the declarant state is the plaintiff. There is no doubt that the Bulgarian Government, aware of the difference between the Israeli and United Kingdom Declarations,<sup>66</sup> would have availed itself of the British reservation as in fact it availed itself of the American reservation. However, before the Bulgarian Government submitted any objections to the jurisdiction of the Court, the United Kingdom on July 8, 1959, requested that proceedings be discontinued. This decision was reached in view of the Court's Judgment of May 26, 1959, in the parent case of *Israel v. Bulgaria*, that it had no jurisdiction.<sup>67</sup> The Judgment certainly justified the discontinuation insofar as the British Government relied on the Bulgarian Declaration of 1921 as the basis of jurisdiction. It does not explain the abandonment of the alternative basis insofar as it related to the *forum prorogatum* doctrine. By order of August 3, 1959, the President of the Court decided that the case be removed from the Court's list.<sup>68</sup>

The British alternative for founding the jurisdiction of the Court might possibly be construed in another way, namely, as the unconditional acceptance of the offer contained in the Bulgarian Declaration of 1921. Under this construction, Bulgaria would appear as making the offer and Britain as accepting it. Whether the Court, had it been free to do so, would have declared itself competent on the basis of this construction is doubtful, for the Bulgarian Declaration, although it accepted the jurisdiction of the Court "unconditionally," presumably still required the condition of reciprocity in the words: "in relation to any other Member or State which accepts the same obligation."

### 3. *United States v. Bulgaria*

United States proceedings against Bulgaria were initiated by an application dated October 24, 1957, in which damages were claimed for stated "breaches of international obligation." The jurisdiction of the Court was founded in the following manner:

The United States Government, in filing this application with the Court, submits to the Court's jurisdiction for the purposes of this

<sup>65</sup> [1957-1958] I.C.J. Yearbook 211.

<sup>66</sup> Communication from the Bulgarian Government to the President of the Court of May 14, 1959. Pleadings at 695. <sup>67</sup> Pleadings at 698.

<sup>68</sup> Case concerning the Aerial Incident of 27 July 1955 (*United Kingdom v. Bulgaria*), Order of Aug. 3, 1959, [1959] I.C.J. Rep. 264.

case. The Bulgarian Government accepted the compulsory jurisdiction of the Court by virtue of the signature of its representative to the Protocol of Signature of the Statute of the Permanent Court of International Justice, and his acceptance was completely unconditional; acceptance became effective as to the jurisdiction of the International Court of Justice by virtue of Article 36(5) of the Statute of the Court upon the date of admission of Bulgaria into the United Nations.<sup>69</sup>

Thus the United States, like the United Kingdom, adopted the same construction as that formulated by Israel with regard to Article 36, paragraph 5, of the Statute and its effectiveness, brought about by the admission of Bulgaria to the United Nations. Unlike the United Kingdom, the United States maintained this construction even after it was rejected by the Court in *Israel v. Bulgaria* on the strength of Article 59 of the Court's Statute, and further on the ground that

Particularly where the interpretation of a constitutional text (Article 36, paragraph 5) is in question, no doctrine of *stare decisis* precludes reexamination of the holding in a previous case in this court.<sup>70</sup>

It is generally accepted that, from a formal point of view, the doctrine of *stare decisis* does not apply in the jurisprudence of the Court, although in practice the Court has shown a strong tendency to adhere to previous holdings. It is not clear what additional support for Article 59 the United States sought to derive from singling out constitutional texts. The Court has consistently taken the position that the Charter of the United Nations is a multilateral treaty and has construed it accordingly. No authority in international law to underpin the distinction implied above was cited, although some American and Canadian cases were cited.<sup>71</sup>

The United States Government followed up its application with a memorial,<sup>72</sup> and the Bulgarian Government on September 3, 1959, submitted Preliminary Objections to the jurisdiction of the Court.<sup>73</sup> It will be recalled that in its application the United States did not refer to its own Declaration of August 26, 1946, accepting the compulsory jurisdiction of the Court pursuant to Article 36, paragraph 2, of its Statute. The Bulgarian Government objected to this manner of proceeding on several grounds. It did not conform to Article 32, paragraph 2, of the Rules of the Court,<sup>74</sup> and this defect made it impossible for Bulgaria to comply with Article 62, paragraph 1, of the Rules<sup>75</sup> and to formulate its pre-

<sup>69</sup> Pleadings at 23. For a more detailed analysis of this case, see Gross, "Bulgaria Invokes the Connally Amendment," 56 A.J.I.L. 357-382 (1962).

<sup>70</sup> Observations and Submission of the Government of the United States of America on the Preliminary Objections of the Government of the People's Republic of Bulgaria, February, 1960. Pleadings at 307. See *ibid.* at 311-322, for construction of Art. 36, par. 5.

<sup>71</sup> *Ibid.* at 310-311.

<sup>72</sup> *Ibid.* at 167 ff.

<sup>73</sup> *Ibid.* at 265 ff.

<sup>74</sup> The application "must also, as far as possible, specify the provision on which the applicant founds the jurisdiction of the Court . . ."

<sup>75</sup> Art. 62, par. 1: "A preliminary objection must be filed by a party at the latest before the expiry of the time-limit fixed for the delivery of its first pleading." Relevant also is par. 2 of Art. 62: "The preliminary objection shall set out the facts and

liminary objections *in limine litis*. Secondly, in order to seize the Court by means of a unilateral application, that is, by invoking the compulsory jurisdiction of the Court, it is necessary to do so on the basis of a prior acceptance of this jurisdiction. According to the constant jurisprudence of the Court, the seizing of the Court depends on and is possible only within the limits of applicable declarations. The acceptance of the jurisdiction of the Court in the United States application does not have the character of a declaration within the meaning of Article 36, paragraph 2, and was, moreover, not deposited with the Secretary General of the United Nations as required by paragraph 4 of Article 36.

Thirdly and finally, Bulgaria contended that the statement could be construed as "an offer to enter into a special agreement." This Bulgaria declined to accept on the ground that the dispute related to matters essentially within its national jurisdiction.<sup>76</sup> The United States admitted that the Bulgarian exceptions were well founded and "that apart from the United States declaration of August 26, 1946, there is not a basis for compulsory jurisdiction."<sup>77</sup> It is not often that one sees a government attempting to found the compulsory jurisdiction of the Court on a basis which could be knocked out so easily. The United States might have done better had it admitted that the statement in its application indeed constituted an offer to accept voluntarily the jurisdiction of the Court under the doctrine of *forum prorogatum*, and that this offer was rejected, thus placing the blame squarely on Bulgaria.

To the United States reliance on the Bulgarian Declaration of 1921, in substance the same line of reasoning was opposed as was developed in the case of *Israel v. Bulgaria*. The Judgment of May 26, 1959, in that case was invoked as confirming the thesis that the Declaration had lost its force. It is unnecessary to go further into this phase of the pleadings. The United States' view that the Court was not barred from taking a fresh look at the matter by its Judgment in the *Israel v. Bulgaria* case has already been mentioned.<sup>78</sup>

The main thrust of the Bulgarian preliminary objections was directed against the United States Declaration of August 26, 1946, as an implied basis of jurisdiction. This Declaration contains the Connally Amendment, a reservation *ratione materiae* so far as it excepts "disputes with regard to matters which are essentially within the domestic jurisdiction" of the United States, and a reservation of a self-judging and pre-emptory character so far as it provides that the nature of the dispute in question shall be "determined by the United States of America." Bulgaria, availing itself of the principle recognized by the Court, namely, that all jurisdic-

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the law on which the objection is based, the submissions and a list of the documents in support . . ." Bulgaria was quick to seize upon the obvious insufficiency of the American application. However, it failed to conform to the requirements of Art. 62 of the Rules in submitting preliminary objections against the Israeli application. See *Observations of Israel, Pleadings* at 135-136.

<sup>76</sup> *Pleadings* at 273-276.

<sup>77</sup> *United States Observations, ibid.* at 306.

<sup>78</sup> *Cf.* p. 768 above, note 70.

tional rights which a state may invoke for itself may be invoked against it by other states, invoked the Connally Amendment. Bulgaria

could not admit that any matters which it rightly [*"en bon droit"*] qualifies as falling essentially within its domestic jurisdiction, should be examined, directly or indirectly, before the Court. It requests, accordingly, that the Court declare itself incompetent to entertain the Application of the United States.<sup>79</sup>

Out of an abundance of caution and in view of the alleged unconditional acceptance of the jurisdiction of the Court in the United States application, Bulgaria submitted three subsidiary arguments derived from the principle of reciprocity and the norms governing the compulsory jurisdiction of the Court. First, by accepting unconditionally the jurisdiction of the Court, the United States attempted to change unilaterally the prior consensual bond created by the declarations. Such a unilateral modification of the 1946 Declaration, which is studded with several reservations, is inadmissible. Secondly, such a unilateral modification would frustrate the rights which Bulgaria is entitled to derive from Article 36 of the Court's Statute. And, thirdly, such a modification made after the event being contrary to the Statute, could have no bearing on the case at bar.<sup>80</sup>

The United States, in its observations on the Bulgarian Preliminary Objection, admitted the principle of reciprocity<sup>81</sup> but denied that the Connally Amendment could properly be invoked, on two grounds: first, the determination of the 1955 incident as falling within Bulgaria's domestic jurisdiction "would fly in the face of actuality."<sup>82</sup> Secondly, having taken certain steps and having entered "into the international engagements" recited by the United States, "the Government of Bulgaria is not entitled now to determine that these matters are 'essentially within the domestic jurisdiction of the People's Republic of Bulgaria.'"<sup>83</sup> In the second argument the United States seems to use as a counter-defense the doctrine of estoppel or preclusion. However, the United States in its observations appears to have given greater prominence to its own construction of its own Declaration on the ground that, as author of the Connally Amendment, it knew better than did Bulgaria how it was intended to be construed and under what circumstances it could properly be applied. In substance the United States in a variety of formulations argued, without using the words, that its reservation should be used sparingly and reasonably, saying it does not consider that it

authorizes or empowers this Government, or any other government on a basis of reciprocity, to make an arbitrary determination that a

<sup>79</sup> Pleadings at 272 (author's translation).

<sup>80</sup> *Ibid.* at 271-278. Bulgaria also said that "by dint of such an *ad hoc* renunciation motivated solely by opportunistic considerations, the Government of the United States would aim to preserve for the future and in all cases in which it would be the respondent the benefit of its own reservations without being exposed to their drawbacks in cases in which it was the plaintiff." (Author's translation.) *Ibid.*

<sup>81</sup> *Ibid.* at 308, 323.

<sup>82</sup> *Ibid.* at 308.

<sup>83</sup> *Ibid.* at 324 f.

particular matter is domestic, when it is evidently one of international concern and has been so treated by the parties.<sup>84</sup>

Opponents of the Connally Amendment would have had every reason to applaud this construction which in effect would have nullified it. By necessary implication as well as explicitly,<sup>85</sup> the United States must have been prepared to let the Court determine whether in the premises the reservation of domestic jurisdiction applied, thus restoring to the Court the power, under Article 36, paragraph 6, of the Statute, to determine whether it had jurisdiction, a competence which, it was believed, the Connally Amendment was intended to nullify. The approving reference to the relativity test of domestic jurisdiction established by the Permanent Court in the case of the *Tunis-Morocco Nationality Decrees*<sup>86</sup> strengthens this reading of the American observations. The jubilation would have been short-lived, for on May 13, 1960, having been informed on March 18, 1960, that oral proceedings would begin on June 1, 1960, the United States requested the Court to discontinue the proceedings against Bulgaria,<sup>87</sup> which request was granted by order of the Court on May 30, 1960.<sup>88</sup>

As stated in the request, the United States, after further study, concluded that the premise of its argument against Bulgaria was not valid, and that the position taken in the *Interhandel* case was correct. As construed now by the United States, the Connally Amendment excludes any review by the Court of the propriety or arbitrariness of the determination by Bulgaria that the dispute fell within its domestic jurisdiction. The United States accordingly withdrew its observations with respect to Bulgaria's invocation of the Connally Amendment.<sup>89</sup> It remains to be noted that the United States obviously desired to set the record straight with respect to its own understanding of the legal scope of the Connally Amendment as "an absolute bar to jurisdiction," irrespective of its policy not to invoke it arbitrarily or unreasonably. It could have requested discontinuation of the proceedings on the same ground as the United Kingdom had done, had discontinuation been its sole or primary objective.

CASE CONCERNING SOVEREIGNTY OVER CERTAIN FRONTIER LAND  
(BELGIUM/NETHERLANDS)

Belgium and The Netherlands signed on March 7, 1957, a special agreement which entered into force on November 19, 1957, requesting the Court to determine

whether sovereignty over the plots shown in the survey and known from 1836 to 1843 as Nos. 91 and 92, Section A, Zondereygen, belongs to the Kingdom of Belgium or the Kingdom of the Netherlands.<sup>90</sup>

<sup>84</sup> *Ibid.* at 323.

<sup>85</sup> See the United States submissions, *ibid.* at 330, where the Court is requested to overrule the Bulgarian objections.

<sup>86</sup> *Ibid.* at 325.

<sup>87</sup> *Ibid.* at 676.

<sup>88</sup> Case concerning the Aerial Incident of 27 July 1955 (United States v. Bulgaria), Order of May 30, 1960, [1960] I.C.J. Rep. 146.

<sup>89</sup> For a fuller presentation and analysis, see Gross, *loc. cit.* at 370 ff.

<sup>90</sup> Case concerning Sovereignty over Certain Frontier Land, Judgment of June 20, 1959, [1959] I.C.J. Rep. 209, at 211; I.C.J. Pleadings, under the same title, at 8. Digest,

The Court gave judgment on June 20, 1959, by a vote of 10 to 4 in favor of Belgium. Judges Sir Hersch Lauterpacht, Armand-Ugon and Moreno Quintana dissented; the first submitted a brief declaration, and the latter two wrote dissenting opinions. Judge Spiropoulos, in a declaration, stated that the case involved choosing between two hypotheses, and that in his view the Netherlands hypothesis was less speculative and should be preferred. "For this reason," he concluded, he "hesitated to concur in the Judgment of the Court."<sup>91</sup> This is probably an accurate description of his state of mind but not an unequivocal indication of how he voted. It must be noted that neither Belgium nor The Netherlands availed itself of the provision in Article 31, paragraph 3, of the Court's Statute to appoint a judge *ad hoc*.

The case involved two plots of land of about fourteen hectares, of ancient history,<sup>92</sup> which were in dispute between the Belgian Commune of Baerle-Duc and the Netherlands Commune of Baarle-Nassau, and constituted enclaves in Netherlands territory and Baarle-Nassau. The controversy between the parties did not concern a substantial material or political interest, although it affected the territorial aspect of their sovereignty. As pointed out by the Belgian Agent at the beginning of the oral hearings, the dispute was highly interesting from the viewpoints of jurisprudence and doctrine with respect to the application in international law of the concept of error in connection with the conclusion of treaties.<sup>93</sup>

The error in question—and both parties were in agreement on this point—arose, if it did arise, in connection with the Boundary Convention between the two countries of August 8, 1843, which resulted from the labors of a Mixed Boundary Commission set up pursuant to the Treaty of London of April 19, 1839, sanctioning the separation of Belgium from The Netherlands. The directive addressed to this Commission is contained in Article 14 of the Treaty of November 5, 1842, between The Netherlands and Belgium for the Execution of the Treaty of London of April 19, 1839. Article 14 reads:

The *status quo* shall be maintained both with regard to the villages of Baarle-Nassau (Netherlands) and Baerle-Duc (Belgium) and with regard to the ways crossing them.<sup>94</sup>

Article 70 provided further that the Mixed Boundary Commission should draft the convention "in accordance with the foregoing provisions," that is, in accordance with the *status quo* prevailing between the two Baarles. The Boundary Convention consists of a text and descriptive minutes, and survey maps prepared and signed by the Commissioners,

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in 53 A.J.I.L. 937-943 (1959). For a succinct analysis of the case, cf. Verzijl, "The I.C.J. in 1959," 7 Netherlands Int. Law Rev. 1-16, at 10-15 (1960). See also note, 1960 Duke Law J. 252; and note, 13 Revista Española de Derecho Internacional 519 (1960).

<sup>91</sup> [1959] I.C.J. Rep. at 232.

<sup>92</sup> For an historical sketch, cf. Netherlands Counter-Memorial, Pleadings at 37 ff.

<sup>93</sup> Pleadings at 463.

<sup>94</sup> Pleadings at 439, and [1959] I.C.J. Rep. at 214. The Court refers to the 1842 treaty as the "Boundary Treaty" as distinguished from the "Boundary Convention" of 1843.

which "shall remain annexed to the present Convention and shall have the same force and effect as though they were inserted in their entirety."<sup>95</sup> With respect to the boundary between the two Baarles, the Convention, in paragraph 5 of Article 14, states that it was impossible to draw a continuous line between these communes because the Commission had been directed by Article 14 of the Boundary Treaty to maintain the *status quo*. For the division between these communes reference is made to Article 90 of the "Descriptive Minute" annexed to the Convention. This is the seat of the opposing contentions. The "Descriptive Minute" declares that, having regard to Article 14 of the Boundary Treaty requiring the maintenance of the *status quo* and the resulting impossibility of drawing a regular delimitation, the Commissioners consider

that it may be useful to note what was established with the agreement of both sides, by the Minute of 29 November 1836, agreed to and signed on March 22, 1841 by the local authorities of the two communes.

The Commissioners' decision follows:

a. The above-mentioned Minute, noting the plots composing the communes of Baerle-Duc and Baerle-Nassau, is transcribed word for word in the present Article.

b. A special map . . . showing the whole detailed survey plot by plot of the two communes . . . has been made. . . .<sup>96</sup>

In the transcription of the Minute of 1836 and 1841, called by the Court the "Communal Minute," there appears the following listing for Zondereygen:

Plots numbers 78 to 90 inclusive belong to the commune of Baerle-Nassau.

Plots numbers 91 and 92 belong to Baerle-Duc.

Plots numbers 93 to 111 inclusive belong to Baerle-Nassau.<sup>97</sup>

However, the copy of the "Communal Minute" on which The Netherlands relied and which it submitted to the Court provides:

Plots numbers 78 to 111 inclusive belong to the commune of Baerle-Nassau.<sup>98</sup>

Considering that the "Descriptive Minute" directed the transcription "word for word" of the "Communal Minute" of 1836/41 and that the transcribed text did not conform to the copy of the "Communal Minute" produced in Court, The Netherlands claimed that the "flagrant contradiction" between the two texts was due to an error, which The Netherlands explained at great length.<sup>99</sup>

The Netherlands, in law, derived several conclusions from the above instruments. It contended, first, that Article 90 of the "Descriptive Minute" could not create a valid title to sovereignty. The title was to

<sup>95</sup> Art. 3. [1959] I.C.J. Rep. at 215, and Pleadings at 442.

<sup>96</sup> [1959] I.C.J. Rep. at 216, and Pleadings at 450.

<sup>97</sup> [1959] I.C.J. Rep. 216, and Pleadings at 452.

<sup>98</sup> [1959] I.C.J. Rep. 216.

<sup>99</sup> Pleadings, Netherlands Counter-Memorial at 36, 44 ff.

be found in Article 14 of the 1842 Boundary Treaty and Article 14, paragraph 5, of the 1843 Boundary Convention, which require the maintenance of the *status quo*. This could not be changed by the "Descriptive Minute" drawn up by the Boundary Commission.<sup>100</sup> Secondly, even if the error which found its way into the "Descriptive Minute" was not noted at the time the Minute was drafted, insofar as it related to the contested plots it was null and void *ab initio*, in spite of its being signed by the High Contracting Parties:

C'est en effet un principe reconnu en droit international, aussi bien que par le droit des nations civilisées, que l'erreur constitue un vice du consentement et lui enlève sa force obligatoire, tout comme le dol ou la contrainte. L'application de ce principe s'impose. L'erreur porte sur la substance même de l'engagement en ce qui concerne les parcelles litigieuses.<sup>101</sup>

The Netherlands requested, alternatively, that the Court nullify the clause in the "Descriptive Minute."

Thirdly, The Netherlands relied on the events which followed the 1843 Boundary Convention: it continued to collect from the owners the land tax on the contested plots, and transfers of land were registered in the Netherlands registers of land transfer deeds. From this The Netherlands argued:

An undisputed, stable and permanent situation is capable of creating law. In particular, an exclusive and valid title of sovereignty may be the result if typical acts of sovereignty were performed without opposition and over a period of time on a certain territory. In international relations the State which provides an effective government for a territory should be preferred to a State whose jurisdiction rests on legal titles which it does not assert.<sup>102</sup>

On these grounds The Netherlands claimed that its sovereignty should be recognized even if the "Descriptive Minute" should be accepted as giving a title of sovereignty to Belgium.

The Court rejected all Netherlands contentions. As to the work of the Mixed Boundary Commission, the Court was satisfied that unquestionably, under both the 1839 and the 1842 treaties, the Commission had authority to delineate the boundary, and that it

did not confine itself to a mere reference to Article 14 of the Treaty of 5 November 1842 and to the *status quo* whatever it was. From the record of its proceedings as disclosed in the minutes, it appears that the Commission went much further and proceeded to delimit the boundaries between the two States in respect of the two Baarles in the only way which was open to it.<sup>103</sup>

<sup>100</sup> *Ibid.* at 85 f.

<sup>101</sup> *Ibid.* at 88. "It is indeed accepted as a principle of international law as well as of the law of civilized nations, that an error vitiates the consent and, just like fraud or duress, deprives it of binding force. The error affects the very essence of the obligation so far as it relates to the contested plots." (Translation of author.)

<sup>102</sup> *Ibid.* at 89.

<sup>103</sup> [1959] I.C.J. Rep. at 220.



The Commission reversed an earlier minute which attributed the plots to The Netherlands, and adopted the text which attributed the plots to Belgium. Furthermore, the Commission ordered detailed survey maps; these maps show the disputed plots as belonging to Belgium, they became part of the Boundary Convention and have in virtue of Article 3 the same legal force as the Convention itself.<sup>104</sup> The Convention represents the final and common intention of the two states.

Having concluded that the 1843 Boundary Convention made a definite allocation of the disputed plots, the Court then examined the Netherlands thesis that the Convention was vitiated by error. The Court was not satisfied with the hypothesis offered by The Netherlands with respect to the origin of the error in transcription, which it found was neither plausible nor substantiated by proof.<sup>105</sup> Regarding the Netherlands contention that, regardless of its origin, the mistake was apparent between the copy of the "Communal Minute" produced by it and the text appearing in the "Descriptive Minute," the Court said:

The matter is not, however, capable of being disposed of on this narrow ground. The Court must ascertain the intention of the Parties from the provisions of a treaty in the light of all the circumstances.<sup>106</sup>

The Court was satisfied that no error or mistake had occurred in the process of the transcription. But what was transcribed was not the copy of the "Communal Minute" produced by The Netherlands before the Court; rather it was the copy "then in the possession of the Netherlands Commission." It was this copy which, in the view of the Boundary Commission, represented the *status quo* in relation to the disputed plots; it attributed sovereignty over them to Belgium, and was incorporated in the Boundary Convention.<sup>107</sup> The Court, reviewing the protracted labors of the Boundary Commission, noted the notoriety of its decisions on both the communal and state level, the signature, ratification and publication of the Boundary Convention, and concluded:

... For almost a century the Netherlands made no challenge to the attribution of the disputed plots to Belgium.

The Court is satisfied that no case of mistake has been made out and that the validity and binding force of the provisions of the Convention of 1843 in respect of the disputed plots are not affected on that account.<sup>108</sup>

Turning to the Netherlands claim to sovereignty "in derogation of the title established by treaty," the Court examined first whether Belgium ever relinquished its sovereignty. The Court found no such evidence. On the contrary, when it was discovered by a Belgian inspector of survey, who visited Baarle-Nassau some time after 1906, that the disputed plots were entered in the Netherlands survey, official inquiries were made which, after an interruption through World War I, led the Belgian Ministry of Foreign

<sup>104</sup> *Ibid.*

<sup>106</sup> *Ibid.* at 225.

<sup>108</sup> *Ibid.* at 227.

<sup>105</sup> *Ibid.* at 224 and 226.

<sup>107</sup> *Ibid.* at 226.

Affairs in 1921 to draw the attention of the Netherlands Government to the inclusion of the plots in the Netherlands survey. It was in reply to this that The Netherlands for the first time, on October 6, 1922, claimed that the "Communal Minute" had been inaccurately transcribed. That exchange marked the origin of the dispute.<sup>109</sup> Reviewing the various acts cited in support of its claim to sovereignty by The Netherlands, the Court observed:

The weight to be attached to the acts relied upon by the Netherlands must be determined against the background of the complex system of intermingled enclaves which existed. The difficulties confronting Belgium in detecting encroachments upon, and in exercising, its sovereignty over these two plots, surrounded as they were by Netherlands territory, are manifest. The acts relied upon are largely of a routine and administrative character performed by local officials and a consequence of the inclusion by the Netherlands of the disputed plots in its Survey, contrary to the Boundary Convention. They are insufficient to displace Belgian sovereignty established by that Convention.<sup>110</sup>

The Court also considered the 1889-1892 negotiations between the two countries to achieve a regular boundary, which culminated in a convention signed in 1892 but not ratified. According to this convention, Belgium was to cede the disputed plots to The Netherlands. Without attaching any legal significance to the unratified convention, the Court noted that "The Netherlands did not in 1892, or at any time thereafter until the dispute arose between the two States in 1922, repudiate the Belgian assertion of sovereignty." Taking all these factors into account, the Court concluded "that Belgian sovereignty established in 1843 over the disputed plots has not been extinguished."<sup>111</sup>

In substance the Court's Judgment will not affect the situation which, as Professor Verzijl points out, forced "a married couple to continue to share their conjugal couch, traversed by an international frontier,"<sup>112</sup> a fact which, it is to be hoped, will interfere with the population growth of the Baarles no more in the future than it did in the past. From the juridical point of view, it is submitted, the Judgment illuminates the question of the impact of error or mistake on the validity of a treaty and even more decisively the controversial question of adverse prescription or, to use the words of the Court, of the acquisition of sovereignty "in derogation of title established by treaty." The Court, though not the dissenting judges, was reluctant to accept anything short of conclusive proof of error. Such proof was lacking, and the Court would not upset a treaty on the basis of an hypothesis. If the negotiators at both the local and state level, who were so close to the problems with which they had to wrestle for several years, had not found fault with the instruments recording their work, it was not for the Court to do so a hundred years later on the basis of a reconstruction which, no matter how ingenious, was not fully con-

<sup>109</sup> *Ibid.* at 228.

<sup>111</sup> *Ibid.* at 230.

<sup>110</sup> *Ibid.* at 229.

<sup>112</sup> *Loc. cit.* at 11.

clusive.<sup>113</sup> Nothing less would or should be allowed to interfere with the validity of a treaty duly signed, approved by parliaments, ratified, and published and applied over a long period of years. For a similar reason the Court declined to upset the Boundary Convention on the ground that the Commission had exceeded its powers, as, according to Judge Lauterpacht, it should have done.<sup>114</sup> The Court laid greater stress on the broad powers conferred upon the Commission than on the specific directive to maintain the *status quo*, a seemingly precise term to describe a very imprecise situation. Again, to upset a treaty, more conclusive proof of excess of power would be required.

For the dissenting judges the "Communal Minute" was, if not conclusive, then sufficient proof of the *status quo*. The authenticity of the copy produced by The Netherlands before the Court was undisputed and this, coupled with the failure of Belgium to produce its copy, a fact to which Judge Armand-Ugon attached great significance,<sup>115</sup> might have been sufficient in an ordinary court of law in a litigation between private parties to tip the scale in favor of the party producing the document. But the Court is not bound by ordinary rules of evidence and has the widest authority and discretion in admitting and considering evidence in a litigation between sovereign states. What the Court appears to have accepted as proven—its own reconstruction makes this clear—is the fact that the two copies, the Netherlands and the Belgian copies, were available to the Commission when it formulated its decision laid down in the Descriptive Minute and accepted by The Netherlands and Belgium in the Boundary Convention.<sup>116</sup>

In considering the Netherlands claim to sovereignty over the disputed plots, it is noteworthy that the Court made it clear at the outset that it would weigh the acts of sovereignty performed by The Netherlands against the Belgian title established by treaty. This was the decisive point. The dissent of Judge Lauterpacht makes this plain, for in his opinion, "there is no room here for applying the exacting rules of prescription in relation to a title acquired by a clear and unequivocal treaty; there is no such treaty."<sup>117</sup> But the Court assumed that there was such a treaty and it

<sup>113</sup> It may be relevant to recall that, according to the Judgment, the error, if there was one, occurred not on the part of the Commission but on the part of the Netherlands Commissioner. [1959] I.C.J. Rep. at 225 and 226.

<sup>114</sup> [1959] I.C.J. Rep. at 231.

<sup>115</sup> "The non-possession of this document," he stated, "invoked by the Belgian Government, cannot create for that Government a more favourable situation. It has neither explained nor proved when and how this disappearance occurred; neither accident nor *force majeure* has been put forward by way of explanation. It is a mere assertion on its part, made in 1955." *Ibid.* at 235.

<sup>116</sup> Said the Court: "The Commission was not a mere copyist. Its duty was to ascertain what the *status quo* was. It had authority to fix the limits between the two States, which duty it discharged . . . it was aware of the discrepancy between the two copies of the Communal Minute . . . the Commission, by enquiries on the spot and by recourse to records and surveys of both communes, must have reached its own conclusion and determined, as was its duty, what the *status quo* was in relation to the disputed plots." *Ibid.* at 226.

<sup>117</sup> *Ibid.* at 231.

did apply exacting rules. This it did by qualifying the Netherlands acts as "of a routine and administrative character," by stressing the difficulties confronting Belgium in detecting such acts, and making the most of the unratified treaty of 1892 and the failure of The Netherlands to repudiate the Belgian assertion of sovereignty. The Court did not deviate from the rule established in the *Eastern Greenland* case that, in evaluating the character and quantum of acts of sovereignty, the nature of the territory is to be taken into account. What characterized the nature of the territory in this case was that it was intermingled with undisputably Netherlands territory. It was this character also which explains why the Court did not attach significance to the absence of protest on the part of Belgium against the acts performed by The Netherlands.<sup>118</sup>

Judge Armand-Ugon expressed the view that "sovereignty over the Minquiers and Ecrehos was decided by this Court exclusively on the basis of facts similar to those relied upon by the Netherlands Government in the present case."<sup>119</sup> This statement, it is respectfully submitted, overlooks an essential difference. In the cited case the Court was weighing acts of sovereignty performed by the United Kingdom against acts of a similar kind performed by France. Here it was weighing the acts performed by The Netherlands against a title established by treaty. Herein lies the essential difference between the two cases. This was perceived by Judge Lauterpacht who, as noted above, urged upon the Court the view that there was no occasion to apply exacting standards "in the absence of clear provisions of a treaty."<sup>120</sup> The Court was of the contrary opinion and, moreover, it could find no evidence that "Belgium ever relinquished its sovereignty over the disputed plots."<sup>121</sup> It is significant that, before even looking at the Netherlands claim, the Court desired to assure itself that there was no abandonment of sovereignty on the part of Belgium. Had the Court found evidence of it, it would have applied different standards to the acts of The Netherlands, for then it would have been considering a different situation.

To be sure, the Judgment of the Court perpetuates "a geographic anomaly,"<sup>122</sup> but in so doing, the Court felt bound to give effect to the common intention of the parties as expressed in the Boundary Convention. It is not for the Court to revise treaties, even though there may be appealing reasons of a practical character to do so. Having set at rest authoritatively the legal controversy, the Court cleared the path for the governments to revise the treaty.

#### COMPULSORY JURISDICTION OF THE COURT

The development of the compulsory jurisdiction of the Court pursuant to Article 36, paragraph 2, of its Statute continues in the doldrums. Between 1955, when the "package deal" opened the door to many states, and

<sup>118</sup> Judge Armand-Ugon in his dissenting opinion would have attached weight to this fact. *Ibid.* at 250.

<sup>119</sup> *Ibid.* He referred to [1953] I.C.J. Rep. 67-70.

<sup>120</sup> *Ibid.* at 232.

<sup>121</sup> *Ibid.* at 227.

<sup>122</sup> Judge Lauterpacht, *ibid.* at 232.

1959, the year here under review, twenty-three states were admitted to membership of the United Nations, namely: Albania, Austria, Bulgaria, Cambodia, Ceylon, Federation of Malaya, Finland, Ghana, Guinea, Hungary, Ireland, Italy, Japan, Jordan, Laos, Libya, Morocco, Nepal, Portugal, Rumania, Spain, The Sudan, and Tunisia. Of these, only five have accepted the compulsory jurisdiction of the Court, namely: Cambodia, Finland, Japan, Portugal, and The Sudan.

During the year under review no state accepted the compulsory jurisdiction of the Court. Two states, France and India submitted new Declarations dated, respectively, July 10, 1959, and September 14, 1959, replacing their old Declarations. A welcome feature of the new Declarations is the elimination of the Connally Amendment type of reservation. Both states reverted to the classic type of reservation of domestic jurisdiction, with this difference: whereas France, following the League of Nations Covenant formula, exempts "disputes relating to questions which by international law fall exclusively within the domestic jurisdiction," India adopted the United Nations Charter formula in exempting "disputes in regard to matters which are essentially within the jurisdiction of the Republic of India."<sup>123</sup> The text of these two Declarations is as follows:

*France:*<sup>124</sup>

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On behalf of the Government of the French Republic, I accept as compulsory *ipso facto* and without special agreement, in relation to other Members of the United Nations which accept the same obligation, that is to say, on condition of reciprocity, the jurisdiction of the Court, in conformity with Article 36, paragraph 2, of the Statute, for a period of three years and thereafter until such time as notice may be given of the termination of this acceptance, in all disputes which may arise in respect of facts or situations subsequent to this declaration, with the exception of:

- (1) disputes with regard to which the Parties may have agreed or may agree to have recourse to another method of peaceful settlement;
- (2) disputes relating to questions which by international law fall exclusively within the domestic jurisdiction;
- (3) disputes arising out of any war or international hostilities and disputes arising out of a crisis affecting the national security or out of any measure or action relating thereto;
- (4) disputes with any State which, at the date of occurrence of the facts or situations giving rise to the dispute, has not accepted the compulsory jurisdiction of the International Court of Justice for a period at least equal to that specified in this declaration.

Paris, 10 July 1959.

<sup>123</sup> [1959-1960] I.C.J. Yearbook 240, 242.

<sup>124</sup> *Ibid.* at 240. This declaration replaced that dated Feb. 18, 1947, notice of the termination of which was received by the Secretary General of the United Nations on July 10, 1959. For the text of the earlier declaration, see [1957-1958] Yearbook 199.

<sup>125</sup> This is the date of the deposit of the declaration.

India:<sup>126</sup>14 IX 59.<sup>127</sup>

I have the honour, by direction of the President of India, to declare on behalf of the Government of the Republic of India that they accept, in conformity with paragraph 2 of Article 36 of the Statute of the Court, until such time as notice may be given to terminate such acceptance, as compulsory *ipso facto* and without special agreement, and on the basis and condition of reciprocity, the jurisdiction of the International Court of Justice over all disputes arising after 26 January 1950 with regard to situations or facts subsequent to that date, other than:

(1) Disputes, in regard to which the Parties to the dispute have agreed or shall agree to have recourse to some other method or methods of settlement.

(2) Disputes with the Government of any State which, on the date of this Declaration, is a Member of the Commonwealth of Nations.

(3) Disputes in regard to matters which are essentially within the jurisdiction of the Republic of India.

(4) Disputes concerning any question relating to or arising out of belligerent or military occupation or the discharge of any functions pursuant to any recommendation or decision of an organ of the United Nations, in accordance with which the Government of India have accepted obligations.

(5) Disputes in respect of which any other party to a dispute has accepted the compulsory jurisdiction of the International Court of Justice exclusively for or in relation to the purposes of such dispute; or where the acceptance of the Court's compulsory jurisdiction on behalf of a party to the dispute was deposited or ratified less than twelve months prior to the filing of the application bringing the dispute before the Court.

(6) Disputes with the Government of any State with which, on the date of an application to bring a dispute before the Court, the Government of India has no diplomatic relations.

New York, 14 September 1959.

<sup>126</sup> *Ibid.* at 241-242. For the text of an earlier declaration by India, terminated by a notice of Feb. 8, 1957, see [1955-1956] Yearbook 186.

<sup>127</sup> This is the date of the deposit of the declaration.

## MAPS AS EVIDENCE IN INTERNATIONAL BOUNDARY DISPUTES: A REAPPRAISAL

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### I

In determining the location of a boundary, international as well as national tribunals have in the past been reluctant to place much evidentiary value on maps, regardless of their number or designation. Such a tendency has been particularly noticeable whenever the map describes territory of which the authors have had little knowledge, is geographically inaccurate, or is sketched in order to promote a country's claim. Even official maps, that is, those issued or approved by a governmental agency, have been treated with considerable reserve. A somewhat similar attitude has also prevailed in those instances in which a map forms the basis on which an agreement is negotiated, is attached to a treaty without being specifically described as part of the instrument, or is incorporated by reference in a treaty and becomes an integral element of the settlement. Nor has the result been very different in cases in which a treaty defines a boundary, and a delimitation commission subsequently surveys the area and prepares a map which is in derogation of, or inconsistent with, the treaty provision. In such situations the intention of the parties is the governing factor, and in such a determination the symbols on a map have slight value when in conflict with the treaty.

The *Palmas Island* case, which came before the Permanent Court of Arbitration, illustrates these concepts. Both the United States and The Netherlands claimed sovereignty over the territory, the former on the basis of the Treaty of Peace with Spain of December 10, 1898, and the latter as a result of the prolonged exercise of state authority. In its memorandum, the United States asserted that over one thousand maps dating from 1599 to 1898 had been examined, and of these only three had given some semblance to the Dutch claim of sovereignty. In the arbitral award, which Dr. Max Huber rendered on April 4, 1928, and in which he ruled that the Island of Palmas or Miangas formed part of Dutch territory, this contention was discussed in the following terms:

If the Arbitrator is satisfied as to the existence of legally relevant facts which contradict the statements of cartographers whose sources

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of information are not known, he can attach no weight to the maps, however numerous and generally appreciated they may be.

The first condition required of maps that are to serve as evidence on points of law is their geographical accuracy. It must here be pointed out that not only maps of ancient date, but also of modern, even official or semi-official maps seem wanting in accuracy.<sup>1</sup>

Numerous maps were also introduced by both Guatemala and Honduras before the special boundary tribunal, which was appointed pursuant to a 1930 convention to determine the line of the *uti possidetis* of 1821 between the two countries,<sup>2</sup> because the "pertinent and applicable pieces of evidence"<sup>3</sup> which bore on the establishment of the juridical line included geographical data and maps. Consequently, the opinion and award of the tribunal, which was rendered on January 23, 1933, noted that "authenticated maps" should also be considered, but described such material as of "slight"<sup>4</sup> significance when it refers to areas of which there is little or no knowledge and over which no administrative control is exercised. Thus, symbols on maps—even on official maps—were, in the words of the tribunal, of which Mr. Chief Justice Hughes was President, of "little or no value in marking the just limits of territorial jurisdiction as shown by actual developments."<sup>5</sup>

A similar result was reached by the Judicial Committee of the Privy Council in the Canada-Newfoundland dispute in the Labrador Peninsula. Here the litigants produced a series of maps to support their claims. After Newfoundland's acts of sovereignty with respect to the coast had been discussed, and no evidence of the exercise of Canadian jurisdiction had been found, the territory was awarded to Newfoundland. In his judgment, Viscount Cave, L. J., observed that, since Canadian maps had for a long period conformed with Newfoundland's claim, they were of "some value" to indicate the manner in which officials and the general public regarded statutes and the Orders in Council. Nevertheless, he remarked that the maps to which reference had been made, even if of an official caliber, could not be treated as "admissions."<sup>6</sup>

<sup>1</sup> See 2 Int. Arb. Awards 829 at 853 (1949); 22 A.J.I.L. 867 at 891 (1928).

<sup>2</sup> Although the line of the *uti possidetis* of 1821 was described as the only juridical line which could be established, Art. V of the convention added that, if the tribunal found that one or both parties had developed interests beyond that line, these should be taken into consideration. In consequence, the tribunal could modify the line and determine such territorial or other compensation as it regarded justified.

<sup>3</sup> Guatemala-Honduras Boundary Arbitration: The Counter Case of Guatemala 285 (1932).

<sup>4</sup> Guatemala-Honduras Special Boundary Tribunal, Opinion and Award 8 (1933).

<sup>5</sup> *Ibid.* 80. See also Guatemala-Honduras Boundary Arbitration: The Counter Case of Guatemala 341-342, 486, 500 (1932); The Case of Honduras 43-47 (1932); Counter-Case of Honduras in Answer to the Case of Guatemala 129-134 (1932); Reply of Guatemala to the Counter Case of Honduras 151-171 (1932); Rejoinder of Honduras to Counter-Case of Guatemala 94-95 (1932).

<sup>6</sup> Re Labrador Boundary, [1927] 43 T.L.R. 289 at 298-299. See also the oral arguments of Messrs. Watson, Taylor and Dickinson, Counsel for the United States, in the Alaska Boundary Tribunal Proceedings, 58th Cong., 2d Sess., Sen. Doc. No. 162 (1904), Vol. VI, p. 444; Vol. VII, pp. 591, 599-601; Vol. VII, pp. 850-851, 867-870,



Unlike the previous cases, the *Saint Croix River Arbitration* of 1798 involved a map which had been used by the negotiators but had not been incorporated in the settlement. Thus, the dispute evolved around the identity of the St. Croix River which, on the basis of Mitchell's map of 1755, had been designated as part of the 1783 Peace Treaty between the United States and the United Kingdom. Although Mitchell had named the more easterly of two rivers in the region as the St. Croix, it was subsequently shown that no river known as St. Croix existed, nor did the map reflect the accurate position of the two streams which fell into Passamaquoddy Bay. In consequence, the Arbitral Commission, established under the Jay Treaty of 1794, merely used the map to reflect the intent of the parties and to compare it with other evidence. In light of such other data it was determined that the more westerly "Scudiac, and the northern Branch of it"<sup>7</sup> was the river which had been intended under the name of the St. Croix, and that its mouth was at Joes Point.

Once again the pleadings are studded with comments concerning maps. For example, Mr. Ward Chipman, the Agent for the United Kingdom, reiterated with approval<sup>8</sup> the 1751 memorial of the British Commissioners, in the dispute concerning the limits of Nova Scotia or Acadia, to the effect that maps are "very slight evidence," since they are often based on incorrect surveys; that, even if drawn from accurate surveys, they cannot determine territorial limits, since these depend on authentic proof. Therefore, the proof from which the maps should be sketched would be "better evidence" and should be submitted in disputes which involve the "Rights of Kingdoms."<sup>9</sup>

The Advisory Opinion of the Permanent Court of International Justice in the *Jaworzina* case involved an interpretation of the decision of the Conference of Ambassadors of July 28, 1920, by which the frontier between Poland and Czechoslovakia in the Spisz district had been defined, subject to such modifications as might later be made on the recommendations of a

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respectively. For the response to these statements by the British Counsel, Sir Edward H. Carson, Sir Robert B. Finlay and Mr. C. Robinson, see *ibid.*, Vol. VII, pp. 674-675, 681-682; Vol. VI, pp. 176, 183; Vol. VII, pp. 525, 528, respectively. See also *ibid.*, Vol. VII, p. 526, in which Robinson quoted Sir Travers Twiss' view, as expressed in the Oregon Question (1846), p. 228, that maps are only "pictorial representations of supposed territorial limits, the evidence of which must be sought for elsewhere." And see the opinions of Lord Alverstone, the British member of the tribunal, and of Messrs. Root, Lodge and Turner, the United States members. *Ibid.*, Vol. I, pp. 34-35, 43, 61-62.

<sup>7</sup> 2 Moore, *International Adjudications* (Modern Ser.) 385 (1930). See also 1 Moore, *History and Digest of International Arbitrations* 65 *et seq.* (1898).

<sup>8</sup> This statement had also previously been quoted in the Canada-Newfoundland Boundary Dispute in the Labrador Peninsula. See Joint Appendix, Doc. No. 1430, Vol. VIII, pp. 3755-3756.

<sup>9</sup> 2 Moore, *International Adjudications* (Modern Ser.) 27 (1930). See also *ibid.* 91, 240-241; and 1 *ibid.* 289 (1929). For the argument of Mr. Sullivan, Agent for the United States, see 2 *ibid.* 165, 173. See, further, the comments of Severo Mallet-Prevost in the Venezuela-British Guiana Boundary Arbitration (1897), in 2 *The Counter-Case of the United States of Venezuela*, No. 6, pp. 267, 268 (1898). And see Newcombe, J., in *The King v. Price Bros. & Co. Ltd.*, [1925] 3 D.L.R. 595, 608-610.

delimitation commission. Poland now declared that this decision was only of a partial nature, in the sense that it settled that section of the frontier which had been described topographically, but that in those regions of Spisz in which Polish and Czech territory was coterminous, no ruling had yet been reached. A unanimous Court rejected this line of reasoning. In support of its conclusions the Court referred to "[s]everal important facts," among which were maps which marked the boundary and which, while "annexed" or "attached" to the 1920 decision, were not specifically declared to be a part of it. The maps led the Court to state that it "appears" that their authors, who had also formulated the topographical descriptions, knew that "the line defined in the decision embraces much more than the frontier described in detail," and to draw on a third map to confirm this view. With regard to maps as such, the Court noted that, "in the present case," they confirmed the results derived from the documents and from a legal analysis of these documents, and were by no means contradicted by any of them. But the Permanent Court expressed its awareness of their relative value by adding that "maps and their tables of explanatory signs cannot be regarded as conclusive proof, independently of the text of the treaties and decisions."<sup>10</sup>

Cases and statements<sup>11</sup> such as these have led Dr. Durward Sandifer

<sup>10</sup> Delimitation of the Polish-Czechoslovak Frontier (Question of Jaworzina), Dec. 6, 1923, P.C.I.J., Ser. B, No. 8 (1923), pp. 32, 33.

In the Monastery of Saint-Naoum case, this Court had another occasion to deal with maps. Here an opinion was sought concerning the decision of the Conference of Ambassadors, which had allotted the monastery to Albania on the basis of an interpretation placed on the Protocol of London of 1913. The Permanent Court found that the Conference did not err in holding that this part of the boundary had not been definitely determined in 1913, and added: "A map which has been submitted to the Court and which is described as . . . the map annexed to the instructions given to the Austro-Hungarian Commissioners on the Albanian Frontier Delimitation Commission contains a frontier line leaving Saint-Naoum outside Albania. It is alleged that the map represents the decision of London. Even admitting, however, that the line marked on this map is that referred to at the end of the first paragraph of the decision of August 11th, 1913, it must be observed that this line . . . did not necessarily represent the Albanian frontier. Moreover the map in question is unsigned and its authentic character is not established." P.C.I.J., Ser. B, No. 9 (1924), p. 21.

<sup>11</sup> See also *U. S. v. Texas*, 162 U. S. 1, 37-42 (1895), in which a unanimous Court, per Harlan, J., in interpreting the intentions of the parties, held that the reference to a certain meridian in Art. III of the Treaty of Feb. 22, 1819, between the United States and Spain, was to the correct astronomical location of the meridian, and not to the meridian as located on a map, incorporated in the treaty, which was one hundred miles in error of the true line.

See, further, the controversy between Russia and France on the one hand, and Britain and Austria on the other, as to whether a mistake in a map used during the negotiations of the Treaty of Paris of 1856 assigned a town named Bolgrad to Russia. Lord McNair has described this dispute as supporting the view that "an assent to a treaty based upon an erroneous map would be no assent at all." McNair, *Law of Treaties* 132 (1938). And see the 1871 report on a boundary dispute between the United States and Canada, in which it is stated that if a report, prepared by the Boundary Commissioners appointed under the Treaty of Ghent, and a map are at "irreconcilable variance," the report "must prevail." McNair, *Law of Treaties* 211.

to describe maps not as primary, but as secondary evidence, frequently of a "hearsay" nature.<sup>12</sup> As "evidence upon which to base an award in which the demarcation of the boundary is dependent upon the location and character of topographical features, they are generally worth next to nothing."<sup>13</sup> And Professor Charles Cheney Hyde, in a 1933 editorial comment in this JOURNAL, noted that in a boundary arbitration the "most obvious function" of a disputant's official map may be that of holding him "in leash."<sup>14</sup> The then Hamilton Fish Professor "doubted" whether "a series of maps, however numerous, necessarily proves that the boundary which they unite in prescribing is necessarily the correct one, to be accepted as the juridical basis of the proper frontier, especially when they are contradicted by trustworthy evidence of title."<sup>15</sup>

At the time of the writings of these authorities, that is, in the thirties and forties, courts, whenever adjudicating boundary disputes, had indeed considered maps with great reluctance. Since this period, however, the International Court of Justice has had several occasions, one as late as 1962, to deal with such evidence and, in some of the proceedings which have come before it, has set forth pronouncements which are at variance with the past. At this stage it is the purpose of this article to deal with these cases in order to show the differences and similarities with previous practice. Consequently, three disputes in which maps were submitted will be examined, namely, the *Minquiers and Ecrehos* case, the *Case Concerning Sovereignty over Certain Frontier Land*, and the *Case Concerning the Temple of Preah Vihear*.

## II

In the *Minquiers and Ecrehos* case of 1953 between the United Kingdom and France, which involved the issue of sovereignty over the islets and rocks of the groups, a unanimous Court held that sovereignty belonged to the United Kingdom. To support its ruling, the Court relied, *inter alia*, on a letter and two charts from the French Minister of Marine to the French Foreign Minister, which the French Ambassador had dispatched to the British Foreign Office. The note stated that the Minquiers were "*possédés par l'Angleterre*,"<sup>16</sup> and one of the charts showed the Minquiers (1961). Finally, see *The Island of Timor Case of 1914* in Scott, *Hague Court Reports* 354 *et seq.* (1916).

<sup>12</sup> Sandifer, *Evidence Before International Tribunals* 157, 259 (1939). And he continues: "... maps can seldom, if ever, be taken as conclusive evidence in the determination of disputes which may arise concerning the location of the boundary." *Ibid.* 157.

<sup>13</sup> *Ibid.* 261. See also the opinion of Mr. Justice Davis in *Missouri v. Kentucky*, 11 Wall. 385, 410-411 (1870). And see the Argentine-Chilean Boundary Arbitration, April 17, 1896, Report presented to the Tribunal appointed by Her Britannic Majesty's Government, Vol. II, p. 556 (1900).

<sup>14</sup> Hyde, "Maps as Evidence in International Boundary Disputes," 27 A.J.I.L. 311 at 315 (1933). See also 1 Hyde, *International Law Chiefly as Interpreted and Applied by the United States* 496 (2nd ed., 1945).

<sup>15</sup> *Ibid.* 316 and 497, respectively. See also Sandifer, *op. cit.* 164.

<sup>16</sup> [1953] I.C.J. Rep. 47 at 71; digested in 48 A.J.I.L. 816 *et seq.* (1954). For the text of the letter, see 1 I.C.J. Pleadings, *The Minquiers and Ecrehos Case* (United

as British. No line of territorial waters was drawn around the Ecrehos group, part of which was included in the line for Jersey and thus marked as British, while the other part was apparently viewed as *res nullius*. In her memorial the United Kingdom contended that these steps revealed that France regarded the Ecrehos "as belonging to nobody," and thus "did not claim them as French," and considered the Minquiers as "a British possession."<sup>17</sup> Since the communication was submitted in connection with proposals for delimiting the exclusive areas to which the fishermen of the two countries were entitled, and since the negotiations did not materialize, Professor Gros, the French Agent, argued that this material could not be invoked. The British Counsel, Mr. Harrison, opposed this reasoning on the ground that a "domestic communication on the internal plane from one French authority to another" was involved, and thus "fully admissible as evidence"<sup>18</sup> of France's position that the Minquiers were British, and the Court did in fact accept this correspondence as indicative of the French state of mind.<sup>19</sup>

During the course of the proceedings, more detailed emphasis was placed on cartographic evidence, for both sides introduced a number of maps. Mr. Harrison, the Attorney General for Jersey, although specifically refraining from submitting British maps, presented two separate editions of a well-known German atlas which showed both groups as British. He regarded this as "rather significant," and remarked that such "evidence of the general notoriety of the situation is evidence which the Court may, and indeed should, take into account."<sup>20</sup> Professor André Gros admitted that, in a territorial dispute, maps served a useful purpose, and called the Court's attention to other neutral and technical maps. Italian, Swedish, Hungarian, German and British atlases were displayed and the French Agent concluded

simplement que le Royaume-Uni pourrait d'ailleurs difficilement dire à la fois qu'une même carte lui donne les Ecrehos, parce que la délimitation les englobe, et les Minquiers, parce qu'elle ne les englobe pas.

Mais les données géographiques du litige, pour n'être pas déterminantes, n'en sont pas moins intéressantes à connaître.<sup>21</sup>

This statement caused Sir Lionel Heald, British Counsel and Attorney General of the United Kingdom, to reply that, while the maps which France had submitted to the Court did not show one or both groups as British, not a single one, other than a French chart, marked either of the groups as French. He found it "significant" that Stieler's *Hand-Atlas* described

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Kingdom/France), Annex A/25 at 174-176, hereinafter cited as "I.C.J. Pleadings, United Kingdom/France."

<sup>17</sup> 1 I.C.J. Pleadings, United Kingdom/France at 115. See also 2 *ibid.* at 159.

<sup>18</sup> *Ibid.* at 335.

<sup>19</sup> See [1953] I.C.J. Rep. 47 at 71. But see Judge Basdevant's dissent from this point of view, *ibid.* at 80-81.

<sup>20</sup> 2 I.C.J. Pleadings, United Kingdom/France at 169-170.

<sup>21</sup> *Ibid.* at 201.

both as British, thus giving "positive evidence of some notoriety for the fact that they *are* British."<sup>22</sup>

In spite of this and other attempts<sup>23</sup> to debate the relative value of cartographic data, neither the Court nor Judge Basdevant in his separate opinion commented upon or evaluated the significance of these maps, perhaps indicating a future trend. Only Judge Levi Carneiro availed himself of the opportunity to observe that evidence supplied by maps

is not always decisive in the settlement of legal questions relating to territorial sovereignty. It may however constitute proof of the fact that the occupation or exercise of sovereignty was well known. . . . A searching and specialized study would be required in order to decide which of the contending views in respect of maps should prevail. At any rate, maps do not constitute a sufficiently important contribution to enable a decision to be based on them. I shall not take the evidence of maps into consideration.<sup>24</sup>

### III

The *Case Concerning Sovereignty over Certain Frontier Land*, in which the Court was to decide whether two plots of land, which from 1836 to 1843 were known as Nos. 91 and 92, Section A, Zondereygen, belonged to Belgium or The Netherlands, provided this judicial organ with a real chance to pronounce on the import and impact of maps.

In 1836 the burgomasters of the Belgian commune of Baerle-Duc and the Dutch commune of Baarle-Nassau sought a determination of their boundary for purposes of taxation. As a result a "Communal Minute" was established on November 29, 1836, and signed on March 22, 1841, in two originals which were to be deposited in the respective communal archives. The Netherlands, however, was the only party able to produce before the Court what purported to be one of the two originals of the Communal Minute (Belgium was unable to do so), and the Dutch copy stated that plots 78 to 111 inclusive belonged to Baarle-Nassau.

Under the Treaty of London of April 19, 1839, which separated Belgium from The Netherlands, a Mixed Boundary Commission was to determine

<sup>22</sup> *Ibid.* at 285 (emphasis in original).

<sup>23</sup> See the observations drawn in connection with a chart attached to the Fishery Convention of Aug. 2, 1889. 1 *ibid.* at 487-488; 2 *ibid.* at 237-238; [1953] I.C.J. Rep. 47 at 57-59.

<sup>24</sup> [1953] I.O.J. Rep. 47 at 105. For a detailed analysis of this case see, *inter alia*, Hudson, "The Thirty-Second Year of the World Court," 48 A.J.I.L. 1 at 6-12 (1954); Fitzmaurice, "The Law and Procedure of the International Court of Justice, 1951-54: General Principles and Sources of Law," 30 Brit. Yr. Bk. Int. Law 1 at 43-47, 55-56 (1953); *idem*, "The Law and Procedure of the International Court of Justice, 1951-4: Points of Substantive Law. Part II," 32 *ibid.* at 20-76 (1955-56); Johnson, "The Minquiers and Ecrehos Case," 3 Int. and Comp. Law Q. 189-216 (1954); Verzijl, "Territorial Controversies before the International Court of Justice," 1 Nederlands Tijdschrift voor Internationaal Recht 234 at 356-364 (1954); Wade, "The Minquiers and Ecrehos Case," 40 Grotius Society Transactions 97-109 (1954); Roche, *The Minquiers and Ecrehos Case (An Analysis of the Decision of the International Court of Justice)* (1959), reviewed in 54 A.J.I.L. 721 (1960).

the boundary between the two Kingdoms. After the Commission had begun its work, the two governments on November 5, 1842, signed a boundary treaty (effective February 5, 1843), Article 14 of which declared that the *status quo* should be maintained for the two villages, and Article 70 of which stipulated that the Boundary Commission should "draft the convention . . . in accordance with the foregoing provisions."<sup>25</sup>

This Commission prepared a Boundary Convention on August 8, 1843, which provided that the frontier was defined by a "Descriptive Minute" drafted in accordance with detailed survey maps and on-the-spot examinations. Topographical maps were drawn for the whole frontier. Article 1 further noted that a "special map" was sketched for the communes and, with regard to these villages, the *status quo* was "maintained in virtue of Article 14" of the 1842 Treaty.<sup>26</sup> In accordance with Article 3 of the Convention, the "descriptive minute, the detailed survey maps and the topographical maps . . . prepared and signed by the Commissioners," remained "annexed" to the Convention and had "the same force and effect as though they were inserted in their entirety."<sup>27</sup> The Descriptive Minute first referred to Article 14 of the 1842 Treaty, then stated that the Communal Minute of 1841, "noting the plots composing the communes of Baerle-Duc and Baarle-Nassau, is transcribed word for word in the present Article,"<sup>28</sup> and described the special map. But the second part of the Descriptive Minute departed from the text of the copy of the Communal Minute produced by The Netherlands and instead read that plots 91 and 92 belonged to Baerle-Duc.

Belgium based her claim on this Communal Minute as reproduced in the Descriptive Minute. The Netherlands contended that the 1843 Boundary Convention did not determine the *status quo*, but only recognized its existence, and left this determination to the Communal Minute under which sovereignty was vested in The Netherlands.

The Court examined the records of the Boundary Commission and found that at its 225th meeting on April 4, 1843, the Commission adopted a text which called for a word-for-word transcription of the Communal Minute and for the drafting of detailed survey maps. In the language of the Court, the significance of the maps must have been "obvious" to the Commissioners of both parties, for such maps "require most careful preparation and checking." These maps, which showed the disputed plots as belonging to Belgium, were intended to become, and became, part of the settlement and had "the same legal force as the Convention itself."<sup>29</sup>

The majority then noted that the Commission had gone further than to confine itself to a reference to Article 14 of the Treaty of November 5, 1842, and had delimited the boundaries. Authority to demarcate the communes

<sup>25</sup> [1959] I.C.J. Rep. 209 at 214; digested in 53 A.J.I.L. 937 *et seq.* (1959). For a discussion of this case, see Leo Gross, "The Jurisprudence of the World Court," above, at p. 771; and Verzijl, "The International Court of Justice in 1959," 7 *Nederlands Tijdschrift voor Internationaal Recht* 1 at 10-15 (1960).

<sup>26</sup> [1959] I.C.J. Rep. 209 at 214.

<sup>27</sup> *Ibid.* at 215.

<sup>28</sup> *Ibid.* at 216.

<sup>29</sup> *Ibid.* at 220. See also *ibid.* at 216.

was "beyond question," for this was the "common intention" of the parties as expressed in the 1839 Treaty of London and the preamble to the Boundary Convention of 1843.<sup>30</sup> Hence the objective of the Convention was to decide, which was in fact done, sovereignty over the various plots in each commune.

The second Dutch contention, to the effect that, if the Boundary Convention purported to settle possession of the plots, it was vitiated by mistake, and did not carry out the desires of the parties, was likewise rejected. While The Netherlands argued that she did not have to "establish the origin of the mistake,"<sup>31</sup> since a comparison between the copy which she produced and the text of the Descriptive Minute revealed that a clerical error had occurred, the Court was unwilling to dispose of this issue on such limited grounds. Rather, the majority declared that the intentions of the parties had to be ascertained from the terms of a treaty in the context of all circumstances. In finding that no error had taken place, the majority once again referred, *inter alia*, to the fact that the detailed survey map, prepared pursuant to the 225th meeting of the Boundary Commission, indicated "clearly, and in a manner which could not escape notice," that the plots belonged to Belgium, for:

They stood out as a small island in Netherlands territory coloured to show, in accordance with the legend of the map, that they did not belong to the Netherlands but to Belgium. The situation of those plots must have immediately arrested attention. This map, signed by the members of the respective Commissions, of its very nature must have been the subject of check by both Commissions against original documents and surveys.<sup>32</sup>

The final argument of The Netherlands, that her exercise of effective, notorious and peaceful possession of the plots since 1843 displaced the legal title flowing from the Treaty and established her sovereignty over the villages, was also unsuccessful. In this connection the Court relied in the first place on Belgian military staff maps which, since their publication in 1874, had shown the plots as Belgian territory. Indeed, in commenting on these maps, M<sup>e</sup> Grégoire, the Belgian Advocate, declared: "l'inscription sur la carte militaire . . . représent[e] des manifestations de souveraineté."<sup>33</sup> M<sup>e</sup> Bisdom, as Counsel for The Netherlands, sought to treat this

<sup>30</sup> *Ibid.* at 221. But see the dissenting view of Judge Sir Hersch Lauterpacht, *ibid.* at 231.

<sup>31</sup> *Ibid.* at 225. See the dissenting opinions of Judges Armand-Ugon and Moreno Quintana, *ibid.* at 241, 257-258, respectively.

<sup>32</sup> *Ibid.* at 225-226.

<sup>33</sup> I.C.J. Pleadings, Case Concerning Sovereignty over Certain Frontier Land (Belgium/Netherlands) at 572. See also *ibid.* at 17, 317, 513, hereinafter cited as "I.C.J. Pleadings, Belgium/Netherlands."

Compare the oral argument of Sir Eric Beckett in the Anglo-Norwegian Fisheries case. In describing British base lines, which were at variance with those drawn by Norway, Sir Eric declared: "We believe that we could justify our facts on the Norwegian charts in the great majority of cases. . . . There is . . . clearly no sensible alternative to the use of charts officially used by the coastal State, and that is what

map in a cavalier fashion. Noting that Belgium, in claiming to have exercised sovereignty, depended on symbols on a military map, he observed:

L'inscription à la carte de l'état major? Eh bien, Messieurs, nous savons que dans des conditions spéciales, qui sont loin d'être remplies en l'espèce, des cartes peuvent présenter un certain intérêt quand il s'agit de la preuve d'une situation de fait. Mais je crois que c'est dépasser les limites de ce qui est admissible en droit international public que de soutenir qu'une carte, dont on ne suggère même pas qu'elle était connue d'aucune autorité néerlandaise, puisse être considérée comme un acte de souveraineté.<sup>34</sup>

The majority, however, did not consider the map in this light. Only Judge Armand-Ugon, in his dissenting opinion, was unwilling to attach such significance to the map as the Court had accorded it, because The Netherlands had had no knowledge of it and because he viewed it as a repetition of the mistake in the Descriptive Minute. Accordingly he remarked: "What is shown on the map cannot be regarded as having any effect with regard to sovereignty; nor can one attribute to it the value of an act of sovereignty."<sup>35</sup>

To be sure, the ten members of the Court who ruled in favor of Belgium found that the Commissioners were authorized to demarcate the communes with discretion, considered all of the proceedings of the Boundary Commission which related to the plots and not only those involving cartographic aspects, and did not rest their judgment exclusively on maps. Nevertheless, in examining the contentions of the parties, in evaluating the intentions of the two states, and in reaching a decision, an unusually significant value was attached to maps in comparison with earlier cases. Nor is this conclusion substantially altered, even if it is recalled that the Descriptive Minute, and thus the special map of the two villages, had been incorporated by reference in the Convention, and had the same legal force as the instrument itself.<sup>36</sup> Thus, a map was given considerable import in

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we did." 4 I.C.J. Pleadings, Oral Arguments, Documents, Fisheries Case (United Kingdom v. Norway), Judgment of Dec. 18th, 1951, at 147.

<sup>34</sup> Pleadings, Belgium/Netherlands at 582. See also *ibid.* at 551.

<sup>35</sup> [1959] I.C.J. Rep. 209 at 247. See also *ibid.* at 246, 249. Contrast his view on the "value" of an 1826 map, *ibid.* at 246. For the statements of the parties concerning this material, see Pleadings, Belgium/Netherlands at 48-49, 367, 529, 286-287. See, further, *ibid.* at 41, 284, 364.

<sup>36</sup> Compare the 1950 charge by Jordan that Israel had committed "aggression" in the Naharayim area. The complaint alleged that neither the text of the Armistice Agreement, nor the original maps signed at Shuneh, which were said to have formed the basis of those signed at Rhodes, referred to a demarcation line in this territory. It further stated that the only justification for Israel's action was a map attached to the Agreement. This map was described as unauthenticated and as showing a "fraudulently inserted, or inaccurate, line." U.N. Doc. S/1824, par. 9. "Tampering" and "erasures" were said to have occurred during the transcription of the map from one scale to another, a transcription which had taken place in order to make it more convenient to attach a smaller map to the text. *Ibid.* par. 10(d). The cablegram of the Jordanian Foreign Minister added: "It is an established principle that the text of the Armistice Agreement is more forceful than the map, for the text explains the map



striking down the first two contentions advanced by The Netherlands, namely, that the Maastricht Boundary Convention of 1843 did not determine sovereignty over the area, and that, if such a determination had been made, the Convention was vitiated by a mistake. And still another map weighed heavily in defeating the Dutch claim that she had displayed sovereignty since 1843, and in negating evidence which showed that for decades she had exercised preponderant governmental activities in the communes.

Indeed, Judge Moreno Quintana, to whom the dispute was one of treaty interpretation, and who noted that a mistake of fact had vitiated the consent of the parties, emphasized this very aspect, for he declined to base his decision on a map. He pointed out that the Commissioners, who were a "technical body" and not a "judicial commission," had a "specific task," that of transcribing "word for word" the Communal Minute. And this jurist remarked that the issue was one of "factual verification," not of "enumerative description" or "graphical reproduction," since a Descriptive Minute, which established that the plots belonged to Baerle-Duc, was attached to the Convention. This Descriptive Minute was also "borne out by a map" which the plenipotentiaries of the two states had signed. But, as a consequence of this description, "the said map, or any other document," which might have resulted from "a mistake in numbering, would be of highly doubtful value. One is aware, moreover, of the value—the very relative value—which international law attaches to geographical maps."<sup>37</sup>

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annexed to the Agreement, and, in the event of discrepancy, it is the text that applies, not the map." *Ibid.* par. 18.

During the U.N. Security Council debate, Mr. Haikal of Jordan repeated the charge that the map was "inaccurate," and was not binding on his government because it did not copy the armistice lines accurately, and was not properly signed. U.N. Security Council, 5th Year, Official Records, 514th Meeting (Oct. 20, 1950), p. 5. Mr. Eban of Israel informed the Council that "[a]ll the relevant maps" since the demarcation, including the original Rhodes map and the revised map of June 22, 1949, which had become the master map and bore the signatures of the two parties, showed the territory on the Israeli side of the line. *Ibid.*, 517th Meeting (Oct. 30, 1950), p. 5. He suggested that, even if the region was included "inadvertent[ly]," this "could not prevail against the clear, legal, military and political validity of the agreement and the maps which were finally signed. What matters is the eventual signature, not the process which led up to it." *Ibid.*, pp. 6-7. Eban further noted that the dispute did not involve an interpretation of the Agreement, for Israel stood on "the text and the demarcation of the armistice documents themselves." *Ibid.*, pp. 7-8. The testimony of Dr. Bunche, the former Acting Mediator, revealed that only "overlays," and not a map, were brought from Shuneh to Rhodes and that these were the basis for preparing the official maps. Dr. Bunche emphasized that the signing of the map prior to the Agreement was an unnecessary additional precaution, since the signing of the Agreement implied immediate and unqualified acceptance of all of its parts, including the maps. The map attached to the text was described as "entirely in order"; there were "no erasures on it"; there was "no basis for questioning its authenticity in any way." *Ibid.*, 518th Meeting (Nov. 6, 1950), p. 12.

<sup>37</sup> [1959] I.C.J. Rep. 209 at 254.

## IV

Since the *Frontier Land* case involved a map which was incorporated by reference in a treaty, the suggestion may be advanced that the International Court of Justice did not necessarily depart from precedent insofar as the evidentiary value of maps was concerned. For this reason, it becomes imperative to analyze the *Temple of Preah Vihear* case. Such an examination will substantiate the view that, in the adjudication of boundary disputes, maps have gained much more import than they have possessed in the past. Indeed, it is particularly noteworthy that in the *Temple* case, in which the relationship between the map and the treaty was far more tenuous than in the *Frontier Land* case, the map, nevertheless, prevailed. Truly, the *Frontier Land* case does not stand alone.

The Temple dispute had its *fons et origo* in the boundary settlements reached in 1904-1908 between France (then the protecting Power over Cambodia) and Siam (as Thailand was then called), particularly the Treaty of February 13, 1904. Article 1 of this Treaty provided that the general character of the frontier along the eastern section of the Dangrek range, in which Preah Vihear is located, was to follow the watershed line or ("*la ligne de partage des eaux*"). In accordance with Article 3 of the Treaty, a Franco-Siamese Mixed Commission was to delimit the frontiers as "determined by Articles 1 and 2."<sup>88</sup> On the basis of these provisions, the Court found that it was the function of the Commission to delimit the "exact course" of the boundary, and while the objective had, "*prima facie*, to be carried out by reference to the criterion indicated in Article 1, the purpose of it was to establish the actual line of the frontier."<sup>89</sup> Hence the frontier line would for all practical purposes be the one which resulted from the Commission's work, unless it was shown that the delimitation was invalid.

A Mixed Commission was subsequently formed and in due course traveled along the Dangrek range and carried out the required reconnaissance. Captain Oum, a French member of the Commission, was also asked to survey all of the eastern part of the range. Consequently, it was clear to the Court that a frontier had been surveyed and fixed, but no record of any decision that may have been taken was made and no reference to the Dangrek region was found in the minutes of the Commission after the initial decision to survey the frontier. On March 23, 1907, at a time when the Commission was waiting for the reports and maps of Captain Oum, France and Siam concluded another boundary treaty. Therefore no further meetings of the Commission were held.

The preparation and publication of maps was the final phase of the

<sup>88</sup> [1962] I.C.J. Rep. 6 at 16; digested in 56 A.J.I.L. 1033 *et seq.* (1962). See also Johnson, "International Court of Justice. Judgments of May 26, 1961, and June 15, 1962. The Case Concerning the Temple of Preah Vihear," 11 Int. and Comp. Law Q. 1183 *et seq.* (1962); Verzijl, "International Court of Justice—Case Concerning the Temple of Preah Vihear (Cambodia v. Thailand)," 9 Nederlands Tijdschrift voor Internationaal Recht 229 at 236-263 (1962).

<sup>89</sup> [1962] I.C.J. Rep. 6 at 17.

delimitation operation. Since Siam did not possess adequate technical means, she requested French officers to map the frontier region. Eleven maps were completed in the late autumn of 1907 by a team of French officers, the majority of whom had been members of the Mixed Commission, and these maps were subsequently dispatched to Siam. One of these maps (filed as Annex I to the Cambodian memorial), was of the Dangrek range, and this map, on which Cambodia principally relied in support of her contention that she possessed sovereignty over the Temple, showed Preah Vihear in Cambodian territory.

Specifically, Cambodia argued that the map was drafted and published "in the name and on behalf of" the Mixed Commission, that it set forth the "decisions" of the Commission, and that, in view of this "fact" and the "subsequent agreements and conduct" of the parties, it presented "a treaty character." She further pleaded that the boundary line between the two states in the disputed area was the one "marked on the map of the Commission."<sup>40</sup> On the other hand, Thailand contended that the map did not bind the parties, since it did not represent the work of the Mixed Commission of Delimitation, that at Preah Vihear it contained a material error because the frontier indicated on the map was not the true watershed line, which would place the Temple, "an ancient sanctuary and shrine,"<sup>41</sup> in Thailand, that she had never accepted the map in such a way as to be bound by it or, alternatively, that, if she did so, this was done in the mistaken belief that the map line corresponded with the watershed line.

The Court found that the map had indeed never been formally approved by the Mixed Commission. However, there was "no reasonable doubt" that it was drawn on the basis of the survey, was "invested with an official standing," had an "inherent technical authority" of its own, and an origin which was "open and obvious." Still, the Court held that the map did not have a "binding character" in "its inception, and at the moment of its production."<sup>42</sup> Yet this conclusion did not avail Thailand, since the majority saw the issue not in terms of whether the Commission had a discretionary power to depart from the watershed line, but whether the parties had adopted the map and its line, which was far to the north from the watershed boundary, as "representing the outcome of the work" of the Commission, thereby "conferring on it a binding character."<sup>43</sup>

Thus, the majority disregarded the position advanced by Thailand, namely, that:

When a basic treaty has to be interpreted in the face of . . . a mistake evidenced by a map, the interpretation of the treaty cannot be based on the evidence of the erroneous map itself, nor can that map be taken as determinative of the intent of the parties. On the contrary, the contradiction between the treaty definition and the map must limit the evidentiary value of the map. In short, the mistake of fact

<sup>40</sup> *Ibid.* at 11.

<sup>41</sup> *Ibid.* at 15.

<sup>42</sup> *Ibid.* at 21. See also the view of Judge Sir Gerald Fitzmaurice in his separate opinion. *Ibid.* at 54-55.

<sup>43</sup> *Ibid.* at 22.

vitiates the intent of the parties, and hence vitiates also the operative effect of the map produced in consequence of the mistake.<sup>44</sup>

Instead, the majority, in holding that Thailand had accepted the map, noted the communication of the maps was not merely an interchange between states, adding that this would have sufficed, but "something of an occasion,"<sup>45</sup> since they were widely publicized and circulated. If Thailand disagreed with the maps she should have reacted; yet she did nothing, either at the time or for many years thereafter, and thus by her conduct, or lack of it, had acquiesced in the map. Markings on the face of the map also necessitated some reservation, but none was forthcoming. Even after the maps were distributed to the Siamese members of the Mixed Commission, who must have known how the maps had come into existence, no objections were raised. And Prince Damrong, the Minister of the Interior, thanked the French Minister in Bangkok for the maps and requested additional copies for transmission to provincial governors, an action which the Court interpreted as a recognition of the character of the maps and what they purported to represent. Additional evidence was drawn from the work of a Franco-Siamese Commission of Transcription which met in 1909 to convert existing maps into atlas forms, and from the fact that the maps were seen by several other high Siamese officials who, in spite of their knowledge of Preah Vihear, had remained silent.<sup>46</sup>

The Court next dismissed the plea of error in law not only because of the "character and qualifications" of the Siamese who saw the map, which "alone"<sup>47</sup> was said to make it difficult for Thailand to press this contention, but also because the map drew obvious attention to Preah Vihear and the map line was sketched in such a fashion as to put prudent men on notice. Since the Siamese officials had accepted the map without undertaking their own investigation, they could not now base themselves on a mistaken belief as invalidating their approval. This interpretation was founded on an "established rule of law that a plea of error cannot be allowed as an element vitiating consent if the party advancing it contributed by its own conduct to the error, or could have avoided it, or if the circumstances were such as to put that party on notice of a possible error."<sup>48</sup>

<sup>44</sup> 1 I.C.J. Rejoinder of the Royal Government of Thailand at 47, par. 97 (Feb., 1962), hereinafter cited as "Rejoinder of Thailand."

<sup>45</sup> [1962] I.C.J. Rep. 6 at 23.

<sup>46</sup> Compare Judge Sir Percy Spender's description of the preparation and distribution of the maps, *ibid.* at 125-127, and see Judge Wellington Koo's analysis, *ibid.* at 83-85, paras. 18-21. See also the remarks of Mr. Dean Acheson, Counsel for Cambodia, in response to the explanation offered by Professor Henri Rolin, Advocate and Counsel for Thailand, in Case Concerning the Temple of Preah Vihear, Oral Proceedings, March 1 to 31, 1962, Distr. 62/50 at 319-320, hereinafter cited as "Oral Proceedings." Thailand, in her rejoinder, pointed out that the note of the Minister of the Interior did not "mean that he accepted, or even that he had studied, every detail shown on the eleven maps." Rejoinder of Thailand at 38, par. 73.

<sup>47</sup> [1962] I.C.J. Rep. 6 at 26.

<sup>48</sup> *ibid.* See also the separate opinion of Judge Sir Gerald Fitzmaurice, *ibid.* at 57-59.

Events subsequent to 1904-1909 were then examined to support the concept that Thailand was precluded from claiming that she had not accepted the map. Here Cambodia had alleged, *inter alia*, that from

la collection des cartes imprimées par le [*Siamese*] *Royal Survey Department* de son ministère de la Défense, on constaterait que le tracé de la frontière est celui que la Commission mixte de 1904 a donné et fait publier.

And she had further stated that:

Le ministère de la Défense nationale n'hésite pas . . . à faire dresser et publier par son service géographique des cartes qui situent Préah Vihear en territoire cambodgien. Le ministère des Affaires étrangères a produit, au cours de négociations diplomatiques, des cartes qui montrent également Préah Vihear en territoire cambodgien.

Il ne s'agit pas d'actes privés mais d'actes publics et de cartes officielles. Si la thèse de la souveraineté siamoise sur Préah Vihear, avant et après 1904, était fondée, le Gouvernement aurait veillé à ce que ses cartes soient conformés à ses revendications territoriales.<sup>49</sup>

Thailand countered with the statement that it was "abundantly clear" that, once her own survey of 1934-1935 had revealed a divergence between the map line and the true watershed, the Royal Survey Department had not regarded the map line as accurate, but had issued maps showing the border "in its proper place" and Preah Vihear as lying in Thailand.<sup>50</sup> Still, in 1937 Thailand printed a map which placed the Temple on the Cambodian side. The explanation that this map, which was published for a particular purpose and clearly marked "for temporary use,"<sup>51</sup> was issued because she did not possess, and was at the time unable to produce, maps of the right scale of her own, was found unconvincing. In a manner reminiscent of the evaluation of the charts in the *Minquiers and Ecrehos* case, the majority stated that use of a map for internal military purposes did not make it "any less evidence" of the Thais' state of mind. The inference was drawn that Thailand had accepted, or still accepted, the Annex I map, "even if she believed it incorrect, even if, after her own survey of 1934-1935, she thought she knew it was incorrect."<sup>52</sup>

In describing another map, which showed Preah Vihear in Cambodia, and which was filed with the 1947 Franco-Siamese Conciliation Commission, Thailand noted that these proceedings did not involve the issue of sovereignty over the Temple, and that the map was introduced in relation to areas south of Preah Vihear which were the subject of the negotiations. She contended that submission of this erroneous map, which was a reproduction of the Annex I map, did not imply that Thailand had

<sup>49</sup> 1 I.C.J. *Réplique du Gouvernement du Royaume du Cambodge*, Mémoire, at 31, pars. 50, 52 (Nov., 1961), hereinafter cited as "*Réplique du Cambodge*."

<sup>50</sup> Rejoinder of Thailand at 33, par. 63.

<sup>51</sup> *Ibid.* at 35, par. 67. See also the oral argument and rejoinder of Sir Frank Soskice, Advocate and Counsel for Thailand. Oral Proceedings at 179-180, 184-186, 472-473.

<sup>52</sup> [1962] I.C.J. Rep. 6 at 28. See Wellington Koo's dissent, *ibid.* at 89, par. 30.

accorded "official recognition"<sup>53</sup> to the 1907 map. And to show the very relative value of maps, when contradicted by other evidence, Sir Frank Soskice, Advocate and Counsel for the Thai Government, took this argument one step further. Thus, Sir Frank offered the hypothesis that, even if Thailand's publication and occasional use of maps which showed the Temple in Cambodia "might . . . by themselves be regarded as some recognition"<sup>54</sup> of French, and thus Cambodian, sovereignty, such action could not be considered independently. He invited the Court to examine these maps in light of Thailand's exercise of sovereignty over the Temple, and concluded that in such a context they did not "constitute any recognition at all"; that, as a matter of fact, their use had "no significance."<sup>55</sup> The comment of Mr. James Nevins Hyde, another Advocate and Counsel for Thailand, who was concerned with the evidentiary value of maps in general and the Annex I map in particular, that, under "the well-recognized juridical principle," a map "at best . . . is a doubtful basis on which to rest the decision of an international tribunal,"<sup>56</sup> should also be noted in this respect. In spite of these efforts, however, the majority drew an adverse effect from the 1947 map and emphasized that Thailand had not presented the question of the Temple at that time because she accepted the map line, regardless of whether it corresponded with the watershed line.<sup>57</sup>

This evidence, as well as the maintenance of silence<sup>58</sup> during other occasions, for example, at the time of the 1925 and 1937 negotiations of the Franco-Siamese treaties, and failure to raise the issue until 1958, precluded Thailand from claiming that she did not recognize the map. In this connection, the Court also analyzed Thailand's plea that at all times she had exercised full sovereignty in the Temple area to the exclusion of Cambodia, that this was evidenced by her administrative functions on the ground, and that therefore she had no need to submit the question of a map which she had never accepted. Most of the acts were interpreted, however, as of a local nature and as insufficient to override or negative the "consistent and undeviating attitude of the central Siamese authorities to the frontier line as mapped."<sup>59</sup>

<sup>53</sup> Rejoinder of Thailand at 26, par. 68. And see Thailand's explanation of the map used during the 1941 Tokyo negotiations, a map on which Cambodia had also relied. *Ibid.* at 35, par. 68, and Oral Proceedings at 180.

<sup>54</sup> Oral Proceedings at 181.

<sup>55</sup> *Ibid.*

<sup>56</sup> *Ibid.* at 465.

<sup>57</sup> Contrast Judge Wellington Koo's dissenting opinion, *ibid.* at 89, par. 31.

<sup>58</sup> Compare the protest delivered by the Honduran Chargé d'Affaires to the U. S. Secretary of State against a map, published in a 1934 issue of the National Geographic Magazine, which showed the Swan Islands as a U. S. possession. 4 U. S. Foreign Relations at 750-751 (1935). And see the British protest against Portuguese maps of Central Africa in 2 Smith, Great Britain and the Law of Nations at 8-9 (1935). For the more recent protests delivered by India against Chinese maps, see notes 70-72, 74, below.

<sup>59</sup> [1962] I.C.J. Rep. 6 at 80. In striking down this contention, emphasis was also placed on a 1930 archeological tour of the Temple area by Prince Damrong, former Minister of the Interior, and at that time President of the Royal Institute of Siam.

In ruling that the Temple was situated in Cambodian territory, and that Thailand was obligated to withdraw any forces or guards stationed "at the Temple, or in its vicinity on Cambodian territory,"<sup>60</sup> the Court noted that Thailand's conduct since 1908, which to a large extent was evidenced by or through maps, precluded or estopped her from contesting the issue.<sup>61</sup> The majority was careful to point out, however, that Thailand had already accepted the map in 1908-1909 as representing the result of the delimitation, and had recognized the map line as being the frontier line. As a result, the map entered the treaty settlement and became "an integral part of it."<sup>62</sup> According to the Court, this process did not involve any departure from, or violation of, the terms of the 1904 Treaty, for the parties, in 1908 and thereafter, had

adopted an interpretation of the treaty settlement which caused the map line, in so far as it may have departed from the line of the watershed, to prevail over the relevant clause of the treaty.<sup>63</sup>

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At Preah Vihear the Prince was officially received by the French Resident for the adjoining Cambodian territory and the French flag was flying. The majority regarded such a reception as a clear affirmation of title which required a reaction; yet, once again, Thailand remained silent. *Ibid.* at 30-31. But see the manner in which Judges Wellington Koo and Sir Percy Spender construed this incident. *Ibid.* at 89-91, pars. 32-34, and 128-129, respectively.

<sup>60</sup> *Ibid.* at 37.

<sup>61</sup> While the majority did not use the term "estoppel" or "estopped," but preferred to speak of "preclusion" or "precluded," which was the terminology Judge Sir Percy Spender had employed in the Case Concerning the Arbitral Award Made by the King of Spain on December 23, 1906 (*Honduras v. Nicaragua*), [1960] I.C.J. Rep. 192, this principle was carried further in the Temple Case. Compare also Sir Percy's separate opinion in the Arbitral Award Case, *ibid.* at 219-220, with his views in the Temple Case, [1962] I.C.J. Rep. 6 at 130-131, 142-146. And see Vice President Alfaro's separate opinion, *ibid.* at 89-91, as well as Sir Gerald Fitzmaurice's and Judge Wellington Koo's construction, *ibid.* at 62-65 and 97, par. 47, respectively.

<sup>62</sup> *Ibid.* at 33.

<sup>63</sup> *Ibid.* at 34. Contrast Wellington Koo's view that the map "does not possess a treaty character." *Ibid.* at 80, par. 14. See also *ibid.* at 88, par. 27; 92, par. 36; and see Spender's dissent, *ibid.* at 118, 132-133.

Judge Moreno Quintana reiterated the stand he had taken in the Frontier Land Case. He remarked that "territorial sovereignty is not a matter to be treated lightly, especially when the legitimacy of its exercise is sought to be proved by means of an unauthenticated map," and referred to "[a] well-established rule," embodied in the Treaty of Versailles, that in a discrepancy between the text of a boundary treaty and a map, the terms of the treaty govern. The jurist added that as "evidence" maps have only "a complementary value which is in itself without legal effect." This was said to be especially applicable to the maps submitted by Cambodia which had been drafted by "official Thai services" and which placed the Temple in Cambodia. Such maps did not appear conclusive, because they followed the Annex I map which was "not authoritative" and did not show the watershed line. "An error remains an error and cannot by repetition make good acts of later date that are based upon that error. That is the only significance that should be attached to the question of error in the present case, where it does not have the significance of vitiation of consent, the existence of which is possible in a legal instrument but not in a map." *Ibid.* at 69, 70, 71.

Such a conclusion is rather noteworthy, for in essence it amounted to, and resulted in, a finding that, in a conflict between a map not expressly incorporated in a treaty, attached to it, forming the basis on which a treaty is negotiated, or referred to in the agreement, and not prepared, approved, or even discussed by a delimitation commission or signed by the parties, and a boundary definition described in a treaty, the map prevailed. This construction was reached not only as a result of Thailand's course of conduct subsequent to the conclusion of the 1904 Treaty—a path which the majority regarded as a tacit acceptance of, or acquiescence in, the map, precluding or estopping her from challenging the map line—but also “*as a matter of treaty interpretation.*”<sup>64</sup> The latter concept was expressed in the following terms: “Even if . . . the Court were called upon to deal with the matter now as one solely of ordinary treaty interpretation, it considers that the interpretation to be given would be the same.”<sup>65</sup> Justification for this line of reasoning was based on the view that a stable and final regulation of a frontier is the overriding issue of a boundary treaty, an objective which could not be achieved as long as “possible errors still remained to be discovered.”<sup>66</sup> And in the instant case France and Siam were said not to have attached any special significance to the watershed line, for they had considered the finality of the frontier of much greater importance.<sup>67</sup>

<sup>64</sup> *Ibid.* at 35 (emphasis supplied). See also Judge Sir Gerald Fitzmaurice's separate opinion, *ibid.* at 65-66, and see pp. 802-803 below.

<sup>65</sup> [1962] I.C.J. Rep. 6 at 34. Sir Percy Spender could not agree that a “derogation” from a treaty provision could be “disposed of . . . by treating the map, the line on which was to conform to the Treaty, as in law overriding it.” He regarded this not as “treaty interpretation,” but a “redrafting” of the Treaty in accordance with “a presumed intention” for which no evidence could be found and which was inconsistent with the terms of the Treaty. *Ibid.* at 133-134. Indeed, in the Interpretation of Peace Treaties (Second Phase), Advisory Opinion of July 18, 1950, [1950] I.C.J. Rep. 221 at 229, the Court stated that it was its duty “to interpret . . . Treaties, not to revise them.”

<sup>66</sup> [1962] I.C.J. Rep. 6 at 34. Wellington Koo found the argument based on stability as “strained and unreal.” *Ibid.* at 98, par. 48.

<sup>67</sup> Previously, the majority had held that Thailand could not challenge the map line because she had enjoyed the “benefit of a stable frontier” for half a century. Since France and Cambodia had relied on Thailand's acceptance, and since neither side could plead error, it was “immaterial whether or not this reliance was based on a belief that the map was correct.” *Ibid.* at 32.

Here it should be noted, however, that the Judgment did not determine the frontier in the disputed area with certainty and left the precise line of the watershed on the Preah Vihear promontory unclear. Indeed, the Court did not find it necessary “to consider whether, at Preah Vihear, the line as mapped does in fact correspond to the true watershed line in this vicinity, or did so correspond in 1904-1908, or, if not, how the watershed line in fact runs,” *ibid.* at 35, and thus failed to pass on one of the Cambodian submissions, *ibid.* at 11. On the other hand, Sir Percy found it “hardly . . . possible . . . to pronounce in favour of the line of Annex I in the absence of a determination of the extent to which Annex I does or does not in fact conform to the stipulations contained in Article I of the Treaty itself.” *Ibid.* at 134. See also Wellington Koo's dissent, *ibid.* at 98-100, pars. 51-55.

Finally, see the conflicting reports and testimony of the witnesses and experts of the



## V

Maps still play a significant rôle in present-day boundary disputes. This is revealed not only by the cases which have come before the International Court of Justice but also in the conflict between China and India. In that dispute the parties have relied on their own, each other's, and neutral maps to support their contentions. A note of March 22, 1959, from Prime Minister Nehru, for instance, informed Premier Chou En-lai that there was no doubt of the frontiers "as shown in the published maps,"<sup>68</sup> and another Indian communication of November 4, 1959, stated that the frontier has been well known and has been displayed with "precision"<sup>69</sup> in the official maps of the Survey of India. Chou En-lai, on September 8, 1959, remarked that British and Indian maps had at first also drawn the boundary "roughly in the same way as the Chinese maps," and that British and Indian maps had "unilaterally"<sup>70</sup> altered the boundary line, a charge which Nehru met with the statement that Chinese maps had

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two sides. Annexes to Counter-Memorial of the Royal Government of Thailand, Annex No. 49 at 236-240 (Sept., 1961); 2 *Réplique du Cambodge*, Annexes, Annex LXVIA at 69-71 (Nov., 1961); 2 *Rejoinder of Thailand*, Annexes, Annex No. 75a at 85-89 (Feb., 1962); Oral Proceedings at 212-298, 300-304.

<sup>68</sup> "Notes . . . between . . . India and China, 1954-1959," White Paper 55 at 57, par. 7, hereinafter cited as "White Paper No. I." The author wishes to express his gratitude to the Indian Embassy in Washington and to the Information Service of the Indian Consulate in New York for placing at his disposal the White Papers and the Report of the Officials of the Governments of India and the People's Republic of China on the Boundary Question.

<sup>69</sup> "Notes . . . between . . . India and China, September-November 1959," White Paper No. II, p. 20, par. 4.

<sup>70</sup> *Ibid.* 27 at 30. The Indian note of March 22, 1959, as well as other correspondence, also protested against Chinese maps, which Prime Minister Nehru described as giving "a wrong borderline between the two countries." According to the Indian Government, Premier Chou En-lai had stated in October, 1954, that these maps were "reproductions of old pre-liberation maps," which the Chinese People's Republic "had had no time to revise," and left the "impression" that "revision" was "essentially a procedural issue, which would be made in due course." The re-issuance of these maps was termed "embarrassing," a "matter of great concern," a "standing threat" to India's "integrity," and "not in accordance with long established usage as well as treaties." See letters from Nehru to Chou, Dec. 14, 1958, and March 22, 1959, in White Paper No. I, pp. 49, par. 5, and 51, par. 13; 57, par. 8; note of Feb. 12, 1960, in "Notes . . . between . . . India and China, November 1959-March 1960," White Paper No. III, p. 92, par. 22; note of Sept. 10, 1959, in White Paper No. II, p. 8. See also the notes of Aug. 21, 1958, White Paper No. I, p. 46, and Nov. 4, 1959, White Paper No. II, p. 20, par. 4.

Subsequently, Chou En-lai asserted that the entire Sino-Indian boundary had never been delimited, and the Communist Government stated that, during the 1954 conversations, the Premier had explained that the maps followed old ones and that it would be inappropriate for China "on its own" to alter the delineation, "before conducting surveys and consulting with the countries concerned." Since Chou En-lai had remarked that the frontiers were undelimited, and Nehru was of the opinion that no boundary issues existed, there was "an obvious difference of views." The note of December 26, 1959, added that the Communist leader had "clearly expressed his disagreement to any unilateral revision of maps," while another, dated January 23, 1959, declared that the settlement of the boundary issue would also "solve" the "problem

changed the markings "through the years to include large areas of Indian territory in China."<sup>71</sup> During the 1960 meetings of the Indian and Chinese officials on the boundary question, the Indian side quoted 36 official Indian and 8 official Chinese maps, and the Chinese side referred to 13 official Indian maps.<sup>72</sup> The Indians described these official maps as "evidence of the Governmental viewpoints," and termed the numerous un-

of drawing the boundary on the maps." White Paper No. III, p. 75; White Paper No. I, p. 54. See also the note of Nov. 3, 1958, White Paper No. I, p. 47.

<sup>71</sup> See note of Sept. 26, 1959, in White Paper No. II, p. 42, par. 19. Insofar as the Ladakh area, for example, is concerned, China has claimed that her maps of the past "one to two hundred years" were "in the main . . . consistent," while British and Indian maps revealed "considerable contradictions and confusion," although some were "close to the traditional customary line as shown on Chinese maps." See note of Dec. 26, 1959, White Paper No. III, p. 68. See also notes of Sept. 8, 1959, White Paper No. II, p. 28, and of April 3, 1960, "Notes . . . between . . . India and China, March 1960–November 1960," White Paper No. IV, p. 12. India, however, pointed out that "[e]ven official Chinese maps of the late nineteenth century showed a boundary approximating to our line," and that, while official twentieth-century Chinese maps "included large parts of our territory," the 1917 Postal Map of China drew a boundary "more or less according to the traditional Indian alignment." The "broad trend in recent Chinese maps has been to push the alignment deeper into Indian territory." See notes of Sept. 26, 1959, White Paper No. II, p. 37, par. 10, and of Feb. 12, 1960, White Paper No. III, p. 89, pars. 13 and 14. See also the note of Nov. 4, 1959, White Paper No. II, p. 21, par. 7. And the "unofficial" maps of the Ladakh region, to which China had referred, were described as based on incomplete surveys, a contention which the Chinese regarded as "untenable." See notes of Feb. 12, 1960, White Paper No. III, p. 86, par. 6, and of April 3, 1960, White Paper No. IV, p. 12. The Communists also stated that the 1917 map did not represent the "view of the Chinese people" but "only that of the imperialist elements." *Ibid.* 11.

<sup>72</sup> The Indian officials also examined the 1954 conversations between Nehru and Chou En-lai and found that, at that time, the Chinese Premier had treated the Chinese maps "as of little significance," and that the Chinese side now termed the description of what had occurred a "distortion." The Indians strongly objected to this assertion and remarked that even Chinese statements after 1954 "confirmed" the accuracy of the Indian standpoint. The Indian officials added that China had never given her "version of the boundary or disputed the definition" submitted by India. Claims to "Indian territory" and statements that "maps which had been earlier said to be reprints of erroneous ones" represented "valid claims," were a matter of "astonishment" and "serious concern" to India. "Having failed, in the face of open declarations and direct communications by . . . India, to specify her claim or to protest . . . no doubt" was said to remain that "under the accepted canons of international usage China must be held to have accepted and acquiesced in the Indian alignment and to be now estopped from raising claims to Indian territory." Report of the Officials of the Governments of India and the People's Republic of China on the Boundary Question 272, 274 (1961). See also *ibid.* 99, and CR-163.

The Chinese officials declared that the Chinese Government had "repeatedly" stated that the Chinese maps were based on delineations of "pre-liberation maps," and that only "minute" discrepancies existed, which "is only natural prior to a formal delimitation." This was held not to prove the Indian assertions, but rather the "basic consistency of delineation in Chinese maps." China had neither "acquiesced" in the "allegation" that the boundary had been delimited, nor in the alignment "now claimed" by India. The principle of estoppel was, in the words of the Chinese side, "absurd." *Ibid.* CR-181, CR-165, 99.

official maps which had been brought forth as "evidence of tradition."<sup>73</sup> They carefully pointed out that all the maps which had been displayed revealed that "throughout the centuries" the traditional boundary between the two states had been in conformity with the present alignment, and that until the production of Communist Chinese maps, "which were only recently claimed to be correct," none of the official Chinese maps "substantiated the alignment now claimed by China."<sup>74</sup>

While maps are thus still as frequently employed as in the past, the decisions of the International Court of Justice disclose that their evidentiary value has undergone a considerable amount of change since the days of the carefully documented and authoritative writings of Drs. Hyde and Sandifer. Thus, the conclusions which were advanced in the thirties and forties are no longer as applicable as in the past.<sup>75</sup>

Indeed, the *Frontier Land* case in a sense illustrates a situation in which a map of a Delimitation Commission, which was incorporated by reference in a treaty but was inconsistent with the text of the instrument, prevailed over the written article. And in the *Temple of Preah Vihear* case, in which the relationship between the map and the treaty was far less specific and direct and of a more speculative nature, the Court treated a map, not prepared or approved by the Mixed Commission which was to delimit the frontier as determined by the provisions of the treaty, as if it were part of the treaty. This conclusion was reached because, in the eyes of the majority, the respondent state had accepted, adopted, recognized or acquiesced in the erroneous map as representing the outcome of the delimitation and had precluded herself from contesting its validity. Approval was given as early as 1908 as a result of certain circumstances, such as the wide distribution of the maps and their acknowledgment by Prince

<sup>73</sup> *Ibid.* 162. See also *ibid.* 64, 120-121.

The Chinese officials stated that old "authoritative" Chinese maps "are of great reference value," but do not have such "precision as modern maps" in showing "the location of places and distances," and that unofficial neutral maps cannot serve "as valid evidence." *Ibid.* CR-73, 74, CR-61. See also *ibid.* CR-180.

<sup>74</sup> *Ibid.* 250, 252. On the other hand, the report of the Chinese officials noted that: "Some of the Chinese maps cited by the Indian side, including the so-called official maps . . . could not prove that China has accepted the boundary claimed by India." *Ibid.* at CR-181. China's revised informal English translation of the official Chinese text, however, read: "Similarly, nor can the Chinese maps cited by the Indian side, including so called official Chinese maps, prove that China has accepted the boundary claimed by India," eliminating the word "some," a change which caused India to lodge a protest. China rejected the view that the alteration was unwarranted by the Chinese text, which India, in turn, denied. See "Notes . . . between . . . India and China, November 1960-November 1961," White Paper No. V, pp. 30, 36, 38.

<sup>75</sup> Compare Johnson: ". . . governments would, as a result of . . . [the Temple] case, be well advised to exercise a strict control over their technical departments, especially those concerned with survey work and map-making. . . . The Court, in interpreting the Franco-Siamese Treaty of 1904, would appear to have departed from the rule stated in Article 29 of the Treaty of Versailles of June 28, 1919, as follows: 'In the case of any discrepancies between the text of the Treaty and this map or any other map which may be annexed, the text will be final'." *Loc. cit.*, note 88 above, at 1203.

Damrong, the Minister of the Interior. Events subsequent to this period, especially Thailand's continued use of the map and other maps which placed the Temple within Cambodia, after her own survey of 1934-1935 revealed a divergence between the map and watershed lines, were also scrutinized and held to have confirmed and reaffirmed the "original acceptance,"<sup>76</sup> which had occurred many years earlier. Of far greater significance than this, however, is the theory of the International Court that, in the interest of certainty, stability and finality of frontiers, an unsigned map in derogation of a treaty provision supersedes the text as a matter of treaty interpretation. This is certainly a far cry from the decisions of an earlier period. Taken in a slightly different context, such a doctrine could be of comfort to India in her boundary dispute with Communist China.

Account should, of course, be taken of the fact that Sir Gerald Fitzmaurice sought to limit to the specifics of the *Temple* case the impact of the Court's view concerning the superiority of a map in conflict with a treaty provision, as a matter of treaty interpretation, and suggested that Thailand could have pursued a different course. Hence Sir Gerald observed that her Advocates and Counsel could have admitted acceptance of the map as being the outcome of the delimitation and recognized it as part of the treaty settlement, and then argued that in a conflict between the treaty and the map the former should prevail. The distinguished jurist noted that there was "no general rule" which required the map line to predominate; that in numerous instances the opposite had occurred, "even though the map was one of the instruments" of the treaty settlement and not "a mere published sheet or atlas page—in which case it would, in itself, have no binding character for the parties."<sup>77</sup>

Since the Court had also examined the dispute in this fashion, it is difficult to see how Thailand could have been more successful, even if this had been her primary strategy. In the past, as Sir Gerald himself has commented, tribunals have attached even less significance to maps not an integral part of treaty settlements than they have attributed to them if incorporated in or attached to them, although there is no doubt that even in such situations not much more value has been assigned to them. And, once again, the ruling in the *Frontier Land* case, and the importance with which the Court weighed the map which formed part of the treaty, must be recalled. Therefore it is not surprising that the Advocates and Counsel for Thailand adopted the technique which has been set forth. That these tactics did not avail them was due, *inter alia*, to the

<sup>76</sup> [1962] I.C.J. Rep. 6 at 33. Among other important subsequent events on which the majority relied was Prince Damrong's visit to the Temple in 1930. See note 59 above. But this episode, too, was among those which "confirm[ed]" and "b[ore] out" the prior acceptance. *Ibid.*

<sup>77</sup> *Ibid.* at 65. Sir Gerald went on to say: "The question is one that must always depend on the interpretation of the treaty settlement, considered as a whole, in light of the circumstances in which it was arrived at. So considered in the present case, I agree with the Court that, in this particular instance, the question of interpretation must be resolved in favour of the map line." *Ibid.* 65-66.

fact that the evidentiary value of maps has undergone a change. Indeed, on the basis of the decisions of the International Court of Justice, it may surely be concluded that a map in derogation of a treaty provision can no longer be regarded as of slight value, particularly if the map is attached or annexed to the agreement or is specifically read into the treaty settlement.

In addition, official maps have played a major part in support or as proof of the exercise of sovereignty over a disputed area or as evidence of a litigant's state of mind. Thus, in the *Minquiers and Ecrehos* case, a chart submitted by the defendant during the course of negotiations was admitted in evidence and held against the respondent; in the *Frontier Land* case, the applicant's military map carried considerable weight in support of the view that the plots belonged to the plaintiff state; in the *Temple of Preah Vihear* case, reliance was placed on the respondent's maps to demonstrate a subsequent course of conduct and to confirm the conclusion that the defendant state was precluded from contending that she had not accepted the map line. And in the *Minquiers and Ecrehos* case, in which the parties even introduced numerous unofficial neutral maps to illustrate their arguments, only one jurist commented on their slight value. In consequence, maps may be regarded as strong evidence of what they purport to portray. They may be termed and treated as admissions, considered as binding, and said to possess a force of their own.

## THE EVOLUTION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS

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It is now over ten years since the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocol were completed. Since 1952 the requisite number of ratifications have been made, the Commission and the Court have been established, and approximately 1500 applications from states and individuals alleging violations of human rights have been submitted.<sup>1</sup> In this relatively short span of time, the member states of the Council of Europe have been able to create a permanent and smoothly-functioning system which provides for the international adjudication of human rights grievances and for enforcement action. It is a tribute to the effectiveness of the judicial provisions of the Convention and prevailing conditions that there has been no need to employ the enforcement provisions.

### HISTORICAL EVOLUTION

The European Convention on Human Rights is one of the tangible expressions of the drive towards European integration. This campaign had its philosophical origins centuries ago, but entered into its modern era following the first World War. During the inter-war period, attempts by Briand and Stresemann to encourage a European political federation were thwarted by the still vigorous European nationalism.<sup>2</sup> The idea of a peaceful and democratic union of Europe quickly receded as Hitler began to unify Europe by force.

With the end of hostilities, the leadership of the European movement passed to Winston Churchill, who left no doubt as to his feelings when, in 1946, he stated: "We must build a kind of United States of Europe."<sup>3</sup> Churchill's United Europe Movement sponsored the Congress of Europe held at The Hague in May, 1948.

Among the matters which received a great deal of attention at the Congress was the question of human rights.<sup>4</sup> There was a general consensus that freedom was the only basis on which peace could be established in Europe, and that the doctrine of sovereign inviolability might hamper

<sup>1</sup> The Convention as signed appears in 45 A.J.I.L. Supp. 24 (1951). The Protocol is discussed by D. P. Myers, and Arts. 1-3 are quoted in a note in 48 A.J.I.L. 299 (1954).

<sup>2</sup> See Arnold Zurcher, *The Struggle to Unite Europe, 1940-1958*, pp. 7-9 (New York: New York University, 1958).

<sup>3</sup> *Ibid.* 20-21.

<sup>4</sup> See *Europe Unites—The Hague Congress and After* (London: Hollis and Carter, 1949).

the exercise of individual freedom, as it had in fact done in Nazi Germany. Since the Nuremberg Judgments had established a new concept of national sovereignty, at least in the view of the Congress delegates, they considered it possible and, what was more important, necessary to establish effective international guarantees of human rights. If human rights in each European country were protected, democracy in these countries could be assured, which, of course, was a *sine qua non* for European unification. Furthermore, it was obvious that Germany would be admitted to the European Community and consequently it was necessary to lay down the conditions for its readmission. By establishing international guarantees it would be possible to prevent the sabotage of democratic institutions by minorities, to preserve the existing liberties and practices of Western Europe, and to encourage the extension of these liberties and practices over a wider area.

The Hague Congress decided that a common declaration of rights should be drawn up, with an independent European Court to decide on cases of alleged infringement. Furthermore, collective sanctions, including the use of armed force, were foreseen as a means of enforcing the Court's decision.<sup>5</sup> Within this framework the International Juridical Section of the European Movement prepared proposals for the inclusion of guarantees in the Statute of the Council of Europe itself and in a subsequent agreement.

The international protection of human rights was therefore placed in the framework of the Council of Europe, an organization which comprised the United Kingdom, the Scandinavian countries and other peripheral European nations, as well as those states which later came to be known as the Inner Six. Within this broad framework and on the basis of the Statute of the Council, which included provisions facilitating the protection of human rights, the organs of the Council undertook the elaboration of a Convention on Human Rights.

The Committee of Ministers, composed of the Minister of Foreign Affairs of each member state, and the Consultative Assembly, composed of parliamentarians of both the government and the opposition parties in each member state, were the organs involved in the preparation of the Convention. The Assembly favored a comprehensive system of guarantees, including an extensive list of rights to be protected. There were, however, heated debates in the Assembly over the rights to be included, whether they should be defined or merely enumerated and whether a court was necessary. Socialist members argued that economic and social rights as well as political and civil rights should be included in the Convention.<sup>6</sup> They felt that it would be possible for an undemocratic government virtually to destroy the freedom of the individual by disregard for economic and social

<sup>5</sup> *Ibid.* 25.

<sup>6</sup> Council of Europe, Consultative Assembly, Doc. 3, and Official Records 404-468. Recently the European Social Charter has been opened for ratification. It provides for a Committee of Experts to examine reports with regard to the implementation of certain economic and social rights and to submit recommendations to the Committee of Ministers.

rights. While the other members of the Assembly agreed that economic and social rights were important, they found them extremely difficult to enforce. In the interests of putting a convention into force quickly, they felt that only those rights on which all agreed should be included. The Socialists finally acquiesced, although there still remained the problem of the right to own property, which entailed two years of discussion before a compromise was reached, and it was included in the Protocol.

A second area of disagreement within the Assembly arose between the British members and some Continental members. The debate was joined over the question whether there should be a mere listing of the rights to be protected, a statement of principles, such as are in the Universal Declaration of Human Rights, or whether there should be a precise and detailed definition of the rights to be included.<sup>7</sup> The Continental members argued that the rights and freedoms to be guaranteed were those which were "defined and accepted after long usage by the democratic regime." Furthermore, any questions of precise definition could be easily enough decided by the European Court. The British members, departing from their tradition of an unwritten constitution, argued vigorously for a precise definition of rights. First, the British were especially anxious to limit clearly the extent of their commitment to the European human rights system, and considered precise definition a prerequisite to their participation. Secondly, in drawing up constitutions for former British colonies, the United Kingdom Government had adopted the policy of including precise human rights provisions based on the British Constitution, since it could not be expected that any new state would be able to continue the gradual development begun nine centuries earlier without well-defined guidelines. By the same token a newly-born European Community could not be expected to rely exclusively on a supposedly common cultural background, but should have a clear indication of its future evolution.

There was also some discussion in the Assembly with regard to the necessity of establishing a court which would be able to render a final decision condemning a state for a violation of human rights.<sup>8</sup> Some members felt that an adverse report by a Commission of Inquiry would be a sufficient sanction upon an offending state. However, the majority felt that provisions for adjudication and the possibility of enforcement action were absolutely necessary if the human rights guarantee were to have any meaning.

The Committee of Ministers as a whole was considerably more conservative than the Assembly in its view of what should be included in the proposed convention.<sup>9</sup> First, they agreed with the Assembly majority that only political and civil rights should be included. Secondly, while they decided that the Convention should contain a compromise between the enumeration and the definition of rights, they finally accepted the British

<sup>7</sup> Consultative Assembly, 1st Sess., Doc. 77; 2nd Sess., Doc. 6.

<sup>8</sup> Consultative Assembly, 1st Sess., Doc. 77.

<sup>9</sup> *Ibid.*, 2nd Sess., Doc. 11, and Appendix A, indicate the conclusions reached by the Ministers.



view of precise definition. Thirdly, while the Ministers agreed to the inclusion of a court in the Convention, they provided that acceptance of its jurisdiction would be dependent upon a special declaration made by a member state in addition to ratification.

Other limitations were placed in the Convention as a result of decisions taken by the Ministers. Although the Convention was conceived of as guaranteeing the rights of individuals, the Commission could only consider individual applications made against states which, by a separate declaration, accepted the right of individual petition. Furthermore, even if the Commission considered that there appeared to be valid grounds for the complaint, the individual under no circumstances would be permitted to appear as a party before the Court; the Commission would have to act on his behalf. The Ministers also provided that the extension of the guarantees of the Convention to dependent areas would only result from a special declaration made by the mother country. Finally the Ministers included the right of a state to derogate from the protection of all but a few of the guaranteed rights in time of national emergency.

The rights included in the Convention as agreed upon by the Assembly and the Ministers included the right to life, freedom from inhuman punishment and slavery, the right to liberty and security of person and to a fair trial, freedom from conviction under *ex post facto* laws, the right to respect for private life and to freedom of thought, conscience and religion, freedom of expression and of peaceful assembly and to marry and found a family.<sup>10</sup>

The right to own property, the right of parents to supervise their children's education and the guarantee of free elections could not be defined at the time that the remainder of the Convention was completed in 1950, and these three rights were included in an additional Protocol which formed a part of the Convention. The debate over the property rights raged between conservatives, who favored private exploitation of resources, and Socialists, who favored public control with a consequent lessening of the importance of private property rights. At last a compromise was reached between these two views as well as between the differing opinions of those favoring religious education and those favoring state education.<sup>11</sup> Finally, it was possible to accommodate the conflicting views with regard to the provisions guaranteeing democratic elections, once a determination was made as to which part of the government should be elected, since national customs varied considerably. Nevertheless, after the drafts of the Convention and Protocol had passed between the Ministers and the Assembly and various subcommittees more than seventeen times in a three-year period, the Protocol was finally signed in March, 1952, thus completing the Convention. The Convention entered into force on September 3, 1953.

#### PROVISIONS OF THE CONVENTION AND PROTOCOL

The documents signed by the Ministers provided for recognition by the contracting parties that some 14 rights of individuals under their juris-

<sup>10</sup> Arts. 2-12.

<sup>11</sup> See Arts. 1 and 2 of the Protocol. .

diction would be guaranteed and might be protected by international institutions. The conditions under which these rights are to be guaranteed are clearly indicated. All individuals protected must have the right of appeal to a domestic court concerning the alleged violation, and they may not be discriminated against on the basis of race, creed or other similar criteria. States may derogate from the Convention with regard to certain rights and may restrict the political activity of aliens. Individuals cannot invoke a provision of the Convention in order to take action itself detrimental to one of the rights in the Convention; states can only employ the limitations on the rights for the purpose for which they were intended.<sup>12</sup>

Two organs, the European Commission of Human Rights and the European Court of Human Rights, were established to supervise the execution of the Convention's requirements.<sup>13</sup> The Commission, composed of a number of members equal to that of the contracting parties, hears complaints brought by states as well as groups or individuals, when states have made a declaration permitting them to do so. It decides whether or not an application is admissible, based on certain criteria, *e.g.*, exhaustion of domestic remedies, anonymity of the application, similarity to an earlier application.<sup>14</sup>

When an application is declared admissible, a Sub-Commission is established to attempt to bring about conciliation. If it succeeds in effecting a friendly settlement, a report, confined to a brief statement of the facts and the solution reached, is published. In the event of failure, the plenary Commission makes a report on the facts and states its opinion as to whether the facts found disclose a breach by the state concerned of its obligations under the Convention.<sup>15</sup> The report remains secret, but the opinion may become public when the case is brought before the Court. The report is not published, since governments are concerned lest the opposition might use critical parts of it as political propaganda. It is essential, of course, that the Commission's opinion be discussed in the public hearings before the Court.

After the report is made, the Commission may decide to bring the case before the Court, as may one of the states concerned. If this is not done, the matter is referred to the Committee of Ministers, who decide by a two-thirds majority whether or not there has been a violation. If it finds there has been a violation, it then prescribes a period during which the state concerned must take remedial action in accordance with its decision. In the event of non-compliance, the Committee is to publish the report and take any other action it considers necessary to implement the decision.<sup>16</sup>

The case may be brought before the Court, sitting in a Chamber of seven members, either by the Commission, a state whose national is alleged to be a victim, a state which referred the case to the Commission, or a state against which the complaint has been lodged, within a period

<sup>12</sup> Arts. 13-18.

<sup>13</sup> Art. 19.

<sup>14</sup> Arts. 20-27.

<sup>15</sup> Arts. 28-31. See p. 819 below, for proposed changes in this procedure.

<sup>16</sup> Art. 32.

of three months from the time the Commission's report is submitted to the Ministers. A state which appears before the Court as a party must either have accepted its jurisdiction for all cases or by an *ad hoc* declaration. The Court decides whether a state has violated its obligations, and in the event that the internal law of the party only allows partial reparation to be made for the consequences of the decision or measure challenged, it may "afford just satisfaction to the injured party." Its decision is final.<sup>17</sup> The Committee of Ministers supervises the execution of the judgment, and all parties have undertaken to abide by the decision of the Committee and the Court.<sup>18</sup>

The Convention also provides that the Secretary General of the Council of Europe may request a contracting party to furnish an explanation as to how its domestic law is ensuring the effective implementation of any of the provisions of the Convention. States agree to settle disputes over the interpretation or application of the Convention within the framework of the Convention, unless they make a special agreement to the contrary.<sup>19</sup>

The right of appeal to the Commission by groups or individuals, the acceptance of the compulsory jurisdiction of the Court, and the extension of the provisions of the Convention or Protocol to colonial territories are only possible by virtue of special declarations made by the contracting parties.<sup>20</sup> The nature of the system as it is actually in force with respect to the various parties differs because of their differing declarations, reservations and derogations.

Nevertheless the system has been used to a considerable extent during the past seven years. In addition, as time has passed, states have indicated a willingness to make additional declarations. Three inter-state applications have been submitted and declared admissible, and eleven individual applications, out of over 1500 submitted, have been declared admissible. The Court has heard and decided one case, as has the Committee of Ministers. The jurisprudence of the Commission and Court provides a considerable exegesis on the articles of the Convention and Protocol, especially when joined with the *travaux préparatoires* of the Assembly, Ministers and experts.<sup>21</sup>

#### INADMISSIBLE APPLICATIONS

The most striking characteristic of the system established under the European Convention is the great number of applications which have been submitted to the Commission over the past seven years, amounting to over 1500. Of these, only a handful have been declared admissible by the Commission and the remainder have been declared inadmissible.

What is the reason for this great number of applications? It must be noted first that these are, for the most part, individual applications

<sup>17</sup> Arts. 38-52, 56.

<sup>18</sup> Arts. 53 and 54.

<sup>19</sup> Arts. 57-62.

<sup>20</sup> Arts. 25, 46, 63.

<sup>21</sup> See Gordon L. Weil, *The European Convention on Human Rights: Background, Development and Prospects* (Leiden: Sijthoff, 1963), for an article-by-article commentary. Certain parts of the present article are drawn from this work, which is reviewed below, p. 960.

directed against states which have accepted the right of individual petition. Only three applications have been lodged by states and all of these have been declared admissible.<sup>22</sup> The reason for this multiplicity of applications and frequency of rejection is that, in a high percentage of the cases, applications are submitted by convicted criminals seeking freedom by any means, mentally-ill individuals, or other irresponsible applicants, and the Commission must be concerned to a great extent with simply clearing away the underbrush of obviously unfounded applications in order that it may deal with the serious ones. Illustrative of applications falling within this category were requests submitted by Rudolph Hess, imprisoned by the victorious Allies for his part in Nazi activities, Ilse Koch, the notorious "witch of Buchenwald," and General Raoul Salan, imprisoned for his anti-government activities in Algeria. These three individuals complained that their human rights had been violated in the various actions taken against them and requested the Commission to order their release. In most such cases the Commission was able to dispose of such applications as being "manifestly ill-founded."<sup>23</sup> The Commission utilizes a number of criteria in deciding on the admissibility of applications, including non-exhaustion of domestic remedies, submission of an application more than six months after the final municipal court decision, the limitation *ratione temporis*, the limitation *ratione personae*, the limitation *ratione materiae*, lack of *prima facie* violation, a substantial similarity with an earlier application, abuse of the right of petition, utilization of the Commission as a *quatrième instance* and utilization of the Convention for undemocratic purposes. All of these criteria are not of the same importance, but are useful tools for the Commission in dealing with the great number of applications which come before it.<sup>24</sup>

In order to expedite its handling of these numerous applications, the Commission establishes three-member groups to filter out frivolous applications. The President of the Commission selects groups to consider applications received during a certain period. Several such groups may exist at the same time. If a group unanimously finds that an application is admissible, notice is sent to the party respondent. If they are not unanimous, then the plenary Commission may declare the application inadmissible *de plano*, or communicate with the state respondent and invite its comments. Additional comments may be requested and oral hearings held. On the other hand, of course, if the group unanimously finds that

<sup>22</sup> Applications 176/56 and 299/57, *Greece v. United Kingdom*; and Application 788/60, *Austria v. Italy*. For further discussion see below.

<sup>23</sup> These three cases are mentioned as examples. Actually the Hess and Salan applications were not considered by the Commission but returned by the Secretary, who indicated they were directed against states not parties to the Convention. Ilse Koch's Application 1270/61 was rejected as relating to facts occurring before the Convention entered into force and as an abuse of the right of petition. For other Commission decisions, see European Commission of Human Rights, *Documents and Decisions 1955-1956-1957* (The Hague: Nijhoff, 1959), hereinafter cited as 1 Yearbook.

<sup>24</sup> Gordon L. Weil, "Decisions on Inadmissible Applications by the European Commission of Human Rights," 54 A.J.I.L. 874 (1960).

an application is inadmissible, the plenary Commission may then easily act upon this recommendation.<sup>25</sup>

The Commission has, however, undertaken to make sure that the procedure for its consideration of applications is not so expeditious as to prevent a fair consideration of a given application. It has, therefore, examined applications as against all possible criteria utilized by it rather than just as a possible violation of the rights alleged in the application itself. This *ex officio* examination permits the Commission to make a thorough review and, as a result, protects the individual applicant.<sup>26</sup>

Among the inadmissible applications there is a percentage of those which must be regarded as serious and not frivolous, but which, for one reason or another, are declared inadmissible. Certain applications are declared inadmissible because of failure to fulfill certain formal criteria, while the Commission may at the same time feel that there is a certain degree of merit in the substance of the application. In this case, the Commission has in certain instances undertaken an informal discussion of the matter with the state involved so as to bring about some satisfactory solution with regard to the complaint. Therefore, among inadmissible applications there are those in which applicants will receive satisfaction, at least to a certain extent.

There have been a few applications declared inadmissible which are of great importance to an understanding of the activities of the Commission. The first of these is the *German Communist Party* case.<sup>27</sup> The Party claimed that its dissolution and prohibition, ordered by the Federal Constitutional Court of the German Federal Republic, was in violation of certain rights included in the Convention, notably freedom of association. The Commission was obliged to decide whether the Communist Party had committed acts or engaged in activity which would have enabled it, if it continued its activities, to destroy rights guaranteed by the Convention. The Commission decided that this was the case and that, as a result, the German Communist Party could not lodge an application based on any provision of the Convention. In effect, the decision of the Commission supported that of the Federal Constitutional Court.

Some applications have alleged that Germany should be held responsible for the decisions handed down by the Supreme Restitution Court set up by the Allies following the establishment of the occupation of Western Germany.<sup>28</sup> The Court has been called upon to make a determination as to whether the Restitution Court was in fact under the jurisdiction of the German Federal Government. Based on the precedent of the *Salem* case, the Commission found that the German Government could not be held responsible for the decisions of the Supreme Restitution Court because it was unable to prevent the repetition of faults by it, that it neither

<sup>25</sup> Commission, Rules of Procedure, Rules 34 and 45.

<sup>26</sup> 1 Yearbook 255.

<sup>27</sup> Application 250/57, 1 Yearbook 222.

<sup>28</sup> For example, Application 235/56, in *The European Commission and European Court of Human Rights, Yearbook of the European Convention on Human Rights, 1958-1959*, p. 256 (The Hague: Nijhoff, 1960), hereinafter cited as 2 Yearbook.

removed nor punished judges, and that it did not establish the rules of procedure of the Court.

Certain applicants submit more than one application to the Commission, and serious ones are given a thorough reconsideration. One applicant, a Polish national residing in Germany, became separated through the force of circumstances from his wife and infant son, who resided in Sweden. It was impossible for him to enter Sweden, and during the period of his absence, relations between him and his wife deteriorated to the point where they both obtained divorces and both claimed custody of the child. At all times and for all hearings, the applicant made efforts to enter Sweden, but this was continually refused him. In his first application, lodged against the Swedish Government, the applicant claimed that his rights had been violated. The Commission did not reject this application in its entirety but found that all domestic remedies had not been exhausted. In an extension of this case, the applicant resubmitted that his child was not being brought up according to his wishes and asked for the right of access to his son.<sup>29</sup> This request to the Swedish Government was also rejected. During the course of the hearing before the Commission, the Swedish Government indicated that, with regard to the question of his personal appearance, all remedies had not been exhausted, and thereupon, the applicant resumed his proceedings in Sweden and the Commission once again deferred a final decision. However, it acted in part on the basis of the statement by the Swedish Government in its oral presentation (which was made without entering into any commitment), that if the Swedish court requested the applicant's appearance, a visa would be issued. Thus the Commission did not find it yet established that the applicant had finally exhausted all domestic remedies, and declared the application inadmissible. However, the Commission felt it necessary to state:

if hereafter the Applicant should finally exhaust the local remedies available to him in Sweden and should then file a fresh Application with the Commission with respect to the same complaints the proceedings in the present Application will be treated as forming part of the proceedings in the new Application.<sup>30</sup>

This decision indicated the Commission's continuing interest in the protection of the rights of this individual.

In the case of *Gudmundsson v. Iceland*, the applicants—an individual and a company in which the individual was the principal stockholder—complained about a law which imposed a 25% tax on individual holdings and shares in companies.<sup>31</sup> Although a complex application, it mainly concerned allegations that the tax was imposed by a Communist-dominated government (two ministers out of six), which had confiscated an excessive

<sup>29</sup> Application 172/56, 1 Yearbook 211; and Application 434/58, 2 *ibid.* 354.

<sup>30</sup> 2 Yearbook 376.

<sup>31</sup> Application 511/59, in European Commission and European Court of Human Rights, Yearbook of the European Convention on Human Rights, 1960, p. 394 (The Hague: Nijhoff, 1961), hereinafter cited as 3 Yearbook.

amount in conjunction with earlier laws in a discriminatory way from a limited number of individuals to be used for unsatisfactory ends. The Commission held that the measure was introduced to achieve monetary stability in the public interest and that 25% payable over a ten-year period was not excessive, even in combination with other applicable fiscal legislation. The appropriation of the revenues by the law was not illegal, since this was a law within the meaning of the article guaranteeing property rights, having been passed according to the constitution and within the taxing power of the state. Most importantly, the Commission held that, while the general principles of international law in this field have been established with regard to confiscation of the property of foreigners, in the absence of a specific treaty clause and of the expressed intention of the drafters of the Convention, the property rights article was not meant to alter this rule so as to apply to the taking of property of nationals, such as the applicants in this case.

These applications are merely illustrations of some of the serious matters which have come before the Commission. As they have been considered, the Commission has been required to enter into an appreciation of many phases of international law, but it has not found it proper to declare such applications admissible. Nevertheless, the mere handling of these applications by the Commission has contributed to the evolution of international jurisprudence on the legal questions involved and to respect for the Commission as a judicial body.

#### *The Rôle of the Commission*

Being the body that is primarily responsible for handling all applications submitted under the Convention system, the Commission has come to play a pre-eminent rôle in the evolution of the Convention. This is due to its procedure and the way that the Convention has been interpreted by the members of the Commission.

It is evident that the procedure of the Commission is, in general, an extremely lengthy one, and a number of complaints have been made about this.<sup>32</sup> In some cases, years may lapse before a decision is rendered. Although it may be argued that a case is of extreme importance and complexity and thus merits careful consideration by the Commission, it must be stressed that important cases are given priority of consideration according to the rules of the Commission. The lengthy procedure is not due to the Commission being burdened with an excessively high number of cases, since so many of them are quickly rejected as inadmissible. Rather, in dealing with serious cases, the Commission either would not or could not expedite matters. On one hand, as the provisions of the Convention and the jurisprudence of the Commission have become better known, the relative proportion of serious applications submitted has increased. Since the Commission members, all of whom hold other time-consuming positions, have been hard-pressed to deal with cases as quickly as might be desired, the procedure has become more lengthy. On the

<sup>32</sup> See, for example, *Le Monde*, April 7, 1961, p. 4.

other hand, the Commission occasionally might have intentionally delayed final decisions in serious cases. This provided a cushion of protection for the states, since it afforded them the opportunity of altering their actions to avoid having a case declared admissible, and because there might be a substantial change in the situation with the passage of time.

It must be recognized, however, that the length of procedure and, in fact, the pre-eminent rôle of the Commission, are due to the fact that the Commission has expanded its scope of activity beyond merely one of a screening body or even a commission of inquiry in dealing with the applications when they are first submitted. It is true that the Commission does act to screen out the manifestly ill-founded and frivolous applications. On the other hand, the procedure followed, including the submission of written arguments, counter-arguments, oral hearings, and careful study by small working parties, indicates that, before arriving at a decision as to whether a question is admissible or not, the Commission has been involved in a detailed and involved judicial examination of the question. While this may create such a peculiar decision as one in which the Commission finds an application manifestly ill-founded after two years of study, it has tended to give the decisions of the Commission considerable weight. In fact, the arguments advanced against the necessity for a court have been to a great extent vindicated, due to the judicial decisions rendered by the Commission and the thoroughness of its study. As will be noted later, both the Committee of Ministers and the Court have relied upon these decisions of the Commission in reaching their own decisions.

The character of the membership of the Commission has been a decisive factor in determining the course which this organ has followed. The fourteen members of the Commission have in general terms been divided between two points of view. Although it might not seem so at first glance, there is a significant conflict between the view that the organs are concerned with seeing that states fulfill the obligations they have undertaken under the Convention, and the one which maintains that the principal purpose of the Convention is to protect certain individual rights. Simply stated, the former view gives the benefit of the doubt to the state, and the latter gives the benefit of the doubt to the individual. The fact that those members of the Commission supporting the first view have dominated seems to be borne out by the high number of rejected applications. Both because of the early stage of development of the Commission's jurisprudence and because of the secrecy of the deliberations and of the reports, it is impossible to reach an ironclad conclusion on this point.

#### ADMISSIBLE APPLICATIONS

Fourteen applications have been found to be admissible by the Commission, including all three of the inter-state applications.

The Government of Greece submitted two applications against the United Kingdom with regard to the British rule over Cyprus in 1956. In the first of these applications, the Greek Government charged that the



United Kingdom had introduced certain exceptional legislative measures which were dictatorial in their nature and jeopardized the rights of Cypriotes. After conducting hearings, the Commission found this application to be admissible.<sup>33</sup> In the second Greek application, that Government alleged 49 cases of "torture or treatment amounting to torture" on Cyprus. This application was declared admissible with regard to 29 cases, after the conduct of oral and written procedure.<sup>34</sup> Under the procedure of the Commission, the first of these applications, after having been found admissible, was turned over to a Sub-Commission of seven members, including a Greek and a Briton. The Sub-Commission attempts to bring about a friendly settlement, but this activity was suspended at the same time as further consideration of the second case, upon the arrival of a joint request submitted by the Greek and British Governments that the procedure before the Commission be terminated. This request was made on the basis of the London and Zurich Agreements, which laid the foundation for the establishment of an independent Republic of Cyprus. Before deciding to discontinue its consideration of the two cases, the Commission felt that it was obliged to determine whether the conditions underlying the alleged violations had been altered in view of the fact that the Convention existed, not simply to deal with complaints submitted, but also to insure the protection of individual rights. When the Commission determined that conditions in Cyprus were substantially changed by the London and Zurich Agreements, it recommended to the Committee of Ministers that the procedure be terminated, and the Ministers concurred in this suggestion.<sup>35</sup>

In the third inter-state application, which was also declared admissible, the Austrian Government charged that there had been a maladministration of justice in Italy in the trial of six men accused of murder.<sup>36</sup> These six men, residents of the Bolzano region, were German-speaking Italians and were accused of the murder of an Italian customs official. The Austrian Government felt that, in the manner in which the case was brought to trial and in the attendant publicity, there had been a violation of the right to a fair trial because of the ethnic background of the individuals concerned.

It was clear that this application was submitted against the background of the Austro-Italian dispute concerning Alto Adige/South Tyrol. In this dispute, the Austrian Government claimed that Italy had not been abiding by the provisions of the Gruber-De Gasperi Agreement, which provided for special rights for German-speaking Italians. The application was declared admissible after the Commission had decided that Austria could submit such an application, although at the time of the alleged violation Austria was not a member of the Council of Europe. Nevertheless, Austria did have the right to initiate such a case on the basis of the protection of individual rights and the ability of any state under the Convention to act to protect individual rights. This case is still under con-

<sup>33</sup> 1 Yearbook 128; 2 *ibid.* 174, 182.

<sup>34</sup> 1 *ibid.* 130; 2 *ibid.* 178, 186.

<sup>35</sup> 2 *ibid.* 186, 196.

<sup>36</sup> Application 788/60, 3 Yearbook 168; 4 *ibid.* 116 (1961).

sideration by the Sub-Commission following the declaration of admissibility. Numerous confrontations between the two parties have taken place.

Eleven individual applications have also been declared admissible. In the first of these, Gerard Lawless, an alleged member of the outlawed Irish Republican Army, was placed under detention by the Irish Government in accordance with emergency provisions of Irish law on the basis of his revolutionary activity in attempting to bring about the reunion of Northern Ireland with the Republic of Ireland. Lawless was subsequently released upon his undertaking to be a loyal citizen of the Irish Republic. However, he brought a claim for damages against the Republic of Ireland on the ground of having been detained without due process of law.<sup>37</sup> This matter came before the Commission, which found the application to be admissible, and an attempt was made at friendly settlement. When this attempt failed, the matter was referred to the European Court of Human Rights, which was called upon the Commission to determine the legality of the Irish act in the light of its declaration that a state of emergency existed. In hearings before the Court, both the Commission and the Republic of Ireland were represented. The Court ruled that Lawless' views could be represented by the Commission since he, as an individual, did not have the right to be a party before the Court.

Although the Commission felt that the application was admissible, a majority felt that it should be rejected because of satisfactory proof on the part of the Irish Government that a state of emergency did exist and had been adequately notified to the inhabitants of the country. The Court, constituted in a seven-member chamber, also adopted this point of view over the objections of the applicant.

In the second case, Raymond De Becker, the former editor of the Belgium newspaper *Le Soir*, charged that Belgium had forced him into exile and had deprived him of the right to freedom of expression. De Becker had been convicted for collaboration with the enemy during World War II, but in return for an undertaking to leave the country and under the prohibition that he not publish any writings in Belgium, he was released from prison. De Becker claimed that this action on the part of the Belgian Government was a violation of his rights under the Convention. The Commission declared his application admissible with regard to the right of freedom of expression, but found that the Convention did not guarantee to an individual the right to reside in his own country.<sup>38</sup> The attempt by the Sub-Commission to bring about friendly settlement met with failure. The Commission decided to submit the case to the Court, since Belgium, like Ireland, was a state which had accepted its jurisdiction. A majority of the members of the Commission found in their report that De Becker's rights had been violated. Immediately prior to the first hearing by the Court, the Belgian Parliament amended the law in question, thus permitting De Becker to publish non-political writings in Belgium.

<sup>37</sup> Application 322/57, 2 Yearbook 308, 3 *ibid.* 474, 492; and Judgments of April 7 and July 1, 1961, 4 *ibid.* 438; 56 A.J.I.L. 171 (1962).

<sup>38</sup> Application 214/56, 2 Yearbook 214, 3 *ibid.* 486; and Judgment of March 27, 1962.

Subsequent to this, De Becker sent a letter to the Commission requesting that his application be withdrawn, but the Commission felt it necessary to determine if the complaint had been satisfied, even if the applicant had himself indicated that he was satisfied. When it reached this conclusion, it recommended that the Court strike this case from the roll, which the Court accordingly did.

One applicant, Bjørn Schouw Nielsen, was convicted in Denmark of having planned and instigated by various means, including hypnotic influence, the commission of robbery and homicide by a co-accused, and he was sentenced to imprisonment for life. On appeal this decision was upheld. The applicant charged that during the proceedings in Denmark the Convention had been violated in several respects, including the fact that he had not been informed in detail of the nature and cause of the accusation before him and that the trial had not been fairly conducted with regard to expert witnesses.<sup>39</sup> The Commission considered that the application was admissible with regard to these two points, but that on the first, the applicant had been adequately informed, and that on the second, there had been no breach of the Convention by any of the courts involved in handling the case.

The Commission decided not to send its report to the Court, and in the absence of a decision by Denmark to bring the matter before the Court, it was automatically referred to the Committee of Ministers. Thus, for the first time, this body was called upon to render the final decision in a case. The Ministers decided by resolution that there had been no violation of the Convention, having adopted in its entirety the reasoning of the Commission.<sup>40</sup>

Four cases were submitted by Austrians against the Austrian Government. The applicants concerned, who were separately convicted by the Austrian courts on various criminal charges and sentenced to terms of imprisonment, alleged that certain elements in the appeal proceedings constituted violations of their right to a proper administration of justice. Two applicants, Ofner and Hopfinger, claimed that at the non-public appeal hearings they had not been permitted to be represented by counsel, while the Government had been heard.<sup>41</sup> Ofner charged that he had not been informed of a change in the nature of the accusation made against him, and in this regard, too, the Commission declared the application admissible.

Two other applicants, Pataki and Dunshirn, claimed that they had not been represented in extended hearings in their cases when the Government had requested and received a prolongation of their sentences.<sup>42</sup> Their applications were referred by the Commission, together with its Report thereon, to the Committee of Ministers, which decided that, in view of recent Austrian legislation amending the procedure complained of, and

<sup>39</sup> Application 343/57, 2 *ibid.* 412. The Commission's Report, "The Nielsen Case," has been published; see 4 Yearbook 494. <sup>40</sup> *Ibid.* 590.

<sup>41</sup> Application 524/59, 3 *ibid.* 322; and Application 617/59, *ibid.* 370.

<sup>42</sup> Application 596/59, *ibid.* 356; and Application 789/60, 4 *ibid.* 186.

giving the applicants a right to a new hearing in the Austrian courts, no further action was required.

Four applications recently declared admissible concern a linguistic problem raised by French-speaking citizens of Belgium.<sup>43</sup> They claimed that the Government had not established a school with instruction in the French language in the predominantly Flemish area where these applicants reside. As a result, as parents the applicants felt they had been unable to educate their children freely because of linguistic discrimination and that other rights, such as respect for family life, had been violated. Such cases as this indicate that individuals with serious complaints have not been deterred from making application, despite the great number of inadmissible applications.

### *The Rôle of the Commission*

Once again the pre-eminent rôle played by the Commission in the handling of admissible applications is evident. The Commission, of course, utilizes the *ex officio* procedure, mentioned earlier, in its examination of all applications. This procedure not only serves as a method of handling applications but sheds light on the Commission's view of its function. The President of the Commission repeatedly stated before the Court in the *Lawless* case that the Commission was not instituted to protect individual applicants, but as a kind of European conscience to make sure that human rights guaranteed in the Convention are always protected, no matter who is involved. This is especially important, since many applicants have been convicted of crimes. However, the Commission is not concerned with the guilt or innocence of the individual, but rather whether at any stage he has been the victim of a violation of the Convention.

For this reason, the Commission has been called a *juge d'instruction* or a public prosecutor.<sup>44</sup> In fact, it is similar to both. Up to the point at which it refers a case to the Court, it undertakes many of the same functions as an *instance d'instruction* in carrying out its preliminary investigation. It is true, of course, that when it tries to bring about conciliation, it is, in the traditional diplomatic term, attempting to use its good offices. However, it has shown itself to be primarily a judicial organ. Once a case is brought to the Court, the Commission attempts, by expressing its own opinion, to represent the general interest in the protection of human rights. This is graphically illustrated by its place in the courtroom which is not that of a party, *i.e.*, directly facing the Court, but at one side, as the adviser to the Court. The Commission, in representing the general interest as opposed to any particular interest has, in fact, become an organ concerned with protecting the *ordre publique européen*. If this is a new concept, the Commission is working to make it a reality.

<sup>43</sup> "New Application against Belgium," Council of Europe News, Sept., 1963, p. 3; and press release C (63) 26.

<sup>44</sup> H. Golsong, *Das Rechtsschutzsystem der Europäischen Menschenrechtskonvention* 40, 101 ff. (Karlsruhe: Müller, 1958).

The thoroughness of the Commission's activities and the importance of its decisions are clearly illustrated by the nature of its reports. These reports are voluminous, and include an opinion rendered by the members of the Commission not only as to the admissibility of the application but also as to the culpability of the state. Furthermore, the Commission has the power to refer a case to the Court or let it be handled by the Committee of Ministers. This power is not an inconsiderable one because in one case it would choose to prolong public judicial proceedings with the attendant embarrassment to certain parties or, on the other hand, it may refer a matter to a political body which may reach its decision for completely different reasons than the Court. However, it should be noticed that in the limited experience thus far, both the Committee of Ministers and the Court have shown a willingness to go along with the decision rendered by the Commission.

Two serious flaws seem to have developed, however, in the operation of the Commission. The first of these is the excessive time which elapses with regard to applications which are declared admissible and in which the applicant may receive some satisfaction. It does not seem just that an individual should be required to wait a number of years to receive just satisfaction of his claim. While it may be in part due to the desire of the Commission to make sure that its investigation is a sound and thorough one, this situation may also result, at least in part, from the other obligations of the members of the Commission. As this system becomes better developed and as more serious applications are submitted, it would seem imperative that consideration be given to the permanent establishment of a Commission with members of as high caliber as possible.

It is also clear that the friendly settlement procedure established under the Convention has been totally unsuccessful up to the present. It is hard to determine what the reasons for this may be, but they might include such factors as the thoroughness of the Commission's investigation and its arrival at an opinion prior to friendly settlement, the unwillingness of individuals to compromise their rights in any way, and the unwillingness of a state which has been forced into an awkward position by an individual to cede ground when it believes it has the alternative of seeing the matter referred to the Committee of Ministers for a political decision. Whatever the reason, the friendly settlement procedure has failed and, in fact, has been an embarrassment to the operation of the Commission. It would seem that, as the activities of the Commission have evolved, these provisions might be omitted from the Convention, since, if an individual were satisfied, he could at any time withdraw his application, and the Commission would still be empowered to decide whether or not there seemed to be a violation of individual rights. A new Protocol to the Convention, which is now open for ratification, would revoke the articles providing for friendly settlement by a sub-commission, although the plenary Commission would still be required to attempt such an agreement. If, however, it found during the course of its examination that one of the grounds for rejection of the application had been established subsequent to acceptance,

it might then reject it.<sup>45</sup> While such a procedure would make it unnecessary to prolong the consideration of unacceptable applications and might accelerate the settlement process by eliminating one step, it would still leave the as yet unproven provisions requiring an attempt at friendly settlement.

#### *Rôle of the Committee of Ministers*

While the Committee of Ministers is obliged to deal with all applications declared admissible involving states not having accepted the jurisdiction of the Court, such as the first two interstate applications, it may also be used for individual applications which the Commission or the state involved decides not to refer to the Court. The Committee of Ministers may in fact be better qualified and more appropriate to handle certain questions than is the Court.

The Committee of Ministers is in effect an organ of the Convention as well as an organ of the Council of Europe, and there is no indication that in its operation under the Convention it would be bound by rules of procedure applicable under the Statute. Hence, it might be able to deal relatively quickly with questions brought before it by the Commission. The Court, on the other hand, is bound by elaborate and necessary rules of procedure, including the submission of memorials and counter-memorials, and the hearing of preliminary objections, if necessary. Thus it may prolong an already lengthy procedure begun by the Commission.

Furthermore, there may be political questions in connection with the protection of certain rights under the Convention which might be decided by the Ministers. For instance, during the preparatory work on Article 3 of the Protocol, it was argued by some that the guarantee of free elections would clearly be more susceptible of settlement by the Committee of Ministers than by the Court.

The Commission, of course, could decide that it was better to have the Ministers consider a certain matter than the Court. Since the Committee of Ministers is a purely political body, it would be unlikely that in a judicial sphere it would oppose a decision reached by a large majority of the Commission. Hence, if the Commission considered there were no questions of interpretation worthy of consideration by the Court, and if it agreed with the government that there had been no violation with regard to the applicant, it might submit the matter to the Ministers in the expectation that its decision would be affirmed. This is what took place in the *Nielsen* case.

#### *Rôle of the Court*

It is, of course, too early to determine the nature and importance of the rôle of the Court. There is no doubt that it must be given a great deal of importance, due to the nature of its membership. All members of the Court are highly qualified lawyers and judges. The President,

<sup>45</sup> Council of Europe News, July, 1963, p. 4; European Treaty Series, No. 45.

Lord McNair, is a former President of the International Court of Justice. It has been claimed that, owing to the fact that the judges come from countries with highly developed legal systems, and because of their competence in the general field of international law, the caliber of the Court may well be comparable to that of the Court of the European Community at Luxembourg or even the International Court of Justice at The Hague.

The Court has established for itself in conjunction with the Commission a number of rules of procedure. However, it has shown a willingness in its handling of the *Lawless* and *De Becker* cases to temper the application of these rules with the wisdom and practicality required by the situation at hand. Once again in this regard, it is perhaps too early to determine the nature and influence of the procedure of the Court. The Court has demonstrated its carefulness and thoroughness in the handling of the *Lawless* decision. Here, the Court acquired for itself the character and dignity required of any international tribunal by the manner in which it conducted its proceedings. It did, as has already been noted, finally accept the opinion arrived at by the members of the Commission.

That the Court exercises an influence, as does the Commission, has been demonstrated in the *De Becker* case. The Belgian Government clearly desired to avoid having the Court decide on the application, especially in view of the adverse decision of the Commission. Therefore the Belgian Government took measures to amend the alleged offending legislation. Thus, the possibility of being hailed before an international tribunal was an adequate sanction in itself. In this case, the Court satisfied itself as to whether there were any grounds which would have opposed the striking of the case from its list, even though the Belgian law had been changed and *De Becker* had submitted a letter stating it was unnecessary to proceed further with the case.<sup>46</sup> The Court found that there was nothing to oppose removal of the case from the list, with one judge dissenting. This judge considered that, without entering into the merits of the case, the Court was obliged to embark on a thorough investigation of the application to determine if there had been a violation of rights during the period prior to the amendment of the Belgian law.

#### THE CONVENTION AND INTERNATIONAL LAW

In addition to being primarily concerned with the protection of human rights in Europe, the Convention has made a substantial contribution to international law in general. It would be sufficient to say that the existence of a right of individual appeal to an international authority more effective than has ever before existed would be of great importance in itself. The Upper Silesian Arbitral Tribunal was perhaps the only significant organ allowing such a right in the past, but it was limited both in time and in subject matter. With the European Convention the possibility of individual appeal increases yearly as the provisions of the Convention become better known.

<sup>46</sup> *De Becker Case Judgment*, March 27, 1962.

The Convention, of course, has also established two new international tribunals, the Commission and the Court. They are regional international tribunals permitted by Article 95 of the United Nations Charter, and supplement the activities of the International Court of Justice. The very fact that their existence and functioning are a contribution to the expanded use of international law in settling not only disputes between states but other kinds of problems is of great significance.

Finally it should be stressed that the Commission and the Court will not have developed a jurisprudence so specialized that it will be of limited importance to the development of international law. There is no doubt, for instance, that the jurisprudence on such a question as the exhaustion of domestic remedies and on the rôle of the state in having to sustain the burden of proof will be of significant importance not only for the evolution of the Convention itself but for international law in general.

### *Legal Problems*

There is one problem under international law which arises out of the Convention itself: the relation between the obligations of a state under the Convention and those under other international agreements.<sup>47</sup> Such treaties as the International Statute for the Navigation of the Rhine, the Accord on German Foreign Debts, the Franco-German Treaty on the Saar, and the treaties instituting the three European Communities, contain provisions which may in some way conflict or at least relate to the guarantee of the Convention. For example, Article 86 of the Treaty instituting Euratom regulates the right of property with regard to fissionable materials. It is possible that this article might be in conflict with Article 1 of the Protocol. The question which arises here is who is to determine the solution of such a conflict, the Luxembourg Court or the Strasbourg Court. In other treaties certain international and domestic tribunals are involved. There will be need for an agreement in the future on the competence of the respective organs. This is to be expected where international jurisdictions proliferate.

### THE CONVENTION IN DOMESTIC LAW

The Convention has been viewed in the international sphere both as an international legal instrument concerning the protection of human rights and as a means for bringing about European unification. However, there is another sphere of immeasurable importance in which the Convention operates wholly outside of the development of the Convention by international organizations—domestic law.

Certain states of the civil-law tradition accept treaties as part of their

<sup>47</sup> H. Golsong, "Interférences entre les obligations incombant à un état en vertu de la Convention des Droits de l'Homme et d'autres accords internationaux." Paper delivered at Colloquium on the Convention at Strasbourg November 14-15, 1960.



internal law when they are ratified by the appropriate organ according to their constitutions.<sup>48</sup> Belgium, The Netherlands, Luxembourg, Germany, Italy, Greece and Turkey have all accepted the Convention as part of their domestic law.<sup>49</sup> Thanks to the efforts of M. Henri Rolin in the drawing up of Article 1 of the Convention, it now has within these states the validity of a self-executing treaty, requiring in normal conditions no special legislation for its implementation. This is of as great importance to European citizens as is the international guarantee of the Convention itself. One well-known case will suffice to illustrate how this works. A Belgian national married to a German woman, the mother of two illegitimate children, was faced with expulsion from Germany under a provision of German law dating from 1938. The Belgian argued on appeal that, if he were forced to return to Belgium, his right to the enjoyment of family life under Article 8 of the Convention would be violated, since it would be unlikely that the Belgian Government would permit his wife and her children to enter that country. The Court agreed with this contention, found no reason to apply the second paragraph of Article 8 and, by virtue of the rule *lex posterior derogat legi priori*, decided that, since the Belgian's right under Article 8 of the Convention would be violated and the Convention was a later law than the Act of 1938, he should be allowed to remain in Germany.<sup>50</sup>

The same kind of a decision could be made to a greater or lesser extent in any of the countries where the Convention forms part of domestic law. In The Netherlands, the Constitution states that international accords are superior to national law and even to the Constitution itself. In Germany numerous decisions have been handed down by domestic courts with regard to the provisions of Section I of the Convention and Articles 1 and 2 of the Protocol. Since the legal and administrative authorities in Germany are obliged to conform to the dispositions of the Convention insofar as they exceed those rights guaranteed in the Basic Law, they represent a notable addition to the internal law of Germany.

For the other states that have ratified the Convention, the statement of the Privy Council of Great Britain with regard to another matter seems to apply:

. . . so far, at any rate, as the Courts of this country are concerned, international law has no validity save in so far as its principles are accepted and adopted by our own domestic law.<sup>51</sup>

<sup>48</sup> K. J. Partsch, "Die europäische Menschenrechtskonvention vor den nationalen Parlamenten," 17 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 93-132 (1956-1957).

<sup>49</sup> Although the question has not yet been finally settled in Austria, that state might also be mentioned as one accepting the Convention in domestic law.

<sup>50</sup> See H. Golsong "The European Convention of Human Rights and Fundamental Freedoms in a German Court," 33 British Year Book of International Law 317 (1957). See also 2 Yearbook 568.

<sup>51</sup> *Chung Chi Cheung v. The King*, [1939] A.C. 160; 33 A.J.I.L. 376 (1939).

A decision in Ireland with regard to the Convention itself has reaffirmed this view.<sup>52</sup> Thus, as Sir Humphrey Waldock, the Commission's first President, has said, these countries must draw inspiration from the Convention in deciding on doubtful points in their domestic legislation, but are not bound by the Anglo-Saxon legal tradition to accept the Convention as part of internal law.

The Convention contains obligations for all states which have great effect in the internal sphere. For example, Article 13 provides that effective recourse before a national court must be available to individuals complaining of violations of the Convention. Consequently a state is obliged to make sure that such institutions exist and function. More importantly, Article 64, which permits reservations concerning legislation in force at the time of ratification, clearly indicates that no legislation contrary to the Convention may be passed subsequent to signature. In addition, the Convention may come to have such importance that these are withdrawn. According to the Constitution of Norway, the Jesuits were banned from Norwegian territory, and as a result a reservation was made to Article 9 of the Convention. Three years later, however, this constitutional provision was abrogated and special reference was made to the Convention.<sup>53</sup> Finally, under Article 57, states may be required to report to the Secretary General on the existing state of domestic legislation with regard to the Convention.

An examination of the domestic law applying to the Convention and the decisions taken by domestic courts would reveal a considerable development in the protection of the human rights of Europeans outside the international framework.<sup>54</sup> The results are a wider knowledge of the Convention itself, an awareness of the problems dealt with in the Convention, and a greater support for the extension of legal supranationality throughout Europe.

#### PROPOSED ADDITIONS TO THE CONVENTION

The Convention does not include certain economic and social rights, although there has been considerable pressure for their inclusion. There has also been a proposal that minority rights be guaranteed.<sup>55</sup> Until the present, the overwhelming fear of a repetition of the failure of the League of Nations in this field has been decisive in preventing the inclusion of such rights in the Convention. However, there are still proposals that at least one article be added to the Convention guaranteeing the rights of individuals to enjoy their own culture, language, schools, and religions, even though they may belong to a national minority within a member state. It is possible that in a second Protocol such a right might be included. Inter-state applications in this sphere would be encouraged by

<sup>52</sup> *The State (O'Laighless) v. O'Sullivan and the Minister for Justice*, 2 Yearbook 608.

<sup>53</sup> 1 Yearbook 41, 42.

<sup>54</sup> For important German decisions, for example, see 2 Yearbook 572-606.

<sup>55</sup> Consultative Assembly, 13th Sess., Doc. 1279.

such a provision, but they might be motivated by political rather than legal considerations.

In addition to individual applications directed against parties to the Convention, the Secretary General of the Council of Europe receives individual petitions directed against members of the Council of Europe which have not ratified the Convention or have not recognized the right of individual recourse. At present they are rejected. Yet one out of five applications coming to the Secretary General falls into this category. It has been proposed that such applications be referred to the members of the Council of Europe for their consideration or that those petitions seemingly admissible and with some interest in themselves might be communicated to the accused state, which might make any reply that it saw fit.<sup>56</sup> In conjunction with this proposal it would also be worth considering whether the Commission's jurisdiction might be accepted *ad hoc* for a specific case.

Under the United Nations system, states have been asked to submit a report every three years on the evolution and progress accomplished in the field of human rights and on the measures taken to extend protection. Certain members of the Council of Europe have submitted these reports to the United Nations. It would seem that as a complement to the provisions of Article 57, these reports might also be submitted to the Secretary General of the Council of Europe.<sup>57</sup> The Secretary General, of course, could annually request such reports in accordance with Article 57. The possible results of the adoption of this method would be a continual realization on the part of states that their actions in the field of human rights are subject to public scrutiny at all times. There is no doubt that greater attention would be paid to these reports in the framework of the European Convention than in that of the United Nations, since states might make applications to the Commission based on alleged deficiencies revealed in the report.

Although numerous discussions have been held on possible rights that might be included in the Convention, certain rights have been considered at a more advanced stage. On the proposal of the Consultative Assembly, a Protocol embodying four additional rights has been opened for ratification. The rights are: freedom from imprisonment on the ground of inability to fulfill a contractual obligation, the right to liberty of movement and to leave any state, freedom from exile from the national state, freedom of aliens from collective expulsion. After the deposit of five instruments of ratification, this Protocol will come into force as an integral part of the Convention and subject to all its procedural provisions.<sup>58</sup>

The decision to undertake a second Protocol is a further recognition that the Convention is just one step in a gradual evolution of increased pro-

<sup>56</sup> K. Vasak, "Le problème des 'pétitions' individuelles relatives aux droits de l'homme." Paper read at Colloquium, see note 47 above. Conclusions of the Colloquium, pp. 4-5.

<sup>57</sup> Conclusions of the Colloquium, pp. 1-4.

<sup>58</sup> Council of Europe Doc. No. H(63) 4 Revised, signed Sept. 20, 1963.

tection. If these rights do not seem extensive, they do at least represent new areas of agreement reached between the members of the Council.

A Protocol giving the Court the authority to render advisory opinions has been opened for ratification.<sup>59</sup> The Court would be able to decide on questions of interpretation of the Convention submitted by a two-thirds vote of the Committee of Ministers. Since the Consultative Assembly, the Secretary General,<sup>60</sup> the Commission, and states would not be permitted to apply for an advisory opinion, such a request would have to be espoused by the Committee of Ministers. The request would be limited in scope to matters concerning the interpretation of the Convention and its Protocols, and certainly could not extend beyond the domain of the Convention or at most the Council of Europe. Beyond this, the International Court of Justice would be competent to render opinions in disputes on other matters submitted by members of the Council; it is not suggested that there be a wholesale derogation from its jurisdiction by the members of the Council of Europe.

The advisory jurisdiction of the Court could be of considerable importance. There are undoubtedly questions arising which require an authoritative interpretation of the Convention. In its appearance before the Court in the *Lawless* case, the Commission indicated that it felt constrained to ask for an opinion on certain procedural matters before embarking on a specific argument, for fear that a subsequent decision by the Court might invalidate not only a specific argument but the entire submission. If the Court had the power to render an advisory opinion, it might enable the Commission to avoid delays in its procedure by submitting requests for specific procedural opinions during the course of a hearing.

As presently constituted, the Court can only render opinions on interpretation of the Convention when these questions are raised by a specific contentious case. Thus the Court is called upon to review substantive materials in great detail in order to be able to decide on certain important procedural questions. If the Court had had the ability to render advisory opinions and had already done so with regard to Article 15, it would have been possible to avoid the hearings held in the *Lawless* case in order to inform all parties of their position under Article 15. For these reasons, it is advisable that advisory jurisdiction should be instituted.

It has been proposed that an International Institute of Human Rights be established at Strasbourg.<sup>61</sup> It would have several functions, including

<sup>59</sup> Consultative Assembly, 11th Sess., Docs. 1061 and 1062; European Treaty Series, No. 44. See also A. H. Robertson, "Avis consultatifs de la Cour." Paper read at Colloquium, see note 47; also Council of Europe News, March, 1963, p. 2. This protocol was signed on May 6, 1963, at the same time as the protocol mentioned above, p. 819.

<sup>60</sup> Golsong, *Rechtsschutzsystem* 44, maintains that the Secretary General is an official of the Convention as well as the Council.

<sup>61</sup> Consultative Assembly, 13th Sess., Doc. 1268; and P. Modinos, *Proposal for the Establishment of an International Institute of Human Rights* (Strasbourg, 1960).

research with regard to the problems arising in the application and interpretation of legal rules drawn up to insure respect for human rights. In addition, the municipal law of each state with regard to its obligations and its possibilities for protecting human rights would be examined, as would the contribution of general international law to the field of human rights. The Institute would also perform a task of documentation by centralizing all materials concerning human rights.

These functions of research and documentation would all contribute to the process of education not only of Europeans but of all interested individuals with regard to the international protection of human rights. By so doing the Institute would assist in fulfilling one of the greatest needs apparent from the operation of the Convention thus far, the spread of information on the Convention.

As the work of the organs of the Convention continues and becomes better known, states not members of the Council of Europe might well consider it desirable to accede to the Human Rights Convention. A recent proposal of the Consultative Assembly would make it possible for the Committee of Ministers to invite non-members to accede to the Convention, thus ensuring that only those states with "the necessary qualifications" would be included.<sup>62</sup>

#### CONCLUSION

It is evident that a permanent system for the international protection of human rights has been established which could, if the members so determined, even survive the demise of the Council of Europe. Mainly through the activities of the Commission, the Convention system has acquired a stability and respect necessary for its successful operation. Its decisions demonstrate that human rights are being effectively protected in Europe both as a result of the existence of the organs and of the efforts of the states themselves. The relatively small number of applications declared admissible is not a sign of weakness, but rather of the beneficial influence of the Convention in member states. Nevertheless, additional acceptances of the right of individual petition and of the jurisdiction of the Court by such states as the United Kingdom and France, coupled with a progressive expansion of the rights included and greater awareness of the international guarantees applying in Europe, would do much to ensure the continued vigorous development of the European Convention on Human Rights.

<sup>62</sup> Council of Europe News, July, 1962, p. 16.

# RIVER POLLUTION IN INTERNATIONAL LAW

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## I. INTRODUCTION

While the world is experiencing its industrial revolution, demand for the efficient exploitation of global natural resources is making states increasingly interdependent. The need for international economic co-operation is greater than ever before, and the failure to co-operate can bring greater disorder. It has therefore become vital to improve the means of settling disputes between states over the allocation and exploitation of natural resources.

This necessity is especially great with regard to the waters of international rivers. Water is precious for industry, for transport, and for life itself. "More than three-quarters of the land-surface of the globe is susceptible to integrated river basin development. . . ."<sup>1</sup> Potential exploitation is thus huge, but so is the area of potential conflict. A single river may be subject to many incompatible claims and uses, and when it flows from state to state, it creates a natural as well as an economic interdependence among riparian states. Moreover, the fact that "international boundaries were often drawn without consideration of the requirements for sound water administration,"<sup>2</sup> aggravates the possibility of conflict.

In this economic context, river pollution has become a new and crucial problem.<sup>3</sup> The same river may be essential for the provision of power for factories, chemicals for industry, sewage-disposal of cities, and the water supply of a nation. The problem of how to reconcile these divergent uses has arisen relatively recently in the international community as a result of intensive industrial development and a global population explosion. Therefore, although there has been considerable national regulation of the economic use of rivers, international control has been less comprehensive, and it has been recognized that

lack of accepted international law on the uses of these (international) streams presents a major obstacle in the settlement of differences,

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<sup>1</sup> "Integrated River Basin Development," U.N. ECOSOC Council Report 5 (E/3066) (1958).

<sup>2</sup> *Ibid.* at 32.

<sup>3</sup> "Pollution of our country's rivers and streams has . . . reached alarming proportions. . . . Current corrective efforts are not adequate. This year a national total of \$350,000,000 will be spent from all sources on municipal waste treatment works. But \$600,000,000 of construction is required annually to keep pace with the growing rate of pollution." President Kennedy in Message to U. S. Congress on Natural Resources, reported in the New York Times, Feb. 24, 1961, p. 12, col. 3.

with the result that progress in development is often held up for years, to the detriment, not only of the countries concerned, but of the world in general.<sup>4</sup>

In view of the novelty and urgency of the problem of international river pollution, it is important to consider international law not merely as it is, but as it might develop. Although the principal concern here is with water pollution, it must be emphasized that this is part of the larger problems of the economic use of international waterways, and of liability for extraterritorial economic injury, where there has also been recognition of the necessity for the development of international law.<sup>5</sup> It is hoped that analysis of pollution problems might be helpful in this much broader area.

At the outset the most general definitions of international rivers and of pollution will be adopted, since they raise the widest range of questions. International rivers are thus

les cours d'eaux contigus ou limitrophes qui servent directement de frontières entre deux États, et les cours d'eaux successifs qui franchissent transversalement les frontières de plusieurs États, sans distinguer selon qu'ils sont navigables ou non.<sup>6</sup>

Pollution includes "any artificial change in the natural quality of any particular natural water,"<sup>7</sup> rather than a more narrow definition in terms of use or damage.<sup>8</sup> These are only preliminary definitions, and they are not, of course, intended to delimit the area of international legal liability.

Some hypothetical questions will indicate the scope of the present inquiry. In the simple situation in which a river flows from state X into state Y, is X ever liable to Y for damage done by pollution? Is damage to sovereignty sufficient to incur liability? Is liability for pollution strict, or may X successfully plead absence of fault? May X rely upon effective and continuous use of the river as a sewer with the knowledge and acquiescence of Y? Alternatively, may Y set up its long use of the river for domestic or industrial needs, and thus prevent X from changing the condition of the water? What remedies are appropriate? How is the situation different when there is a multi-riparian river basin belonging to states A, B, C, and D, which is being polluted by one or more states?

<sup>4</sup> U.N. ECOSOC Council Report, *op. cit.* note 1 above, at 43.

<sup>5</sup> "[I]t must be a matter of consideration whether there is not required a 'formulation and systematization' of rules of international law bearing upon the obligations of territorial sovereignty in the interest of orderly neighbourly intercourse and relations. . . . In the same category . . . may be considered the obligation of a State to prevent its territory from causing economic injury to the neighbouring territory in a manner not permitted by international law." Survey of International Law in Relation to the Work of Codification of the International Law Commission, U.N. Doc. A/CN. 4/1/Rev. 1 at 34-35 (1949). See also Sauser-Hall, "L'Utilisation Industrielle de Fleuves Internationaux," 83 Hague Academy Recueil des Cours 465 (1953).

<sup>6</sup> Sauser-Hall, *loc. cit.* note 5 above, at 481.

<sup>7</sup> Second Report of Rapporteur of International Law Association, Committee on the Use of Waters of International Rivers (cited hereafter as I.L.A. Comm.), Sec. II, p. 12 (1958).

<sup>8</sup> *E.g.*, U.N. Doc. E/ECE/311, par. 4; 14 W.H.O. Bulletin No. 5, at 846 (1956).

Are A and B under a legal obligation to contribute to the cost of abating pollution, where C and D are proposing such an abatement project? How are the conflicting uses of the basin by the riparian states to be reconciled? Is the application of formal legal rules as appropriate here as in the simpler situation, or are other regulatory techniques preferable? It is not claimed that these questions will be answered confidently, but it is useful to pose them before examining how far they can or should be answered by international law.

## II. THEORETICAL BACKGROUND

The problem of state responsibility in international law for extraterritorial damage did not concern publicists before the Industrial Revolution spread throughout Europe in the 19th century, though the early literature contains maxims which bear upon the subject. Grotius, for example, qualified his statement of the sovereignty of riparians over a river,<sup>9</sup> with the interests of the community as a whole, though it is clear that he was not considering the international situation.<sup>10</sup> Subsequent literature consistently developed a limitation upon the use of international rivers, epitomized in the maxim *sic utere tuo ut non alienum laedas*.<sup>11</sup> In the 19th century, some advocates of state sovereignty regarded the use of such waters as unlimited,<sup>12</sup> but their views were not generally accepted.

It was inevitable in a pre-industrial age that the problem of pollution of international rivers did not arise. Indeed, there is no indication that it was regarded as a problem even within the domestic context. The 17th and 18th-century concepts concerning the economic use of water seem to have been transplanted from Roman law.<sup>13</sup> In the 19th century, the principal development related to free navigation on the Danube and the Elbe.<sup>14</sup> In mid-century there was interest in the economic use of navigable waters,<sup>15</sup> but in 1911 the Institute of International Law recognized that

<sup>9</sup> "Thus a river, viewed as a stream, is the property of the people through whose territory it flows, or of the ruler under whose sway that people is. It is permissible for the people or the king to run a pier out into it, and to them all things produced in the river belong." 2 Grotius, *De Jure Belli ac Pacis*, Ch. 2, sec. 12 (1646 ed., Kelsey trans.).

<sup>10</sup> "But the same river, viewed as running water, has remained common property, so that one may drink or draw water from it." *Ibid.*

<sup>11</sup> 4 Pufendorf, *De Jure Naturae et Gentium*, Ch. 5, sec. 7, Ch. 8, sec. 11 (1688 text, Oldfather trans.); 2 Vattel, *Le Droit des Gens*, Ch. 1, sec. 18 (1758 ed., Fenwick trans.); Wolff, *Jus Gentium Methodo Scientifica*, Ch. 2, sec. 173 (1764 ed., Drake trans.); 2 Wheaton, *Elements of International Law*, Ch. 4, sec. 193 (1866 ed.); 1 Martens, *Traité de Droit International* 480-481 (1886).

<sup>12</sup> E.g., Klüber, 1 *Europäisches Völkerrecht* 128 (1821); Heffter, *Das Europäische Völkerrecht der Gegenwart* 150 (1888).

<sup>13</sup> Neumeyer, "Ein Beltrag zum Internationalen Wasserrecht," in *Festschrift für Georg Cohn* 143 (1915).

<sup>14</sup> Caratheodory, *Du Droit International concernant les Grands Cours d'Eau* (1861). For the history and development of the principle of free navigation, see U.N. Doc. E/ECE/186, pp. 26-85 (1952).

<sup>15</sup> Cutler, *The International Law of Navigable Rivers* 3-4 (1865).



"the exploitation of water for industrial, agricultural, and other purposes, remains outside the provisions of the law."<sup>16</sup>

Precisely on account of the primitive state of international river law in the late 19th century, Judson Harmon, the U. S. Attorney General, was able to reply to Mexico's protest against diversion of the waters of the Rio Grande in 1895 that

The case presented is a novel one. Whether the circumstances make it possible or proper to take action from considerations of comity is a question which does not pertain to this Department; but that question should be decided as one of policy only, because, in my opinion, the rules, principles, and precedents of international law impose no liability or obligation upon the United States.<sup>17</sup>

The "Harmon Doctrine" was relied upon by Indian writers during the recent Indo-Pakistan dispute over the waters of the Indus.<sup>18</sup> In the 1906 Treaty with Mexico Regulating the Use of the Waters of the Rio Grande, and in the 1909 Boundary Waters Treaty with Great Britain (on behalf of Canada), the United States expressly denied that the conclusion of such agreements constituted recognition of legal liability.<sup>19</sup> When, as the result of the opening of the Chicago Drainage Canal, the flow of the Chicago River was reversed, and the level of water in the Great Lakes and St. Lawrence River was lowered, the United States relied upon the Harmon Doctrine, and Canada denied the legality of the diversion.<sup>20</sup> However, now that Canada, as upper riparian, seeks to exploit the waters of the Columbia River, Canadian writers have similarly invoked the Harmon Doctrine to support such rights.<sup>21</sup>

Eight months before Harmon enunciated his notorious doctrine, the United States appealed to Great Britain to ensure that waters within

<sup>16</sup> 24 *Annuaire de l'Institut de Droit International* 365 (1911).

<sup>17</sup> Harmon, 21 *Ops. Attys. Gen.* 274, 283 (1895).

<sup>18</sup> Sikri (Advocate-General, Punjab, India), *Comments on I.L.A. Comm. 1st Rep.* (1956); Bains, "The Diversion of International Rivers," 1 *Indian J. Int. Law* 38, 44 (1960).

<sup>19</sup> Treaty with Mexico, May 21, 1906, Arts. 4 and 5, 34 *Stat.* 2953, U. S. Treaty Series, No. 455; 1 *A.J.I.L. Supp.* 281 (1907); Boundary Waters Treaty with Great Britain (on behalf of Canada), Jan. 11, 1909, Art. 2, U. S. Treaty Series, No. 548; 4 *A.J.I.L. Supp.* 239 (1910).

<sup>20</sup> Dealey, "The Chicago Drainage Canal and St. Lawrence Development," 23 *A.J.I.L.* 307, 327 (1929).

<sup>21</sup> Austin, "Canadian-United States Practice and Theory Respecting the International Law of International Rivers," 37 *Canadian Bar Rev.* 393, 439 (1959); Bourne, "The Columbia River Controversy," *ibid.* 444, 457. The possibility of a repudiation of the Harmon Doctrine by the United States, as lower riparian on the Columbia River, has been removed by the signing of a new treaty with Canada on the use of the Columbia River Basin. Provision is made therein for construction, and diversion of waters by Canada, and for compensation by the United States for resulting benefits to her. Art. 17 expressly provides that the previous legal position of the contracting parties shall be unchanged after the expiration of the treaty. Treaty Relating to Co-operative Development of the Water Resources of the Columbia River Basin, Jan. 17, 1961, Sen. Exec. C, 87th Cong., 1st Sess.; in 44 *Dept. of State Bulletin* 234 (1961). This treaty has not yet been ratified by Canada.

Canadian territory were not diverted so as to damage the United States.<sup>22</sup> This was not consistent with a view that an upper riparian state may deny the principle *sic utere tuo* to the detriment of the lower riparian, and indeed Harmon did not attempt to ground his doctrine upon existing state practice. The position of the United States as lower riparian for the first time, in the Columbia River dispute, reveals the unacceptable implications of such anarchic claims. Indeed, from a strictly logical point of view, it is inevitable that unlimited exercise of sovereignty by an upper riparian state must limit the equally important sovereignty of the lower riparian state. Some publicists seem to have committed the reverse logical fallacy of asserting the *absolute* territorial integrity of the lower riparian state.<sup>23</sup> However, *sic utere tuo* appears to be recognized in the literature as a principle of international river law, whether on the basis of "equitable apportionment," "natural justice," or state practice.<sup>24</sup>

<sup>22</sup> "April 12, 1895, the Secretary of the Interior communicated to the Department of State certain papers concerning the reported intention of a . . . corporation of British Columbia to dam Boundary Creek where it washes the boundary line, the result of which would be the overflow and washing away of the lands and improvements of settlers in the State of Idaho. The papers were communicated to the British Ambassador . . . with a request that if on investigation the facts were found to be as stated, suitable measures be taken to avert the threatened injury." After the apprehended injury occurred, further papers were communicated to the Ambassador. The British Government replied "that the complainants had a right of action in the courts of British Columbia, and that they would be entitled to sue for damages and for an injunction against the continuance of the mischief." 2 Moore, Digest of International Law 451-452 (1906).

<sup>23</sup> E.g., Huber, "Ein Beitrag zur Lehre der Gebietshoheit an Grenzflüssen," in Zeitschrift für Völkerrecht und Bundesstaatsrecht (1909); Ullmann, Une Question de Droit International sur les Cours d'Eau 10-11 (1911).

<sup>24</sup> See, e.g., Lederle, Das Recht der internationalen Gewässer 60 (1920); Smith, The Economic Use of International Rivers 71 (1931); Gönnerwein, Freiheit der Flussschifffahrt 65 (1940); Brierly, Law of Nations 205 (5th ed., 1955); 1 Oppenheim, International Law 346-347, 474-475 (8th ed., Lauterpacht, 1955); I.L.A. Comm. 1st Rep. (1955); Laylin, Comments submitted to the I.L.A. Comm. 5 (1956); Eagleton, "The Use of the Waters of International Rivers," 33 Canadian Bar Rev. 1018, 1023 (1955). The literature is comprehensively surveyed in Berber, Rivers in International Law (1959). Berber recognizes *sic utere tuo* only as a matter of comity. *Id.* at 207-209. It may also be noted that the principle has received wide recognition in the analogous field of radio-broadcasting, where interference through "jamming" or unauthorized broadcasting might be viewed as another type of international pollution. International agreements have established the principle of non-interference for propaganda or for peaceful purposes, and specific frequencies have been assigned to the high contracting parties. See, e.g., International Radiotelegraph Convention, Nov. 25, 1927, Art. 10, sec. 2, 84 L.N. Treaty Series 97; International Radiotelegraph Convention, Dec. 9, 1932, Art. 35, sec. 1, 151 L.N. Treaty Series 5; International Convention on the Use of Broadcasting in the Cause of Peace, Sept. 23, 1936, Art. 1, 186 L.N. Treaty Series 301. Moreover, writers on broadcasting in international law have used arguments strikingly similar to those used in discussion of international river law; for example, the familiar concepts of neighborhood rights and duties, the mutual interests of common users, and abuse of rights, Stenuit, La Radiophonie et le Droit International Public (1932). Of even greater relevance is Wright's recent discussion of subversive propaganda, in which he declared that:

It is necessary to emphasize the existence of a general obligation upon a riparian state to respect the rights of its neighbors in the use of international rivers, since otherwise the problem of river pollution is of no concern to international law. It appears that such a general obligation is recognized by publicists. However, the enunciation of a principle as general as *sic utere tuo* is of little use in analyzing complex pollution problems. It remains, therefore, before examining relevant judicial decisions and the practice of states, to discover whether more elaborate criteria exist in theory, which may assist analysis. State responsibility for extraterritorial damage to the territory of another state has been based upon the concepts of neighborhood, abuse of rights, and international servitudes.

A. *Neighborhood*. The concept of neighborhood implies reciprocity. It has been described as the justification for limiting the sovereignty of a riparian state over its rivers,<sup>25</sup> and has been applied specifically to international river pollution.<sup>26</sup> Neighborhood derives from the physical interdependence of contiguous states. It is usually regarded as imposing the duty upon a state to suppress sources of extraterritorial damage.<sup>27</sup> However, despite reference to the concept by writers on pollution, it has been admitted that there are no precise rules for determining rights and duties flowing from neighborhood in concrete situations.<sup>28</sup> The concept may explain or amplify the principle *sic utere tuo*, but it seems incapable of facilitating the solution of problems of international river pollution.

B. *Abuse of Rights*. The development of this controversial doctrine from French jurisprudence has been traced by Politis.<sup>29</sup> The theory is a combination of notions of individual and social fault. It is not always clear whether it is wrongful intention, or the gravity of injury, or social harm, or all these elements which constitute the abuse of a right, and

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"The obligation to respect the territory of others includes the obligations of abstention by the government and prevention from its territory of (1) aggression, (2) subversive intervention, and (3) other injurious activities. The last of these obligations arises from the general principle *Sic utere tuo*. . . States must prevent the pollution or diversion of rivers in their territory unduly injurious to a lower riparian . . .; they must prevent industrial activities or nuclear testing which would pollute the atmosphere of neighboring states. . . ." Quincy Wright, "Subversive Intervention," 54 A.J.I.L. 521, 528 (1960).

<sup>25</sup> Sauser-Hall, "L'Utilisation Industrielle de Fleuves Internationaux," 83 Hague Academy Recueil des Cours 465, 554-555 (1953).

<sup>26</sup> Thalmann, Grundprinzipien des modernen zürischenstaatlichen Nachbarrechts 33 (1951).

<sup>27</sup> Andrassy, "Les Relations Internationales de Voisinage," 79 Hague Academy Recueil des Cours 4, 80-81 (1951). For a more elaborate discussion of the application of the neighborhood concept to international river law, see also Andrassy, "L'Utilisation des Eaux des Bassins Fluviaux Internationaux," 16 Revue Egyptienne de Droit International 23 (1960).

<sup>28</sup> Sauser-Hall, *loc. cit.* note 25 above, at 557-558; U.N. Doc. E/EOC/136, p. 92; Manner, "Water Pollution in International Law," ECE/Water Poll./Conf./12, p. 17 (1960).

<sup>29</sup> Politis, "Le Problème des Limitations de la Souveraineté et la Théorie de l'Abus des Droits dans les Rapports Internationaux," 6 Hague Academy Recueil des Cours 5, 81 (1925).

indeed there appears to be little consistency in the theoretical descriptions of the doctrine. It has been described as an instrument which "must be wielded with studied restraint,"<sup>30</sup> and, although it has been alluded to in dicta of international courts,<sup>31</sup> it is not definitely established as a principle of international law.<sup>32</sup> Indeed, it would seem that discussion of state responsibility in terms of abuse of rights is either tautological or superfluous. The question is not whether a right can be abused and forfeited, but the circumstances under which such forfeiture will occur. It may be useful to stress that a wrongful intention will turn a right into a wrong, provided that a legally protected interest has been violated, but it is doubtful whether this is precisely expressed as the abuse of a right. Other than in emphasizing the relevance of intention and of reasonable user, the doctrine is of little value to the present inquiry.

*C. International Servitudes.* It is unnecessary to enter into the controversy concerning the place of international servitudes in international law. Some writers have acknowledged that such permanent obligations, in derogation of the sovereignty of the servient state, may be acquired by express or implied agreement.<sup>33</sup> The right of a lower riparian state to receive the waters of a river flowing from an upper riparian state into its territory has been described as creating a "natural servitude," independent of consent by the upper riparian.<sup>34</sup>

Many doubts surround this doctrine, which has been described as pervaded with "extreme confusion."<sup>35</sup> In particular, the absence of state practice and lack of theoretical elaboration of such matters as the necessary period of open and continuous user by which to acquire prescriptive rights *in rem*, may be cited in opposition to the doctrine. However, for present purposes the principal consideration is the relevance of the concept in international river law.

The essence of a servitude is its permanence. Thus, whether state X possesses the servitude of polluting a river flowing into state Y, or state Y has the servitude of receiving water from the river flowing from state X unaltered in quantity or quality, the subservient state will be permanently restricted in its use of the river waters. It will be irrelevant that a new city develops in X or Y with urgent drainage or consumptive needs; the fact that no serious damage will result to the dominant state from a change in the use of the water will also be immaterial. In municipal law such

<sup>30</sup> Lauterpacht, *The Development of International Law by the International Court* 162 (1958).

<sup>31</sup> *Case Concerning German Interests in Polish Upper Silesia*, P.C.I.J., Ser. A, No. 24, p. 12 (1930); *Anglo-Norwegian Fisheries Case*, [1951] I.C.J. Rep. 142.

<sup>32</sup> Sauser-Hall, *loc. cit.* note 25 above, at 552.

<sup>33</sup> Fabre, *Des Servitudes dans le Droit International Public* 23 (1901); Reid, *International Servitudes in Law and Practice* 15-16 (1932); Verykios, *La Préscription en Droit International* 309 (2nd ed., 1958).

<sup>34</sup> Labrousse, *Des Servitudes en Droit International Public* 13-14 (1911).

<sup>35</sup> Potter, "The Doctrine of Servitudes in International Law," 9 A.J.I.L. 627, 641 (1915). See also Herbst, *Staatsukzession und Staatsservituten* (1962).

unqualified assertion of property rights at the expense of community interests has been rejected. Thus, within the United States

a right to pollute a stream with sewage cannot be acquired by lapse of time where the use thereof for such purpose is permissive. *Nor can a prescriptive right be acquired where the acts in question would constitute a public nuisance.*<sup>86</sup>

The tendency has been, in recent times, for all industrial states to regulate the use of private property in conformity with national needs. The concept of the unfettered enjoyment of private property has thus been greatly modified in municipal law. This is inevitable, for the essence of private property rights, their permanence, would restrict the process of industrialization. If this is so within separate states, it is submitted that it applies with even greater force in the international community. If a state bound itself permanently against using its river for certain purposes, it might sacrifice the needs of its future towns and their inhabitants. It could do so by treaty, when evidence of intention would be certain, and a *clausula rebus sic stantibus* would be implied, but it surely could not be bound by a veto on the use of the river acquired by a neighboring state by mere prescription. In the area of the exploitation of natural resources, it thus does not seem desirable to apply the concept of international servitudes by analogy from municipal notions of prescription.<sup>87</sup> A doctrine based upon private property cannot be transferred to the different context of the international community without modification.<sup>88</sup> A state may acquire territory permanently in full sovereign ownership, but its rights over its territory are necessarily relative and limited by the rights of neighboring states. The concept of international servitudes is thus of negative value, since its characteristics illustrate the irrelevance of municipal law notions of property and permanence to the problem of international river pollution.

This brief survey of the theoretical background to the problem reveals little of positive value. The principle *sic utere tuo* is asserted and explained in various ways, but essentially it amounts to a plea for reasonable user of natural resources. A digression may be useful to illustrate the dangers of relying only upon such a vague standard in the analogous area of international air pollution.

As a result of the hydrogen bomb explosion by the United States on March 1, 1954, severe damage was done by nuclear fallout to the crew of a Japanese fishing vessel, several cargoes of fish, and the inhabitants of the Trust Territories of the Bikini and Eniwetoc atolls. After protracted diplomatic negotiations, the United States paid monetary compensation to Japan, "*ex gratia*" and "without reference to the question of legal liability."<sup>89</sup> McDougal and Schlei analyzed the position of the United States in international law. They argued that the relevant cri-

<sup>86</sup> 56 American Jurisprudence 816 (1947) (emphasis added).

<sup>87</sup> Lauterpacht, Private Sources and Analogies of International Law 119 (1927).

<sup>88</sup> U.N. Doc. E/ECE/186, p. 89.

<sup>89</sup> Margolis, "The Hydrogen Bomb Experiments and International Law," 64 Yale Law J. 629 (1955).

terion was "the test of reasonableness . . . by which the decision-makers of the world community have consistently during modern times decided between claims to navigation and fishing (on the high seas)." <sup>40</sup> However, since the bomb test was in self-defense, and was limited to the minimum necessary for its purpose, it was stated that "the claim of the United States is, under contemporary conditions, a reasonable assertion which contravenes no prescription or policy of the international law of the sea." <sup>41</sup> The writers saw a "new and significant factor which must be taken into account in determining reasonableness, and that is the factor of security." The "most important element in the problem" was "the overriding utility of the tests to the free world." It was asserted of international disputes over air or water pollution that

The innumerable forms which such controversies may indeed take make it impracticable to adopt any standard more explicit than that of reasonableness, determined by the familiar process of balancing the "utility of the conduct" causing damage, and "the gravity of the harm" to the injured party.<sup>42</sup>

The ultimate justification of the United States position was as follows:

The tests conducted by the United States . . . may be subsumed most easily, in giving effect to the major expectations of the parties, under the broad powers conferred on the United States to promote and protect both international peace and security and its own individual security. . . . In an interdependent world, being made ever more interdependent by a continuously developing technology, even a disinterested observer should be able to discern some relation between the security of another nation-state and that of the United States.<sup>43</sup>

This interpretation of "reasonableness" is plainly subjective, taking account as it does only of the security of the United States. It appears to apply the Harmon Doctrine not only to neighboring states, but to Trust Territories and the high seas. Since the case concerns air pollution, it is an appropriate illustration of the inadequacy of contemporary international legal theory to provide norms for liability for such extraterritorial injury.

### III. INTERNATIONAL CASES AND AGREEMENTS

State practice with regard to international river pollution is sparse. No dispute on the subject has yet been submitted to adjudication. It is therefore necessary to search more widely for relevant material in the analogous area of air pollution, where the *Trail Smelter* case provides the *locus classicus* for liability for extraterritorial damage to property, and among the various international agreements regulating river pollution.

In the *Trail Smelter* case, the Tribunal regarded the analogy between air and river pollution as close, and cited municipal precedents concerning

<sup>40</sup> McDougal and Schlei, "The Hydrogen Bomb Tests in Perspective: Lawful Measures for Security," 64 Yale Law J. 648, 684 (1955).

<sup>41</sup> *Ibid.* at 685-688.

<sup>42</sup> *Ibid.* at 691.

<sup>43</sup> *Ibid.* at 704.

river pollution in reaching its decision.<sup>44</sup> The case therefore warrants close scrutiny. The claim was brought by the United States against Canada under a special convention concluded between the parties, in respect of injuries in the State of Washington allegedly resulting from the activities of a smelting company located in Canadian territory, upstream on the Columbia River. There were a number of questions which the Tribunal expressly did not consider in its decision. Thus, it did not decide whether the Trail Smelter, a Canadian corporation, could acquire a smoke easement over United States territory.<sup>45</sup> It did not consider "whether the facts proven did or did not constitute an infringement or violation of the sovereignty of the United States under international law."<sup>46</sup> Since it was found that Canada, under the convention concluded with the United States, assumed international responsibility for damage resulting to the latter from activity within Canadian territory,<sup>47</sup> the only questions to be decided were the extent of damage suffered, the appropriate indemnity, and the future regime to be maintained by the offending corporation. Nor did the Tribunal have to decide whether United States law or international law governed the dispute, since "the law followed in the United States in dealing with the quasi-sovereign rights of the States of the Union, in the matter of air pollution, whilst more definite, is in conformity with the general rules of international law."<sup>48</sup>

The Tribunal relied in its decision upon several United States Federal cases, which will be discussed separately, and concluded that they,

taken as a whole, constitute an adequate basis for its conclusions, namely, that, under the principles of international law, as well as the law of the United States, *no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the property or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence.*<sup>49</sup>

Damages were therefore awarded to the United States, and an injunction was issued, restraining the Trail Smelter from causing injury, in which detailed instructions were given for the future regime of the Smelter. The decision thus went beyond the narrow terms of the *compromis*, and held that state responsibility for extraterritorial injury existed as a matter of general international law. The more controversial part of the Tribunal's reasoning concerned the framing of the injunction. Its use of precedent, rather than the ultimate conclusion, would seem dubious.<sup>50</sup>

<sup>44</sup> The Trail Smelter Arbitral Decision (United States v. Canada), 33 A.J.I.L. 182 (1939); 8 Int. Arb. Awards 1905, 1963 (1949).

<sup>45</sup> *Ibid.* at 1918.

<sup>46</sup> *Ibid.* at 1932.

<sup>47</sup> *Ibid.* at 1912.

<sup>48</sup> *Ibid.* at 1963.

<sup>49</sup> *Ibid.* at 1965 (emphasis added).

<sup>50</sup> It should be noticed that commentators on the case have generally been uncritical, perhaps because of their enthusiasm that an international tribunal has at last asserted the principle of state responsibility for extraterritorial injury. See, e.g., Kuhn, 82 A.J.I.L. 788 (1938).

While it was probably justifiable to cite United States Federal authority for the propositions that, where a State is defendant, an injunction will be issued against it only where damage is serious,<sup>51</sup> and that the burden of proof on the plaintiff will be greater than in suits between private individuals,<sup>52</sup> it was more questionable to rely upon Mr. Justice Holmes' dictum in *Georgia v. Tennessee Copper Company*,<sup>53</sup> on the ground that it concerned questions "cognate to those here at issue."<sup>54</sup>

The dictum quoted referred to the inevitable inhibition which a court must feel against enjoining a state from using its natural resources freely. However, the *Tennessee Copper Company* case was a State action against a private company whose out-of-State activities had polluted air in Georgia. Since the clash was between State rights and private rights over natural resources, the Supreme Court necessarily felt more free to issue an injunction against the private company than against the State of Georgia. In contrast, the *Trail Smelter* turned upon whether one state could be enjoined from causing damage by pollution to another state. The *Tennessee Copper Company* case would not seem to bear upon this issue, yet the Tribunal cited it in its reasoning, and then reached a different conclusion, namely, that an injunction would lie against a sovereign state only where its activities were resulting in serious extraterritorial injury. Thus, the reasoning of the Tribunal was in some respects unsatisfactory, even though it reached a desirable conclusion. It was perhaps especially unfortunate that there was such heavy reliance upon Federal precedent, under the terms of the *compromis*.

There have been only two disputes over the economic use of international rivers which have been resolved by judicial decision, and neither concerned the problem of pollution. In the case of *Diversion of Water from the Meuse*, the Permanent Court of International Justice showed in its elaborate opinion that third-party adjudication can be used successfully to settle river disputes, despite the complexity of the conflicting uses of the riparian states.<sup>55</sup> However, the Court was careful to restrict its judgment to the narrow terms of the convention between the parties, and, except as an example of the potentiality of the judicial process in this area, the decision would seem to yield no important general principles of international law.

The more significant decision was given recently in the *Lake Lanoux*

<sup>51</sup> *Kansas v. Colorado*, 185 U. S. 125 (1902); *Missouri v. Illinois*, 200 U. S. 496, 521 (1906).

<sup>52</sup> *New York v. New Jersey*, 256 U. S. 296, 309 (1921).

<sup>53</sup> "[T]he State has the last word as to whether its mountains shall be stripped of their forests and its inhabitants shall breathe pure air. . . . It is not lightly to be presumed to give up quasi-sovereign rights for pay . . . if that be its choice, it may insist that an infraction of them shall be stopped. This court has not quite the same freedom to balance the harm that will be done by an injunction against that of which the plaintiff complains, that it would have in deciding between two subjects of a single political power." *Georgia v. Tennessee Copper Company*, 206 U. S. 230 (1907).

<sup>54</sup> *Trail Smelter*, 3 Int. Arb. Awards at 1965.

<sup>55</sup> *Diversion of Water from the Meuse*, P.C.I.J., Ser. A/B, No. 70 (1937).



case.<sup>56</sup> Spain had claimed that a French proposal to divert the waters of Lake Lanoux as part of a hydro-electric project violated the Treaty of Bayonne, 1866, and an Additional Act of the same date. France asserted in defense of the scheme that the diverted water would be returned to the River Carol, which flowed from Lake Lanoux into Spain, and that, since the diversion involved no change in regime in Spain, the matter was wholly within French competence and Spanish consent was unnecessary under the treaty. The Tribunal was mainly concerned to interpret the treaty, but its reasons for rejecting the claim of Spain were stated more generally in terms of international law:

It could have been argued that the works would bring about a definite pollution of the waters of the Carol or that the returned waters would have a chemical composition or a temperature or some other characteristic which could injure Spanish interests.<sup>57</sup>

Failure to produce such evidence of injury barred the claim. A state could not rely upon a mere change in the flow of an international river; it had to prove actual damage. As for Spain's contention that, under the treaty, her prior consent was necessary for any change in the existing regime, the Tribunal declared:

To admit that jurisdiction in a certain field can no longer be exercised except on the condition of or by an agreement between two States is to place an essential restriction on the sovereignty of a State, and such restriction could only be admitted in the presence of clear and convincing evidence.<sup>58</sup>

The *Lake Lanoux* case thus examined the question which the Tribunal in the *Trail Smelter* case had not found it necessary to consider, namely, whether a riparian state may stand upon its strict sovereignty, without proof of damage, and may impose a veto upon any change in the *status quo* proposed by another riparian state. In rejecting such an unqualified assertion of territorial integrity, the Tribunal approved of the relative balancing of conflicting interests, recognizing the need for change and compromise inherent in international river law.

Although the *Corfu Channel* case did not concern the use of international rivers, it should be mentioned here, since it contained reference to state responsibility for extraterritorial injury.<sup>59</sup> The International Court of Justice held that, although a state, because of its exclusive territorial control, could not be regarded as having constructive knowledge of all unlawful acts committed within its territory, nevertheless,

the fact of this exclusive control exercised by a State within its frontiers has a bearing upon the methods of proof available to establish the knowledge of that State as to such events. By reason of this

<sup>56</sup> *Lake Lanoux* (Spain v. France), 62 Rev. Gén. de Droit Int. Pub. 79 (1958); see 53 A.J.I.L. 156 (1959), for translation. The case, which was decided Nov. 16, 1957, has been carefully analyzed by Gervais, "L'Affaire du Lac Lanoux," 6 *Annuaire Français de Droit Int.* 372 (1960). See also J. G. Laylin and R. L. Bianchi, in 53 A.J.I.L. 30 (1959).

<sup>57</sup> *Ibid.* 156, 160 (1959).

<sup>58</sup> *Ibid.* at 163.

<sup>59</sup> *Corfu Channel Case* (Merits), [1949] I.C.J. Rep. 3.

exclusive control, the other State . . . is often unable to furnish direct proof of facts giving rise to responsibility. Such a State should be allowed a more liberal recourse to inference of fact and circumstantial evidence. . . . The proof may be drawn from inferences of fact, provided that they leave *no room* for reasonable doubt.<sup>60</sup>

There would thus seem to be implied a rejection of absolute liability. The Court clearly considered that cases might occur in which a state could escape liability, even though the injurious acts had been done within its territory, and indeed it went on to refer to "every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States,"<sup>61</sup> which would be a very limited definition of state responsibility, if it were interpreted as referring to actual, rather than constructive, knowledge.

The international cases reinforce the conclusion reached earlier that the essence of international river law is the accommodation of conflicting uses, by compromise and a balancing of interests, rather than rigid rules, which would create stagnation and inefficiency in the exploitation of water resources. They are, however, too few in number, and too closely tied to the unique characteristics of the particular river dispute to provide elaborate norms of international river law.

The most detailed regulation of the use of international rivers is provided by the vast number of agreements which have been concluded between riparian states, and it would not be possible to do justice to this rich source without an exhaustive analysis of the material. Clagett has recently examined instruments providing for third-party resolution of water disputes, and has concluded that

disputes regarding the regulation and use of a very high proportion of the international (boundary and successive) water-courses of the world are covered by formal agreements providing for compulsory adjudication or other third-party determination . . . at least sixty-six states have made such commitments with one or more co-riparian states.<sup>62</sup>

The existence of so many agreements of this kind underlines the urgency of developing more specific norms of international law by which water disputes may be resolved. However, despite the existence of these numerous agreements, there are relatively few treaties which establish comprehensive rules and regimes for the use of international waterways, and these have mainly been concluded in the most industrialized areas of the world. Thus, Cano has shown that throughout Latin America there are 22 international instruments concerning the development of international river basins, and that these involve 12 signatory states and 8 hydrographic basins out of a total of 68 international river basins in the Continent.<sup>63</sup>

<sup>60</sup> *Ibid.* at 18.

<sup>61</sup> *Ibid.* at 22.

<sup>62</sup> Clagett, "Survey of Agreements Providing for Third-Party Resolution of International Water Disputes," 55 A.J.I.L. 645, 646 (1961).

<sup>63</sup> Cano, "Preliminary Review of Questions Relating to the Development of International River Basins in Latin America," U.N. ECOSOC Council Report, Economic

The only treaty which provided for joint ownership of an international river basin is that of Peru and Bolivia referring to Lake Titicaca. . . . In the other treaties each country has retained its sovereignty and thus the responsibility for administering those parts of the works situated on its side of the frontier.<sup>64</sup>

Most of the world's water resources lack systems of joint control and exploitation, so that the need is as great for the development of administrative organization as for legal norms for the settlement of disputes.<sup>65</sup>

It is as difficult to determine the legal significance of international river agreements as of other treaties. In particular, it must be decided in every case whether the instrument creates an obligation which would not otherwise exist in international law, whether it provides a detailed regulation of existing customary international law, whether its rules are general or special, or indeed whether it contains any juridical content.<sup>66</sup> A comprehensive analysis of conventional river law, in terms of its general legal significance, is a momentous task which remains to be done. Here, however, selected agreements only will be referred to, as illustrations of the various ways in which the problem of pollution has been approached.

There are several treaties in which any alteration in the existing regime which will affect water flowing across the boundary, is prohibited, unless done with the consent of the other high contracting party.<sup>67</sup> Such embodiments of the principle of territorial integrity, if interpreted narrowly, might confer an unreasonable power of veto on one party, even where it would suffer no injury as the result of change, but the Tribunal in the *Lake Lanoux* case indicated that interpretation of these agreements should be liberal, and that the burden fell heavily upon the party withholding consent to show that the proposed change would be unreasonable. Other treaties prohibit pollution absolutely,<sup>68</sup> and it is difficult to ascertain whether a court would interpret them literally. Others prohibit pollution insofar as it damages a particular use, such as fishing.<sup>69</sup> Many other treaties adopt a relative criterion, and prohibit damage resulting from

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Commission for Latin America, 8th Sess. (1959), U.N. Doc. E/CN.12/511 at p. 13 (1959).

<sup>64</sup> *Ibid.* at 26.

<sup>65</sup> For administrative considerations beyond the scope of this article, see Cano, "Systems of Administrative Organization for the Integrated Development of River Basins," U.N. ECOSOC Council Report, Economic Commission for Latin America, 8th Sess. (1959), U.N. Doc. E/CN.12/503 (1959); Finer, "The TVA: Lessons for International Application," International Labour Office Studies and Reports, Ser. B, No. 37 (1944).

<sup>66</sup> Lauterpacht, *The Development of International Law by the International Court* 377-379 (1958).

<sup>67</sup> *E.g.*, Treaty between Norway and Sweden, Oct. 26, 1905, Art. 2, 34 Martens, *Nouveau Recueil Général* (2e sér.) 710.

<sup>68</sup> *E.g.*, Treaty between Denmark and Germany, April 10, 1922, Art. 29, 10 L.N. Treaty Series 215; Treaty between Belgium and Germany, Nov. 7, 1929, Art. 70, 121 L. N. Treaty Series 329.

<sup>69</sup> *E.g.*, Treaty between France and Switzerland, March 9, 1904, Art. 6, 33 Martens, *op. cit.* 501.

the unreasonable use of the waters.<sup>70</sup> It is to be hoped that, since the essence of the use of international rivers is compromise and co-operation in accommodating differing uses and changing needs, these will be models for future treaties. Such an approach typifies the recent agreement which settled the complex dispute between India and Pakistan over the waters of the Indus River.<sup>71</sup> However, the same treaty also contains a clause (Article 11(2)) expressly denying recognition of any general legal liability resulting from the signing of the agreement, like those in United States treaties with Mexico and Canada,<sup>72</sup> and to that extent preserved the Harmon Doctrine.

In the absence of a firm conclusion about the significance of these various agreements in establishing norms of general international law, it may be stated at least that they are evidence of the need and desire for co-operation between riparian states, and that they illustrate differing standards of care in preventing or abating pollution which may be required according to the use which is being made of the particular international river.

However, more specific guidance for the framing of legal norms for combating problems of international river pollution is provided by the implementation by the United States and Canada of the 1909 Boundary Waters Treaty, in which it was agreed "that the waters herein defined as boundary waters and waters flowing across the boundary shall not be polluted on either side to the injury of health or property on the other." An International Joint Commission was established to supervise use of the waters under this agreement, and, since it considered the problem of trans-boundary pollution in great detail, reference to the work of the Commission may be useful. It illuminates the kinds of legal problems which may arise internationally rather than the significance in international law of treaties regulating the use of rivers.

The Joint Commission first examined the problem of pollution in 1913, and in its most recent report in 1951 it stressed the changes in the type of pollution which had occurred in subsequent years.<sup>73</sup> The Commission concluded that

The pollution problem must be considered not only on the basis of present-day conditions but also in terms of the future. Facilities for the treatment of municipal sewage must incorporate sufficient flexibility to permit of ready expansion to satisfy future demands. In-

<sup>70</sup> Treaty between France and Italy, Dec. 17, 1914, Art. 1, *Basdevant*, 3 *Traités* 810; Treaty between Dominican Republic and Haiti, Feb. 20, 1929, Art. 10, 105 L.N. Treaty Series 216.

<sup>71</sup> "Each Party declares its intention to prevent, as far as is practicable, undue pollution of the waters of the Rivers . . . and agrees to take all reasonable measures to ensure that, before any sewage or industrial waste is allowed to flow into the Rivers, it will be treated, when necessary, in such manner as not materially to affect those uses." Treaty between India and Pakistan, Sept. 19, 1960, Art. 3(2) (emphasis added). The text of the treaty may be found in 55 A.J.I.L. 797 (1961).

<sup>72</sup> Treaty with Mexico, May 21, 1906, Art. 5; Boundary Waters Treaty with Great Britain (on behalf of Canada), Jan. 11, 1909, Art. 2, *loc. cit.* note 19 above.

<sup>73</sup> Report of the International Joint Commission (United States and Canada) on the Pollution of Boundary Waters 165 (1951).

dustrial waste disposal programs must not only provide adequate treatment for the present, but they must ensure that new industries or new industrial processes which may be established will not jeopardize the rights of users of these waters.<sup>74</sup>

It indicated how extensive might be damage from a relatively small polluting source,<sup>75</sup> and how varied are the sources and results of pollution.<sup>76</sup> The Commission found it impossible to determine accurately the relative responsibilities of the United States and Canada for trans-boundary pollution.<sup>77</sup> It made specific recommendations for the suppression of clearly avoidable pollution, such as the carrying by vessels of sewage retention tanks, the avoidance of "slugs" ("release of a volume of highly concentrated polluting material over a short period of time") by industries using intermittent operations, and the selection of dumping grounds for dredging operations, which would not result in the trans-boundary travel of the dumped material.<sup>78</sup> In general, however, it was stated that a series of specific water-quality objectives had to be formulated to define the remedial measures necessary for preventing pollution. Each purpose for which water was used required a specific quality of water.<sup>79</sup> Above all, the "large volume of water flowing between the United States and Canada should be regarded as a natural resource to be shared by both countries."<sup>80</sup>

<sup>74</sup> *Ibid.* at 172.

<sup>75</sup> "One-tenth of one part per million of phenol alone will impart to the water the characteristic taste and odor of carbolic acid. In water supplies which are chlorinated to protect against bacterial pollution phenol reacts with chlorine to produce intensely aromatic compounds. These compounds, even when highly diluted, give to the water tastes and odors which are variously described as medicinal, chemical or iodoform. Two one-thousandths of one part of phenol in one million parts of chlorinated water (2 p.p.b.) may be sufficient to cause objectionable tastes and odors. This condition often compels the public to resort to other water supplies, which may be palatable but dangerously contaminated." *Ibid.* at 167-168.

<sup>76</sup> "Property has been injured through the discharge of sewage and industrial wastes. . . . Wastes containing oils, greases or tars have fouled bathing beaches, coated swimmers, and caused destruction of wildfowl. Any concentration of oil coats the hulls of boats and docks and creates a fire hazard. Phenols from industrial wastes interfere with the enjoyment of property rights by increasing the cost of water treatment or by excluding the use of water for industrial or domestic purposes. Phenol in water kills fish by producing paralysis of the neuromuscular mechanism and hemolizing the blood. . . . In addition to municipal and industrial effluents, these waters receive wastes from navigation, dredging, and careless dumping of refuse at shore points." *Ibid.* at 168-169.

<sup>77</sup> "Since waste discharges tend to diffuse and become diluted with the receiving waters, it is difficult to trace a specific effluent over the distance required to dissipate its potency. Added dilution through travel downstream and the admixture of similar or other deleterious materials further complicate this difficulty. The intermingling is also influenced by winds, bends in the river, islands or other obstructions, and navigation channels. These effects may not be constant. Under these circumstances it is not feasible to state, in exact terms, the amount of pollution which crosses from each country to the other." *Ibid.* at 166. See also Christ, "Assessment of Economic Damage caused by Water Pollution," ECE/Water Poll./Conf./26 (1961).

<sup>78</sup> Report of International Joint Commission (United States and Canada) on the Pollution of Boundary Waters 173-174 (1951).

<sup>79</sup> *Ibid.* at 169-170.

<sup>80</sup> *Ibid.* at 171.

The two governments concerned subsequently approved the recommendations of the Commission for the adoption of specific objectives for boundary waters quality control, and agreed to continue supervision by international control boards and appropriate national authorities.<sup>81</sup>

The International Joint Commission did not, of course, assess the legal significance of its conclusions. Certain aspects of its report are, however, illuminating for the development of international law, and it will be necessary to return to them later. In particular, the following points may be emphasized:

(a) The high contracting parties to the 1909 Treaty found it necessary to implement the general provision against pollution by establishing a Joint Commission, and ultimately recognized the need for specific criteria for water-quality control.

(b) The Commission, while singling out certain practices for explicit condemnation, generally relied upon the formulation of a complex set of water objectives for the solution of the problem.

(c) Pollution changed considerably in character in accordance with increasing industrialization. Any controlling criteria therefore had to be dynamic.

(d) The effects of pollution varied greatly. The presence of tiny quantities of certain polluting sources could cause extensive damage. Some sources permanently excluded the use of water; others made the expense of abatement prohibitive.

(e) The Commission could not accurately apportion the responsibility of the riparian states for pollution of the boundary waters.

#### IV. FEDERAL ANALOGIES

It is elementary that there is a major difference between the river disputes of unitary and federal states, since sovereignty is involved in the former as is not in the latter.<sup>82</sup> Nevertheless, even though federal States are not sovereign in international law, they possess many of the attributes of sovereignty.<sup>83</sup> As has been seen, the Tribunal in the *Trail Smelter* case expressly assimilated federal and unitary states, in considering the problem of international pollution, and cited United States decisions as authority in its reasoning.<sup>84</sup> Moreover, the United States Supreme Court

<sup>81</sup> 25 Dept. of State Bulletin 947 (1951).

<sup>82</sup> "[L] a posizione rispettiva dei cantoni, sottoposti all'autorità federale, e ben diversa da quella degli Stati, e tale differenza non permette di trarre deduzioni dall'uno all'altro campo senza estrema circospezione. Per la stessa ragione hanno un valore assai relativo e più che altro come indicazione di possibili futuri sviluppi di diritto internazionale le opere tedesche sul diritto delle acque che si occupano anche delle questioni concernenti i rapporti fra gli Stati dell'impero. . . ." Anzilotti, "Atti Internazionali, Convenzione con la Francia per l'Utilizzazione delle Acque del Fiume Roja e Suo Affluenti," 9 *Rivista di Diritto Internazionale* 269 (1951).

<sup>83</sup> Schindler, "The administration of justice in the Swiss Federal Court in inter-cantonal disputes," 15 *A.J.I.L.* 149, 155 (1921).

<sup>84</sup> *The Trail Smelter (United States v. Canada)*, 3 *Int. Arb. Awards* 1905, 1965 (1949).

has regarded itself as interpreting international as well as Federal law, in deciding interstate river disputes.<sup>85</sup>

[T]here is nothing in the interests protected by international law which is fundamentally different from those protected by municipal and private law. . . . [B]etween individuals, autonomous groups, and States there is a legal difference of degree only.<sup>86</sup>

There are dangers which must be avoided in this resort to analogy. The absence of the same considerations of sovereignty in municipal as in international law has been mentioned. There is also the temptation to analogize on the basis of similar terminology, without ascertaining whether the underlying principles of the two bodies of law are similar.<sup>87</sup> However, it is believed that there are sufficient similarities of principle in this area to justify reference to Federal sources. Such reference is not intended to indicate existing rules of customary international law, of course, but to suggest potential developments *de lege ferenda*.

United States Federal law provides the richest source of judicial decisions on interstate river disputes. Despite the fact that the States of the Union are only "quasi-sovereign," the Supreme Court has treated them in these disputes very much as though they were sovereign states. It has regarded a State, seeking an injunction restraining a neighboring State or its citizens from causing trans-boundary injury, as acting *parens patriae* "to protect the general comfort, health, or property rights of its inhabitants."<sup>88</sup> It has never accepted extreme claims to territorial sovereignty or integrity, and has required that injury be of serious magnitude before granting an injunction to one State against another.<sup>89</sup> The Court has refused to grant injunctions which would prohibit a State from damaging another State in the future, by pollution or otherwise,<sup>90</sup> whereas it has intervened on behalf of a State which sought equitable apportionment of the use of the interstate water resources.<sup>91</sup> However, where a State sought an injunction against a private corporation rather than another State, to restrain out-of-State activities which caused trans-boundary damage by pollution, the injunction was granted, in accordance

<sup>85</sup> "Sitting, as it were, as an international, as well as a domestic tribunal, we apply Federal law, State law, and international law, as the exigencies of the particular case may demand." *Kansas v. Colorado*, 185 U. S. 125, 146-147 (1902); *North Dakota v. Minnesota*, 263 U. S. 365, 372-373 (1923).

<sup>86</sup> Lauterpacht, *Private Law Sources and Analogies of International Law* 71 (1927).

<sup>87</sup> "[T]he true view of the duty of international tribunals in this matter [of private law analogies] is to regard any features of terminology which are reminiscent of the rules and institutions of private law as an indication of policy and principles rather than as directly importing these rules and institutions." *Status of South West Africa Case*, [1950] I.C.J. Rep. 148, *per Judge McNair*.

<sup>88</sup> *North Dakota v. Minnesota*, 263 U. S. 365, 375 (1923).

<sup>89</sup> *Missouri v. Illinois*, 200 U. S. 496, 521 (1906); *New York v. New Jersey*, 256 U. S. 296, 309 (1921); *North Dakota v. Minnesota*, 263 U. S. 365, 374 (1923).

<sup>90</sup> *Missouri v. Illinois*, 200 U. S. 496 (1906); *New York v. New Jersey*, 256 U. S. 296 (1921); *Connecticut v. Massachusetts*, 282 U. S. 660 (1931).

<sup>91</sup> *Wyoming v. Colorado*, 259 U. S. 419 (1922); *New Jersey v. New York*, 283 U. S. 336 (1931); *Nebraska v. Wyoming*, 325 U. S. 589 (1945).

with the State's protective rôle towards its inhabitants.<sup>92</sup> In this last case, it was clearly easier to grant injunctive relief, since only one State was a party. Where two or more States are parties and the claim is reasonable, the Court has attempted to balance the conflicting uses of the interstate waters, and its approach has been characterized by realism and relativity.<sup>93</sup>

European federal courts have recognized similar principles. In several Swiss intercantonal decisions, the doctrine *sic utere tuo* was upheld against unreasonable trans-boundary encroachment.<sup>94</sup> The German court expressly applied rules of international law in a dispute between Württemberg and Baden over the lowering of the level of the Danube, in which Württemberg sought prohibition of the construction of certain works by Baden.<sup>95</sup> It stated that:

the exercise of sovereign rights by every State in regard to international rivers traversing its territory is limited by the duty not to injure other members of the international community.

The function of the court was to weigh the advantage accruing to the defendant state against the injury to the plaintiff state,<sup>96</sup> and, in view of the common interests of citizens of both states, each had a negative duty "to abstain from altering the flow of the river to the detriment of its neighbors," and a positive duty "to do what civilized States nowadays do in regard to their rivers."<sup>97</sup> The Italian Court of Cassation has also recognized the principle *sic utere tuo*, though it is unclear whether the basis of its reasoning was international law or *comitas gentium*.<sup>98</sup>

It is not relevant in this article to consider the various forms of municipal regulation of pollution which have been attempted.<sup>99</sup> However, it should be noticed that, in the Federal interstate context in the United States, regulatory machinery has been established in a series of interstate compacts.<sup>100</sup> These compacts create interstate commissions, and contain

<sup>92</sup> *Georgia v. Tennessee Copper Company*, 206 U. S. 230, 237 (1907).

<sup>93</sup> *Nebraska v. Wyoming*, 325 U. S. 589, 618 (1945). See also Note on "What Rule of Decision Should Control in Inter-State Controversies?", 21 *Harvard Law Rev.* 132 (1907); Barnes, "Suits between States in the Supreme Court," 7 *Vanderbilt Law Rev.* 494 (1954); Heady, "Suits by States within Original Jurisdiction of the Supreme Court," 26 *Washington U. Law Q.* 61 (1940); Forer, "Water Supply: Suggested Federal Regulation," 75 *Harvard Law Rev.* 332 (1961).

<sup>94</sup> Schindler, *loc. cit.* note 83 above, at 172-173.

<sup>95</sup> *Württemberg and Prussia v. Baden*, [1928] *Ann. Dig.* 128, 130 (No. 86) (German Staatsgerichtshof).

<sup>96</sup> *Ibid.* at 131.

<sup>97</sup> *Ibid.* at 132.

<sup>98</sup> *Société Energie Electrique du Littoral Méditerranéen v. Compagnia Imprese Elettriche Liguri*, [1940] *Ann. Dig.* 121 (No. 47) (Italian Court of Cassation).

<sup>99</sup> See, e.g., Fischerhof, "Liability for Damage through Water Pollution in Municipal and International Law," *ECE/Water Poll./Conf./8* (1960), for summary of relevant municipal practice.

<sup>100</sup> E.g., New England Pollution Control Compact, 1947; New York Harbor (Tri-State) Interstate Sanitation Compact, 1935; Ohio River Valley Water Sanitation Compact, 1939; Potomac River Compact, 1939; Red River of the North Compact, 1937; Delaware River Basin Compact, 1961. These are conveniently collected in Documents



elaborate standards for the guidance of the commissions. The New England Pollution Control Compact, 1947, Article 5, is typical of the approach of these agreements to the pollution problem. It recognizes the impossibility of framing simple standards of water quality in view of the variety of uses and abuses to which rivers are subject, but recommends that the Commission shall establish "reasonable physical, chemical and bacteriological standards of water quality satisfactory for various classifications of use."<sup>101</sup>

It seems these examples of Federal practice are of only cumulative value in adding to what has already been stated. The judicial decisions purport to be based upon international as well as municipal law, and certainly their reasoning closely resembles the writings of the majority of publicists. In particular, they recognize the principle *sic utere tuo*, and apply it as a compromise between territorial sovereignty and territorial integrity, according to notions of equitable apportionment. Federal courts intervene only when the harm complained of is of serious magnitude, though it seems likely that they will be more willing to grant injunctive relief where a State is seeking a remedy against a private person or corporation. In the United States, the existence of a number of interstate compacts is evidence of the need for continuing discretionary regulation in this area, to keep pace with the ever-changing problems of pollution in industrial society. Thus, despite the existence of a Supreme Court with compulsory jurisdiction, the States of the Union have found it useful to provide administrative as well as judicial regulation of the pollution of interstate rivers. There has also been recognition of the dynamic and complex nature of the problem in the formulation of water-quality objectives.

## V. CONCLUSIONS

Some tentative conclusions will now be hazarded concerning the control of river pollution by international law. They are offered with some diffidence, *de lege ferenda*, for the present inquiry should at least have exposed the primitive stage of development of existing international river law. It can be stated confidently, *de lege lata*, that the Harmon Doctrine is not a generally recognized principle of international law, and that there is liability for action incompatible with the general principle *sic utere tuo*. The doctrines of neighborhood, abuse of rights, servitudes, and equitable apportionment stress elements which should be taken into account in the elaboration of river law, but they themselves do not provide specific legal norms.

Pollution problems appear to change in character as societies become more industrial. An international river which was hitherto been used for a few compatible purposes becomes, in a modern state, subject to

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on the Use and Control of the Waters of Interstate and International Streams (U. S. Dept. of the Interior, ed. Witmer, 1956).

<sup>101</sup> Cf. New York Harbor (Tri-State) Interstate Sanitation Compact, Art. 6(1), 1935; Ohio River Valley Water Sanitation Compact, Art. 6, 1939.

complex and conflicting uses which must somehow be reconciled. Riparian states depend more heavily upon water resources, and the complexity of their needs makes them interdependent. Industrial and chemical pollution can cause enormous damage from relatively small polluting sources, and yet, within a river basin, it may be impossible to allocate responsibility for injury among the several riparian states. When abatement schemes are proposed, contribution payments have to be assessed on the basis of factors which are complicated and fluctuating. The changing uses of the river by riparians may demand dynamic rather than static water-quality objectives. In this complex situation, a regulatory rather than an adjudicative process would seem appropriate. An international administrative agency, with the power of continuing discretion, would have sufficient flexibility to cope with such problems. It is doubtful whether a forum of third-party adjudication could provide suitable remedies, even if it could adequately assess responsibility in legal terms. "A man dying of thirst cannot be revived with monetary compensation for his water, even when tendered in advance."<sup>102</sup> And similarly, it is doubtful whether injunctive relief could provide sufficient flexibility and compromise. It would clearly be inappropriate to prohibit *any* use resulting in trans-boundary injury, but it would also seem impossible for a tribunal to frame and enforce water-quality objectives related to future uses, which cannot be anticipated. For these reasons many publicists have advocated the establishment of regional commissions to control the use of international rivers. The International Joint Commission's work in regulating the United States and Canadian boundary waters is an excellent example of the value of such administrative machinery. United States interstate compacts and the entire trend of municipal law in technologically developed states towards administrative regulation, provide further evidence of the necessity for the exercise of continued discretion in controlling complex uses of natural resources.<sup>103</sup> The refusal of states to recognize legal liability, when paying compensation for injury, or contributions to the cost of abatement, may be seen as an illustration of the inadequacy of third-party adjudication to settle disputes of this nature. There is recognition that there should be payment, but states are unwilling to be bound by relatively inflexible legal precedent. It is submitted, therefore, that it is important to separate disputes for the solution of which legal rules are appropriate, from those for which administrative regulation is preferable. Such a separation has been made in municipal law, and should be made in international law, which would be strengthened if it were invoked where it could provide effective remedies, rather than in every international dispute.

However, if it is weakening to invoke international law indiscriminately,

<sup>102</sup> Laylin and Bianchi, "The Role of Adjudication in International River Disputes," 53 A.J.I.L. 30, 31 (1959).

<sup>103</sup> It has recently been suggested that Federal decisions and interstate compacts in the United States do not provide sufficient continuing discretion for the efficient use of national water resources, and that a Federal regulatory agency should therefore be created. Forer, "Water Supply: Suggested Federal Regulation," 75 Harvard Law Rev. 332, 347-349 (1961).

it is undermining the basis of law to suggest that all international disputes over the economic use of international rivers should therefore be decided by regional commissions. There will be many cases of extraterritorial injury by pollution which will not require administrative regulation. Where, for example, an international river is subject to simple, defined uses, and is not part of a complex integrated basin, pollution of the waters may be the subject of adjudication, and there seems no reason why international law should be incapable of furnishing adequate controlling rules and principles. The development of effective international law depends upon its reasoned and consistent elaboration. It is important that there should be such elaboration for this type of extraterritorial injury.

The need for the development of law to govern simple cases of river pollution may be emphasized by considering the alternatives available to a national of state X, who is damaged by pollution of a river by nationals of state Y. He may seek a remedy in the courts of state Y, though he will then suffer inconvenience and expense, and will have great difficulty in obtaining evidence of the cause of damage in state Y. The rules of private international law exist to mitigate the hardships of having to bring suit in an inconvenient forum. Thus, the plaintiff could normally seek a remedy in the courts of state X, and the forum would apply the *lex loci delicti commissi*. However, the plaintiff seeking a remedy in state X for damage caused by international river pollution would not only face the difficulty of proof of causation when the source of pollution was out-of-state. Normally he would also be claiming against a defendant who was and always had been outside the state of the forum. Therefore, the injured individual's only hope of recovery would be to persuade his government to espouse his claim as a matter of international law.

Damage to territory has traditionally been regarded as a direct injury to the state, and territorial injury has been characterized as incurring state-to-state responsibility, rather than state-to-individual responsibility, because the international wrong "occasioned direct pecuniary loss" to the plaintiff state.<sup>104</sup> Since the requirement of exhaustion of local remedies would be peculiarly burdensome where the individual plaintiff had been injured by out-of-state pollution, the wrong complained of is held to incur state-to-state responsibility, and exhaustion of local remedies is not required.<sup>105</sup> It becomes especially important, therefore, to define primary state obligations and appropriate remedies, since no other body of law can deal adequately with the problems raised by simple pollution of international rivers.

There is considerable controversy regarding the existence of strict liability for extraterritorial damage caused by pollution without proof of reckless or negligent conduct by the defendant state. García Amador

<sup>104</sup> Sohn and Baxter, *Convention on the International Responsibility of States for Injuries to Aliens* (Draft No. 12, with Explanatory Notes) 46 (1961).

<sup>105</sup> "The principal significance of the distinction between . . . State-to-individual and State-to-State responsibility is that the exhaustion of local remedies is required in the first case but not in the second." *Ibid.* at 49.

contends that the *Trail Smelter* and *Japanese Fishermen* cases were examples of breach of a state's duty "to ensure that in its territory conditions prevail which guarantee the safety of persons or property."<sup>106</sup> Sohn and Baxter recognize that strict liability might arise as the result of the violation of a treaty or "as the result of violations of boundaries or of extra-hazardous activities, by analogy to the municipal law relating to these subjects." They doubted, however, whether the two cases referred to above were sufficient "to establish a rule of law."<sup>107</sup> Several authorities deny the existence of such liability.<sup>108</sup> It is submitted that Fitzmaurice's formulation is especially question-begging, for he doubted "whether responsibility could arise as the result of objective risk," in other words, if no breach or non-observance of international law was involved, and concluded with an "emphatic negative."<sup>109</sup>

There has been recent recognition of strict liability for damage caused by nuclear fuel or radioactive products or waste from nuclear reactors.<sup>110</sup> In the Convention on Third Party Liability in the Field of Nuclear Energy between Members of the Organization for European Economic Co-operation, the principle has been applied to nuclear risks of an exceptional character.<sup>111</sup> The magnitude of potential damage, the difficulty of establishing responsibility for the injury, and the injury and the possibility of multiplicity of suits, are factors encouraging the solution contained in the convention. It should be observed that similar considerations are present to a lesser extent in the case of the complex integrated river basin, and it is possible that there also the tendency will be to adopt notions of compensation rather than culpability. However, outside the special area of nuclear activity, there is no acceptance at present of the doctrine of strict liability, as was indicated in the *Corfu Channel* decision. Indeed definitions of pollution during the past fifty years have shifted away from absolute prohibitions to use of relative standards.<sup>112</sup>

<sup>106</sup> García Amador, 2 I.L.C. Yearbook [1957] 106.

<sup>107</sup> Sohn and Baxter, Draft Convention on the International Responsibility of States for Injuries to Aliens, Prep. Docs. Nos. 24-36 at 4(9-10) (1959).

<sup>108</sup> Eagleton, The Responsibility of States in International Law 77 (1928); 1 Oppenheim, International Law 343 (8th ed., Lauterpacht, 1955); *Corfu Channel Case* (Merits), [1949] I.C.J. Rep. 3, 18.

<sup>109</sup> Fitzmaurice, 1 I.L.C. Yearbook [1957] 164.

<sup>110</sup> "There is . . . good authority for saying that the doctrine of risk . . . i.e., liability independent of any proof of carelessness for created hazards, has already been accepted in the countries of Euratom and of the Organization for European Economic Co-operation in the case of nuclear dangers . . . [A]mple support may be found among the 'general principles of law recognized by civilised nations', to suggest that in any such case no court, international or municipal, could do otherwise than impose strict liability." Hardy, "International Protection against Nuclear Risks," 10 Int. and Comp. Law Q. 789 at 758-759 (1961).

<sup>111</sup> Berman and Hydeman, "A Convention on Third Party Liability for Damage from Nuclear Incidents," 55 A.J.I.L. 966, 968 (1961). The text of the convention is given *ibid.* at 1082.

<sup>112</sup> Cf. 1911 Madrid Resolution, *op. cit.* note 16 above: "Every alteration of water which constitutes a nuisance, every diversion of polluting substances . . . is forbidden"; Declaration of Montevideo, 7th Int. Conf. of American States (1933):

This shift towards relative standards reflects the need for compromise in the use of international rivers by riparian states. The necessity to accommodate conflicting uses does not eliminate the possibility of the adoption of strict liability for pollution. International river law could offer compromise either by taking cognizance only of serious damage resulting from pollution and then imposing strict liability, or by taking note of less serious injury but placing the burden of proof upon the defendant state to show that it was not lacking in due care in the regulation of international waters within its territory. It has been stated that the former method of imposing strict liability for serious damage "would greatly simplify the solution of the pollution problem in international law."<sup>113</sup> On the other hand, strict liability would be imposed upon a state only with great reluctance in extreme cases, and therefore its adoption as the applicable norm would severely restrict the scope of international law. In view of the inability of private international law to provide satisfactory remedies for the injured plaintiff in cases of international pollution, this would seem an undesirable limitation, and the imposition of strict liability would be better reserved for exceptional cases, such as pollution as the result of nuclear activity.

If, then, in the majority of cases, the plaintiff starts with the presumptive rule in his favor that every state is bound to use its rivers in such a manner as not to injure territory of riparian states, the burden will fall upon the defendant state to establish some appropriate defense. The presumption in favor of the plaintiff would seem reasonable, in view of its difficulties in obtaining necessary evidence, and the fact that, at least *prima facie*, there had been some violation of its territorial integrity. However, it would also seem reasonable that the plaintiff should show at the outset that there had been substantial injury, since "one of the conditions of the good neighbor principle is the duty to overlook small, insignificant inconveniences,"<sup>114</sup> and a state should not be permitted to bring an international claim without serious cause. It is true that it has been suggested that damage might be recovered, even where no pecuniary loss had resulted to a state or its nationals, as "a means of declaring which of the two contending parties was acting consistently with the

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"No State may, without the consent of the other riparian State, introduce into watercourses of an international character, for the industrial or agricultural exploitation of their waters, any alteration which may prove injurious to the margin of the other interested State"; I.L.A. Comm. 1st Rep. (1956): "Preventable pollution of water in one State which does substantial injury to another State renders the former State responsible for the damage done"; I.L.A. Comm. 2d Rep. (1958): "A riparian is under a duty not to increase the level of pollution of a system of 'international' waters to the detriment of a co-riparian." The most recent definition appears to adopt an absolute rather than relative approach.

<sup>113</sup> Manner, "Water Pollution in International Law," EOE/Water Poll./Conf./12, p. 19 (1961).

<sup>114</sup> Jiminez, "International Legal Rules Governing Use of Water from International Watercourses," 2 Inter-American Law Rev. 329, 332 (1960).

law,"<sup>115</sup> but it is submitted that, in the area of the economic use of international rivers, the need for reasonable compromise is greater than purely formal definitions of legal rights, and that serious injury should therefore be shown before an international claim be recognized. The burden will fall upon the defendant state by implication from its exclusive sovereign jurisdiction over waters flowing within its territory, but it is not sufficient for the plaintiff to show an alteration in the quality or quantity of water without also showing serious consequent injury.

The minimum duty demanded of the defendant state in international law would surely be "to require that its citizens observe provisions which are otherwise enforced in its territory to prevent pollution."<sup>116</sup> Where a state's regulation of its rivers falls below what is customarily regarded as reasonable by the majority of members of the international community, it is likely that its own standard would not be considered adequate for the international minimum standard. A difficult problem would, however, arise where the river, which had been polluted, was so insignificant as to be of a kind usually not stringently controlled by other states.

The defendant state, in attempting to establish an appropriate defense, could, with justification, usually plead that a number of factors be taken into consideration. In assessing the degree of injury to the plaintiff an international tribunal might be asked to balance the needs of the states concerned. It would take into account the benefits to the plaintiff of use of the waters and the standard of care which it demanded from its own nationals in the use of domestic rivers. Absence of protest by the plaintiff against continuous and long use of the river as a sewer by the defendant, might be evidence of lack of sufficient injury to the plaintiff, though it is unlikely that such acquiescence would be held to have created a permanent prescriptive right in the defendant to continue to pollute the river. In addition, where "one of the parties wishes to change the existing legal situation on the ground that it is inequitable and contrary to objective justice," the tribunal might have power to render a judgment *ex aequo et bono*, after weighing the relative interests of the parties.<sup>117</sup> Indeed, it would seem that in most cases of international pollution the tribunal would necessarily give its decision in terms of the equitable interests of both parties, unless the injury complained of was an isolated incident or was done deliberately or recklessly. The continuing interests of the riparian states in use of the international waters would have to be taken into account in the judicial assessment of the merits of the case. It was stressed earlier that, as the uses of the river become more complex and interdependent between the riparian states, it would appear appropriate for considerations of compensation and efficiency of exploitation to replace

<sup>115</sup> Sohn and Baxter, *op. cit.* note 107 above, at 48. *Contra*: Parry, "Some Considerations upon the Protection of Individuals in International Law," 90 *Hague Academy Recueil des Cours* 657, 689 (1956).

<sup>116</sup> Manner, *loc. cit.* note 113 above, at 18. *Cf.* U.N. Doc. E/EOE/311, par. 68.

<sup>117</sup> Habicht, *The Power of the International Judge to give a Decision "ex Aequo et Bono"* 79 (1935).

more simple questions of culpability and responsibility. It may become impossible to allocate responsibility; problems of framing water-quality objectives and assessing fair apportionment between the parties of abatement costs may demand a continuing future discretion which the adjudicative process will be unable to provide. The perception of the areas in which legal rules are appropriate or inappropriate is vital to the healthy development and elaboration of international law.

It is hoped that this article indicates adequately that there is not only a suitable but an essential place for elaborated legal rules to govern cases of international river pollution. Despite the growth of international economic organization, there has not been a comparable development of international law. As the need for the efficient and co-operative use of the world's natural resources increases, problems of extraterritorial economic injury are likely to become more important. In this respect river pollution is part of a much larger problem. It is believed, however, that neither the broad nor the more narrow questions raised can be solved unless distinctions between adjudicative and administrative functions are made. It is also thought that international law could adequately control those problems of river pollution which lend themselves to adjudication, and that elaboration of legal norms, perhaps in the way suggested here, would be of increasing value in the growing complexity of international economic activity.

## OUTER SPACE CO-OPERATION IN THE UNITED NATIONS

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There is widespread interest in the United Nations in fostering international co-operation in outer space for two basic reasons: first, to maximize co-operation between the two major space Powers despite their political differences; and second, to encourage the increased peaceful uses of outer space to benefit all countries irrespective of the stage of their economic or scientific development. Countries realize that activities going forward in outer space—satellites helping to forecast the weather, to increase communications, to improve navigational conditions, to test for radioactivity, to do basic research—will all make their impact on everyone on this earth with increasing force.

### I. UNITED NATIONS COMMITTEE

The space age began on October 4, 1957, when the first satellite was orbited by the U.S.S.R. Four months later, on January 31, 1958, the United States launched its first satellite. At the next United Nations General Assembly, an *Ad Hoc* Committee on the Peaceful Uses of Outer Space was established on December 13, 1958, consisting of 18 countries, including the United States and the Soviet Union.<sup>1</sup> Its first session was held in May and June of 1959 and produced a useful account of current activities in outer space.<sup>2</sup> Some of the suggestions of this session provided a basis for follow-up action later in the United Nations. However, only 13 of the 18 countries on the Committee attended this session. Czechoslovakia, Poland and the Soviet Union refused to attend, expressing dissatisfaction with the composition of the Committee. India and the United Arab Republic also did not attend.<sup>3</sup> At the following 1959 U.N. General Assembly, with both the United States and the Soviet Union agreeing, the Committee was enlarged to 24 members, and it was renamed the Committee on the

<sup>1</sup> Res. 1348 (XIII). On U.N. discussions with respect to outer space in 1958, see Taubenfeld, 53 A.J.I.L. 400-405 (1959). On background material on legal problems relating to outer space, see a compilation entitled "Legal Problems of Space Exploration: A Symposium," prepared for the use of the Committee on Aeronautical and Space Sciences, U. S. Senate, 87th Cong., 1st Sess., March 22, 1961. For outer space documentation generally, see a compilation entitled "Documents on International Aspects of the Exploration and Use of Outer Space, 1954-1962," Staff Report prepared for the Committee on Aeronautical and Space Sciences, U. S. Senate, 88th Cong., 1st Sess., Doc. No. 18, May 9, 1963.

<sup>2</sup> U.N. Doc. A/4141.

<sup>3</sup> For consideration of this 1959 session of the Committee, see Jessup and Taubenfeld, 53 A.J.I.L. 877-881 (1959).



Peaceful Uses of Outer Space.<sup>4</sup> However, because of differences between the United States and the Soviet Union concerning administrative arrangements for the Committee, it was not convened during the next two years except for a brief meeting at the end of November, 1961.<sup>5</sup>

President Kennedy in his address before the U.N. General Assembly on September 25, 1961, urged increased co-operation among countries concerning outer space.<sup>6</sup> He stated:

... we shall urge proposals extending the United Nations Charter to the limits of man's exploration in the universe, reserving outer space for peaceful use, prohibiting weapons of mass destruction in space or on celestial bodies, and opening the mysteries and benefits of space to every nation. We shall further propose co-operative efforts between all nations in weather prediction and eventually in weather control. We shall propose, finally, a global system of communications satellites linking the whole world in telegraph and telephone and radio and television. The day need not be far away when such a system will televise the proceedings of this body to every corner of the world for the benefit of peace.

On United States initiative, the 1961 session of the General Assembly adopted Resolution 1721 on December 20, setting forth certain basic principles, calling for the exchange of information, outlining a program of action relating to meteorological and communications satellites, and requesting the Committee on the Peaceful Uses of Outer Space to meet not later than March 31, 1962.<sup>7</sup>

This resolution was in five sections. First, it set forth the following two principles: (a) International law, including the Charter of the United Nations, applies to outer space and celestial bodies; and (b) Outer space and celestial bodies are free for exploration and use by all states in conformity with international law and are not subject to national appropriation.

Second, the resolution called on states launching objects into orbit or beyond to furnish information promptly to the Committee on the Peaceful Uses of Outer Space, through the Secretary General, for the registration of launchings. The Secretary General was asked to maintain a public registry of this information. Information provided by the United States and the Soviet Union on objects launched by them has been circulated by the Secretary General.<sup>8</sup> The Secretary General has, in addition, circu-

<sup>4</sup> Res. 1472 (XIV).

<sup>5</sup> U.N. Docs. A/4749 and A/4987; Report of U. S. Participation in the United Nations for 1960, pp. 28-29 (Dept. of State Pub. 7341); and *ibid.* for 1961, pp. 39-40 (Pub. 7413).

<sup>6</sup> 45 Dept. of State Bulletin 619 (1961).

<sup>7</sup> Res. 1721 (XVI). Gen. Assembly, 16th Sess., Official Records, Supp. No. 17 (Doc. A/5100), pp. 6-7; 56 A.J.I.L. 946 (1962). See generally, Richard N. Gardner, "Co-operation in Outer Space," 41 Foreign Affairs 344-359 (1962).

<sup>8</sup> This information has been published by the United Nations in U.N. Docs. A/AC.105/INF. 1-42 (through Aug. 18, 1963). The United States pointed out in a letter to the Secretary General on Aug. 18, 1963, that the information provided thus far to the Secretary General "comprises a complete registry of all United States vehicles in orbit or beyond as of June 15, 1963." U.N. Doc. A/AC.105/INF. 42. In a letter to the

lated information submitted by 39 countries concerning outer space activities being undertaken by them. Some of these replies, such as those of France, the United Kingdom and the United States, provide considerable information, and others, such as those of Burma, Cambodia, Ceylon and Cyprus, report that they have no information to submit.<sup>9</sup> The Soviet Union has not responded.<sup>10</sup> Nigeria indicated its interest in three aspects of outer space: the feasibility of satellite communications, meteorological data from outer space activities, and the possible interest of the University of Ibadan in outer space research.

Third, the resolution recommended that increased attention be given to improving weather forecasting capabilities and advancing atmospheric science and technology.

Fourth, the resolution stressed the importance of communications satellite development proceeding as rapidly as possible on a global and non-discriminatory basis.

Fifth, the resolution added four more countries to the Committee to increase its membership to 28 in recognition of the increase in the membership of the United Nations during the previous two years.

With the impetus of unanimous action in the 1961 session of the U.N. General Assembly approving Resolution 1721, the Committee on the Peaceful Uses of Outer Space convened in March, 1962, at U.N. Headquarters in New York. All 28 members attended. Its two Subcommittees of the whole, one on Scientific and Technical Questions and the other on Legal Questions, met in Geneva in May and June. The reports of these two subcommittees were reviewed by the full Committee in New York in September.<sup>11</sup>

There was unanimity in the Committee with respect to scientific and technical questions but sharp disagreement on legal questions. On scientific and technical matters, the Committee approved the recommendations of its Subcommittee, which:

- (1) encouraged further steps facilitating the exchange of information on national, regional and international programs in space;

- (2) urged that support be accorded to international programs under way such as the International Year of the Quiet Sun and the World Magnetic Survey;

- (3) asked Member states to increase national participation in international programs established by the Committee on Space Research (COSPAR) of the International Council of Scientific Unions (ICSU) for synoptic rocket and polar-cap experiments;

- (4) expressed appreciation for reports of the World Meteorological Organization (WMO) and the International Telecommunication Union

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Secretary General on June 6, 1963, the United States called attention to six space vehicles which were launched into earth orbit by the Soviet Union but not reported to the Secretary General for registration. The United States observed in its letter that "the United States submits information to the United Nations registry on *all* objects it launches into earth orbit or beyond." U.N. Doc. A/AC.105/15.

<sup>9</sup> U.N. Docs. A/AC.105/7 and Add. 1-3; and A/AC.105/11 and Add. 1 (May 1, 1963).

<sup>10</sup> As of May 1, 1963. *Ibid.*

<sup>11</sup> For the Report of the Committee, see U.N. Doc. A/5181.

(ITU) relating to meteorological satellites and communications satellites;

(5) recommended that the United Nations Educational, Scientific and Cultural Organization (UNESCO) assist Member states in the training of scientists and technicians through fellowships at leading observatories and institutions; and

(6) proposed that sounding rocket launching facilities be established under United Nations sponsorship.

The Committee noted that the Government of India was interested in being a host state for an international equatorial sounding rocket launching facility, on the understanding that the project would be sponsored by the United Nations and that the principal Powers concerned would co-operate.

Since no agreement on legal questions was reached in either the Subcommittee or the full Committee, five proposals on legal matters before the Committee were forwarded to the General Assembly.<sup>12</sup> Two of these were submitted by the Soviet Union, two by the United States and one by the United Arab Republic. The two from the Soviet Union were a draft Declaration of Basic Principles Governing the Activities of States Pertaining to the Exploration and Use of Outer Space, and a draft International Agreement on the Rescue of Astronauts and Spaceships Making Emergency Landings. The two from the United States were a draft Proposal on Assistance to and Return of Space Vehicles and Personnel, and a draft Proposal on Liability for Space Vehicle Accidents. The proposal of the United Arab Republic was a draft Code for International Co-operation in the Peaceful Uses of Outer Space.

The Soviet draft Declaration of Basic Principles repeated the two principles approved in the U.N. General Assembly resolution adopted in 1961, and proposed several additional principles to which the United States vigorously objected.<sup>13</sup> The following four Soviet proposals in its draft Declaration were particularly controversial:

(1) In paragraph 5 the Soviet Union proposed that the use of outer space for propagating war, national or racial hatred or enmity between nations be prohibited. The United States recalled the events of May, 1962, in the Disarmament Committee in Geneva concerning a draft declaration on war propaganda stemming from a proposal put forward by the Soviet Union, carefully negotiated in the Committee of the Whole, and approved by all the participants. When the declaration was, however, reported to the plenary session on May 29 for final action, the representative of the Soviet Union, acting on instructions from his government, had read a statement which repudiated the Soviet agreement to the declaration. In view of this recent history on the subject, the United States

<sup>12</sup> For the texts of these five proposals, see Annex III of U.N. Doc. A/5181.

<sup>13</sup> See statement of U. S. representative in the Legal Subcommittee of the U.N. Committee on the Peaceful Uses of Outer Space, June 7, 1962, discussing U. S. objections to the Soviet proposals. U.N. Doc. A/AC.105/C.2/SR. 7, pp. 7-11, and Documents on International Aspects of the Exploration and Use of Outer Space, 1954-1962, *op. cit.* note 1 above, pp. 269-273.

observed that there would be no useful purpose in discussing war propaganda in a forum which is concerned solely with outer space.

(2) In paragraph 6 the Soviet Union proposed that the implementation of any measure that might in any way hinder the exploration or use of outer space for peaceful purposes by other countries shall be permitted only after prior discussion of and agreement upon such measures between the countries concerned. The United States objected to this proposal as introducing the veto into outer space. As far as prior study and discussion of specific projects are concerned, the United States expressed the view that the Soviet proposal would not add usefully to action already taken by the ICSU Committee on Space Research in establishing a Consultative Committee for this purpose.

(3) In paragraph 7 the Soviet Union proposed that all activities of any kind pertaining to the exploration and use of outer space shall be carried out solely and exclusively by states. The United States opposed this limitation as unwarranted and unwise.<sup>14</sup>

(4) In paragraph 8 the Soviet Union proposed that "the use of artificial satellites for the collection of intelligence information in the territory of foreign states is incompatible with the objectives of mankind in its conquest of outer space." In opposing this proposal, the United States noted that international law imposed no prohibition on the observation of the earth from outer space. Such observation was described as peaceful in character and as not interfering with other activities on earth or in space. It might be performed by astronauts as explorers and scientists, by TIROS satellites for humanitarian public service purposes relating to weather prediction, and by other instrumentalities for such purposes as resource surveys, engineering and development projects, and the mapping of remote areas. In reply, the Soviet Union stated that "Espionage was undesirable and could not be confused with the gathering of scientific data."<sup>15</sup>

The United States and the Soviet Union agreed on the desirability of providing for assistance to space vehicles and their crews and their return, but they disagreed on the principles relating to this subject and the form of the instrument to be used, the United States favoring a simple declaration by the U.N. General Assembly, and the Soviet Union favoring the drafting of a treaty or international agreement. In addition, the United States objected to the limitations of Article 7 of the Soviet draft, which provided that space vehicles would be returned only if they have identification marks showing their national origin and the launching state had officially announced the launching. The United States also objected to the provision in this article which stated that space vehicles would not be returned if devices were discovered in the vehicles "for the collection of intelligence information in the territory of another State."

The United States draft Proposal on Liability for Space Vehicle Acci-

<sup>14</sup> Space activities are expected to be undertaken, for example, by the European Space Research Organization (ESRO) and the European Launcher Development Organization (ELDO).

<sup>15</sup> See statement of Soviet representative, U.N. Doc. A/AC.105/C.2/SR. 7, pp. 11-12.

dents proposed that a small panel of legal experts be established to prepare a draft of an international agreement dealing with the liability of states and international organizations for injury, loss or damage caused by space vehicles. The United States proposed that states or international organizations responsible for the launching of space vehicles be liable internationally for personal injury, loss of life, or property damage.

During the discussion of this proposal in the U.N. Committee on the Peaceful Uses of Outer Space on September 14, 1962, the United States representative, Ambassador Francis T. P. Plimpton, dramatically exhibited a metal object which landed on a street in Manitowoc, Wisconsin, on September 5.<sup>16</sup> Ambassador Plimpton explained that a laboratory analysis of the object showed that it was man-made and not a meteorite. It was of alloy steel and it had been in outer space for a considerable time. He pointed out that from its satellite tracking, the Smithsonian Astrophysical Laboratory had calculated that Sputnik IV, launched by the Soviet Union in May, 1960, would decay and re-enter the atmosphere about September 5, 1962, and that Manitowoc lay on one of its probable re-entry paths. A moon-watch team accordingly made observations in the area on the night of September 4-5 and observed the re-entry of a number of objects. The object found on a street in Manitowoc weighed about 20 pounds. Ambassador Plimpton added that this was not the first space vehicle fragment to return to earth, since parts of United States vehicles have also re-entered the atmosphere and landed on more than one occasion in the past. Although by far the greatest number of satellite components are believed to be consumed in the atmosphere on re-entry and do not reach the earth, Ambassador Plimpton noted that the tangible evidence he submitted showed the practical need to work out agreed rules and procedures for dealing with injury or damage caused by objects launched into outer space.

The draft Code for International Co-operation in the Peaceful Uses of Outer Space submitted by the United Arab Republic set forth a few general principles on the peaceful uses of outer space, the need for international co-operation, assistance to personnel of space vehicles who may be the subject of accident, and the return of space vehicles and their personnel.

On United States initiative at the 1962 session of the U.N. General Assembly, Resolution 1802 on outer space<sup>17</sup> was unanimously adopted on December 14, calling for further action in four general areas:

(1) The resolution asked the Committee on the Peaceful Uses of Outer Space to continue its work on the further elaboration of basic legal principles governing the activities of states in the exploration and use of outer space, on liability for space vehicle accidents, on assistance to and return of astronauts and space vehicles, and on other legal problems. The General Assembly referred to the Committee as a basis for this work

<sup>16</sup> U.N. Doc. A/AC.105/P.V. 14, pp. 56-57.

<sup>17</sup> Res. 1802 (XVII). U.N. Gen. Assembly, 17th Sess., Official Records, Supp. No. 17 (A/5217), p. 5.

legal proposals submitted thus far, that is, the two drafts of the Soviet Union, the two drafts previously submitted by the United States, plus an additional United States draft declaration of principles relating to the exploration and use of outer space,<sup>18</sup> the draft code submitted by the United Arab Republic and a draft declaration of basic principles governing the activities of states pertaining to the exploration and use of outer space submitted by the United Kingdom.<sup>19</sup> It was recognized that the Committee would in turn refer these drafts to its Subcommittee on Legal Questions to be convened in 1963.

(2) The resolution endorsed the basic recommendations of the report of the Committee on the Peaceful Uses of Outer Space.

(3) The resolution recommended an expanded program to strengthen meteorological services and research in the atmospheric sciences.

(4) The resolution emphasized the importance of international co-operation to achieve effective satellite communications to be available on a worldwide basis.

## II. UNITED STATES-SOVIET UNION CO-OPERATION

During discussions in the U.N. Committee on the Peaceful Uses of Outer Space in March, 1962, the representatives of the United States and the Soviet Union circulated the texts of letters between President Kennedy and Chairman Khrushchev concerning projects for common action in the exploration of space.<sup>20</sup> President Kennedy, in his State of the Union message of January 30, 1961,<sup>21</sup> had stated that his Administration intended to explore promptly all possible areas of co-operation with the Soviet Union and other nations "to invoke the wonders of science instead of its terrors." Specifically, he invited "all nations—including the Soviet Union—to join with us in developing a weather prediction program, in a new communications satellite program and in preparation for probing the distant planets of Mars and Venus, probes which may some day unlock the deepest secrets of the universe."

In his letter to Chairman Khrushchev in March, 1962,<sup>22</sup> President Kennedy suggested:

(1) the joint establishment of an early operational weather satellite system;

(2) the establishment and operation of radio tracking stations in each other's territories;

(3) co-operation in mapping the earth's magnetic field in space by utilizing two satellites, the United States to launch one of these and the Soviet Union to launch the other one;

(4) the participation by the Soviet Union in testing intercontinental communications by satellites;

(5) exchange of information concerning space medicine; and

(6) co-operation and the exchange of information concerning manned and unmanned space investigations.

<sup>18</sup> U.N. Doc. A/C.1/881.

<sup>20</sup> U.N. Docs. A/AC.105/1 and 2.

<sup>22</sup> U.N. Doc. A/AC.105/1.

<sup>19</sup> U.N. Doc. A/C.1/879.

<sup>21</sup> 44 Dept. of State Bulletin 207 (1961).

Chairman Khrushchev in his reply<sup>23</sup> agreed on the desirability of co-operation in the exploration and peaceful uses of outer space. He specifically mentioned all of the above areas except the establishment and operation of radio tracking stations in each other's territories. In addition, he urged the preparation of an international agreement for assistance in searching for and recovering space vehicles and a common approach to the solution of important legal problems. Chairman Khrushchev stated that his representatives would be prepared to discuss specific questions with the representatives of the United States.

As a follow-up of this exchange of letters, representatives of the two countries, Dr. Hugh L. Dryden, Deputy Administrator of the National Aeronautics and Space Administration (NASA), and Dr. A. A. Blagonravov, of the Soviet Academy of Sciences, met May 29 to June 8, 1962, in Geneva during the first sessions of the Scientific and Technical Subcommittee of the U.N. Committee on the Peaceful Uses of Outer Space. On June 8 a joint communiqué, issued by these two representatives of the United States and the Soviet Union, stated that they had discussed the possibilities of co-operation in meteorology, a world magnetic survey and satellite telecommunications, and had forwarded recommendations to their governments.<sup>24</sup>

During the consideration of the outer space item in the U.N. General Assembly, the United States and the Soviet Union on December 5, 1962, jointly submitted documentation to the Secretary General reporting agreement on a program of co-operation in meteorology, a world magnetic survey and satellite telecommunications.<sup>25</sup> To implement this agreement, United States and Soviet Union scientists met in Rome in March, 1963, and in Geneva in May, 1963, and defined terms for carrying out a coordinated meteorological satellite program, including the establishment of a communications link for exchanging weather data, joint communications experiments via a passive reflector satellite, and contributions of satellite data to the World Magnetic Survey.

### III. METEOROLOGICAL SATELLITES

Seven meteorological satellites of the *TIROS* series have been in orbit; two of them are still reporting. They have already relayed about 250,000 photographs of cloud conditions which have assisted substantially in improving the accuracy of weather reporting and forecasting. Conventional observations supply weather information from less than one-fifth of the earth's surface; cloud pictures from weather satellites enable meteor-

<sup>23</sup> U.N. Doc. A/AC.105/2.

<sup>24</sup> For a copy of the communiqué, see U.N. Doc. A/AC.105/C.1/L.2/Rev. 2, Annex III. See also *ibid.*, par. 9, and U.N. Doc. A/C.1/880, p. 2.

<sup>25</sup> U.N. Doc. A/C.1/880. For statements of the United States and the Soviet Union in the United Nations on this program of co-operation, see U.N. Doc. A/C.1/P.V. 1292, pp. 36-37. For first memorandum of understanding to implement the bilateral space agreement of June 8, 1962, between the Soviet Union Academy of Sciences and NASA, which came into force Aug. 1, 1963, see NASA News Release 63-186 of Aug. 16, 1963.

ologists to detect severe storms—typhoons and hurricanes—in remote regions or over oceans where regular observations are inadequate.<sup>26</sup>

Year after year destructive storms have developed at sea and struck the coasts of Australia, Japan, India, Pakistan, and Latin America with little or no advance warning. Few nations can afford to pay the very high cost of maintaining conventional weather-observing and reporting stations in ocean areas to provide the information needed to forecast these storms. It is particularly difficult for nations in the Southern Hemisphere to establish and maintain an adequate network of weather reporting stations.

The *TIROS* satellites now provide on a current basis several hundred times more information on weather in the Southern Hemisphere than was ever available before. In 1961, *TIROS III* photographed 10 tropical storms and discovered hurricane Esther. In 1962 *TIROS V* and *VI* photographed 16 tropical storms. Pictures of 10 of these were received prior to information being received on these storms by the United States National Meteorological Center through conventional means. When satellites detect significant weather developments, such as storms, hurricanes and typhoons, special international bulletins are issued by the United States to nations that might be affected. During 1962, 550 such messages were sent to 26 foreign governments and to remotely located weather facilities.

Following the adoption of the U.N. General Assembly resolution on outer space in 1961, the World Meteorological Organization invited the United States and the Soviet Union to send experts to Geneva to help develop proposals for co-operation in this field. In response to this invitation, the late Dr. Harry Wexler, then Director of Meteorological Research of the U.S. Weather Bureau, and Dr. V. A. Bugaev, Director of the Soviet Central Weather Forecasting Institute, were made available, and they produced a draft in co-operation with the WMO Secretariat, which, with some modifications, was approved by the WMO's Executive Committee in June, 1962. This report<sup>27</sup> recommended (1) the development of an internationally co-ordinated plan for meteorological satellites; (2) the establishment of a World Weather Watch; (3) the augmentation of the present network of conventional meteorological observations in areas where they are sparse or non-existent; (4) the improvement of telecommunications networks for the exchange of both satellite information and conventional meteorological

<sup>26</sup> On meteorological satellites, see "Meteorological Satellites," Staff Report prepared for the use of the Senate Committee on Aeronautical and Space Sciences, 87th Cong., 2d Sess., March 29, 1962; and "Meteorological Satellites," Hearings before the Subcommittee on Applications and Tracking and Data Acquisition of the House Committee on Science and Astronautics, 87th Cong., 2d Sess., especially statements of Francis W. Reichelderfer, Chief, U. S. Weather Bureau, pp. 26 ff., and Richard N. Gardner, Deputy Assistant Secretary of State for International Organization Affairs, pp. 273 ff. In addition, see "Space and the Weather," Report of the House Committee on Science and Astronautics, 87th Cong., 2d Sess., Dec. 3, 1962.

<sup>27</sup> See U.N. Doc. E/3662, June 27, 1962, acknowledging the receipt from the World Meteorological Organization of its "First Report on the Advancement of Atmospheric Sciences and Their Application in the Light of Developments in Outer Space."



observations; and (5) the establishment of a WMO Advisory Committee.

The resolution adopted by the U.N. General Assembly on December 14, 1962,<sup>28</sup> proposed that the WMO develop in greater detail its plan for an expanded program to strengthen meteorological services and research, with particular emphasis upon the use of meteorological satellites and the expansion of training and educational opportunities in these fields. With respect to the research aspect of this question, the 1962 U.N. resolution invited the International Council of Scientific Unions, through its unions and national academies, to develop an expanded program of atmospheric science research which would complement the programs fostered by the WMO. Meteorological satellites can contribute significantly to research. For example, meteorological satellites afford the only way of measuring the global distribution of the net solar energy which is the cause of all weather phenomena. Radiation from the sun can be measured from a satellite without the interference of the earth's atmosphere and thereby provide for the first time reliable measurements of changes in energy output from the sun.<sup>29</sup>

Looking to the future, the United States announced during the debate on this subject in the U.N. General Assembly in December, 1962, that it expects to launch an advanced type of meteorological satellite called *NIMBUS* in 1963.<sup>30</sup> Research and development now under way offer promise that relatively inexpensive radio-receivers will permit local readout directly from the satellite of cloud observations.<sup>31</sup> Under such arrangements, any nation could have direct access to the satellite data most important to its immediate weather-forecasting needs.

The Australian representative (Sir James Plimsoll) observed during the General Assembly debate that the United States proposal to initiate local readout directly from a satellite would have great practical significance for his country.<sup>32</sup> Australia has been using information from *TIROS*, but there is a delay of eight hours or more before the information reaches Australia; that is, from the satellite to the United States and then to Australia. Under the new procedure, Australia would receive weather information almost instantaneously—the recording of the cloud observations and its reception on the ground in Australia where it is needed.

The United States is moving ahead in its participation in an integrated international co-operative system of worldwide weather reporting and forecasting, utilizing meteorological satellites in this program. It is hoped

<sup>28</sup> Res. 1802 (XVII), Pt. III.

<sup>29</sup> See Report on "The Atmospheric Sciences 1961-1971, Vols. I-III, prepared by the Committee on Atmospheric Sciences, National Academy of Science (National Research Council, Pub. 946, Washington, D. C., 1962).

<sup>30</sup> See statement of Senator Albert Gore on Dec. 3, 1962, U. N. Doc. A/C.1/P.V. 1289, p. 31.

<sup>31</sup> See NASA News Release 62-252, Dec. 2, 1962, reporting that the new Automatic Picture Transmission Subsystem (APT) may be initially tested on another *TIROS* satellite in 1963 before being used on *NIMBUS*.

<sup>32</sup> U.N. Doc. A/C.1/P.V. 1290, pp. 26-27.

that through better meteorological observations and through a better understanding of the atmosphere, improved weather-forecasting will be substantially advanced.

#### IV. COMMUNICATIONS SATELLITES

As for communications satellites, the first active repeater communications satellite—*TELSTAR*—was launched by the United States on July 10, 1962.<sup>33</sup> On August 31 President Kennedy approved the Communications Satellite Act of 1962 to provide for the establishment, ownership, operation and regulation of a commercial communications satellite system.<sup>34</sup> These two actions served as the foundation for further United States initiative in the establishment of an effective global commercial satellite communications system.

*TELSTAR* provided a significant impetus to this program. It made it possible to relay live programs for the first time between television stations in the United States and Europe. *TELSTAR* is a low or intermediate-altitude experimental satellite. It has been followed with another low or intermediate-altitude satellite (*RELAY*) and a high-altitude satellite (*SYNCOM*). A *SYNCOM* satellite, orbiting at 22,300 miles, would make a complete orbit around the earth in the same time it takes the earth to make a complete turn on its axis. Such a satellite would accordingly appear to remain exactly stationary in outer space. Three such satellites would establish a global synchronous communications satellite system covering practically all parts of the earth except the Polar regions. In the case of the lower-orbit satellites, a good many more satellites are needed for global coverage.

In hearings before the Senate Committee on Aeronautical and Space Sciences in February, 1962, Dr. Hugh L. Dryden, Deputy Administrator of NASA, observed that there is little doubt among experts that existing techniques of undersea cable and high-frequency radio will not provide the necessary capacity for overseas communication needs and that communications satellites must be utilized to meet expanding requirements.<sup>35</sup> He

<sup>33</sup> *TELSTAR* was built by the Bell Telephone Laboratories and launched by the National Aeronautics and Space Administration under a co-operative agreement with the American Telephone and Telegraph Company. Under this agreement A. T. & T. provided the satellite and reimbursed NASA for all identifiable additional costs involved in launching the satellite. 34 76 Stat. 419.

<sup>35</sup> "Communications Satellite Legislation," Hearings before the Committee on Aeronautical and Space Sciences, U. S. Senate, 87th Cong., 2d Sess., on S.2650 and S.2814, pp. 12-13. See also statement by Elmer W. Engstrom, President, Radio Corporation of America, *ibid.*, p. 80. On communication satellites in general, see "Communication Satellites: Technical, Economic and International Developments," Staff Report prepared for the use of the Senate Committee on Aeronautical and Space Sciences, 87th Cong., 2d Sess., Feb. 25, 1962; and "Commercial Communications Satellites," Hearings before the Subcommittee on Applications and Tracking and Data Acquisition of the House Committee on Science and Astronautics, 87th Cong., 2d Sess., especially statements of Leonard Jaffe, Director of Communications Systems, National Aeronautics and Space Administration, pp. 63 ff., and G. Griffith Johnson, Assistant Secretary of State for Economic Affairs, pp. 135 ff.

pointed out that the number of overseas telephone calls has nearly quadrupled in the last decade, growing from slightly more than a million in 1950 to nearly 4 million in 1960. He noted that telephone calls are expected to rise to 8 million by 1965, 20 million by 1970 and nearly 100 million by 1980. In addition, there will be demands for overseas television transmission facilities, as well as for high-speed data transmission, which existing facilities are incapable of providing.

In signing the Communications Satellite Act of 1962 on August 31, President Kennedy observed:

The benefits which a satellite system should make possible within a few years will stem largely from a vastly increased capacity to exchange information cheaply and reliably with all parts of the world by telephone, telegraph, radio and television. . . .

Better and less expensive communications . . . are vital elements in the march of civilization. This legislation will, by advancing the peaceful and productive use of space, help to accelerate that march . . .<sup>36</sup>

The Secretary of State, in testifying before the Senate Foreign Relations Committee on this legislation on August 6, described the proposed corporation as follows:

. . . although the shares of this company are to be privately owned, it would be inaccurate to call it a private corporation in the usual sense. Indeed, it is different in kind from the ordinary public utility company under our system. We have here a new form of organization designed as an instrument for the necessary cooperation between government, the private communications industry, and the public in this great enterprise. The National Government's role in the corporation will be a major one. Three members of the board of directors will be appointed by the President with the advice and consent of the Senate. The corporation will be subject to close and continuing governmental supervision, review, and regulation through the Federal Communications Commission, the President, and the courts. It will depend upon the Federal Government for its very ability to launch its satellites.<sup>37</sup>

The Act itself, in Section 102, calls for the establishment of a commercial communications satellite system in co-operation with other countries. This satellite system is to be part of an improved global communications network to serve the communications needs of the United States and other countries. The Act observes that care and attention will be directed toward providing such services to economically less developed countries and areas as well as those more highly developed. In Section 201 (a) (5) the President is directed to "insure that timely arrangements are made under which there can be foreign participation in the establishment and use of a communications satellite system." United States par-

<sup>36</sup> 47 Dept. of State Bulletin 467 (1962).

<sup>37</sup> "Communications Satellite Act of 1962," Hearings before the Committee on Foreign Relations, U. S. Senate, 87th Cong., 2d Sess., on H.R. 11040, pp. 172-173; see also 47 Dept. of State Bulletin 315 (1962).

ticipation in a global system to be established will be through the communications satellite corporation established by this Act.

The Senate on April 25, 1963, confirmed the 14 incorporators nominated by the President to take whatever action is necessary to establish the corporation. They will serve temporarily as the initial board of directors of the corporation until a board of directors is established under the Act. Provision is made for a board of 15 members, six elected by stockholders who are communications common carriers, six elected by the other stockholders of the corporation, and three appointed by the President with the advice and consent of the Senate.

The establishment of a global communications satellite system will require international agreement on many questions, such as those relating to the manner of participation in the ownership of the system, the allocation of satellite channels, the location of ground terminals, technical standardization assistance to less developed countries and rates to be charged for different services. Although many of these problems are analogous to problems which have been solved in connection with conventional communications systems, many of them raise new and unprecedented questions. International negotiations will have to be undertaken at all levels—bilateral, regional and multilateral. There will be foreign policy negotiations between governments and business and technical arrangements between operating entities in the various countries.

In response to the General Assembly resolution on outer space adopted in 1961, the International Telecommunication Union provided a report giving an account of the steps already under way in that organization to meet the anticipated needs of space communications.<sup>38</sup> An Extraordinary Administrative Radio Conference will be convened in October, 1963, at which members of the ITU will make allocations of radio frequencies for space communications. This Conference is a particularly important one because adequate frequency allocations are a necessary prerequisite for a viable global satellite communications system.

In connection with the launching of active repeater satellites, NASA is working closely with other countries concerning the construction of ground stations. Such ground stations have already been built by France and the United Kingdom at their own expense. Ground facilities are under construction in Brazil, the German Federal Republic, Italy, and Japan. Other countries are considering the construction of such facilities.

#### V. ASPECTS OF INCREASING CO-OPERATION AMONG COUNTRIES

Five years ago the United States and the Soviet Union were virtually alone in the fields of space research and development. As pointed out by the United States representative (Senator Albert Gore) in Committee I of the U.N. General Assembly on December 3, 1962, more than 50 countries

<sup>38</sup> See U.N. Doc. E/3645, May 31, 1962, for letter from the Secretary General of the ITU to the Secretary General of the U.N., transmitting "First Report by the International Telecommunication Union on Telecommunication and the Peaceful Uses of Outer Space."

are now associated with the United States on one or another aspect of outer space.<sup>39</sup> There are over two dozen space-tracking and data-acquisition stations in 19 separate political areas in support of United States scientific programs in this field, the majority operated wholly or in part by technicians of the host countries. Scientists of 44 countries are working with NASA in ground-based research projects in meteorology, communications and other space sciences, directly utilizing United States satellites. Thirteen countries are engaged with the United States in actual flight projects in which experiments, jointly determined by the scientists of both countries, are sent into space either on vertical sounding rockets, or in earth satellites. The United States launched the Canadian *Alouette* satellite in April, 1962, and the United Kingdom *Ariel* in September, 1962. In addition, fellowships have been provided to assist those interested in the theoretical and experimental aspects of space research.

## VI. CONCLUSION

Thus we find that a program of co-operative action in outer space has been going forward outside the United Nations as well as within the framework of the United Nations and its Specialized Agencies. The United States and the Soviet Union have initiated a co-operative program. An increasing number of countries are participating actively in furthering research and experimental projects.

Senator Gore pointedly observed in Committee I of the U.N. General Assembly:

Five years ago people wondered whether all the effort and cost of space exploration would turn out to be worth while; today, after nearly 150 successful satellite launchings and deep probes into the universe, activities in space are already providing practical, everyday benefits to mankind.<sup>40</sup>

He appropriately summed up the challenge of the space age in his closing observation: "Yes, Mr. Chairman, we shall work to make this great Age of Space—in its 6th, its 16th, or its 60th year—the age in which man at last escaped from his sectarian earthly quarrels and went forth to create his universal destiny—an open and cooperative system of world order."

The far-reaching impact of exploratory probes into outer space, manned and unmanned satellites orbiting about the earth, and the development of technology opening up new possibilities and unfolding hitherto unavailable information concerning the atmosphere about us, make the United Nations an increasingly important forum to encourage countries to go forward into outer space in a spirit to maintain principles of law and order and to promote scientific, economic and other benefits for all people everywhere.

<sup>39</sup> U.N. Doc. A/C.1/P.V. 1289, pp. 7-32; 48 Dept. of State Bulletin 21-28 (1963); excerpted in 57 A.J.I.L. 428 (1963).

<sup>40</sup> *Ibid.*

## EDITORIAL COMMENT

### THE MANY FACES OF INTERNATIONAL LAW

Very few persons remember today that some twenty years ago the lawyers of the United States and Canada were engaged in a giant joint effort of assessing the fundamental problems of international law. Their conclusions were embodied in a document entitled "The International Law of the Future: Postulates, Principles and Proposals," which, after a period of private circulation among interested persons and government officials, was published simultaneously by the Carnegie Endowment for International Peace, the American Bar Association and the American Society of International Law in April, 1944.<sup>1</sup>

Many of the proposals embodied in this document found their way into the Charter of the United Nations. (Compare, for instance, Principle 7 with Article 51 of the U.N. Charter.) Almost all "postulates" and "principles" have generally been recognized as forming a part of contemporary international law, and many documents have been greatly influenced by them. (For instance, the Draft Declaration on the Rights and Duties of States adopted by the International Law Commission in 1949,<sup>2</sup> and the statements adopted by the regional conferences on "World Peace Through Law" held at San José, Tokyo, Lagos and Rome, in 1961 and 1962.<sup>3</sup>)

But even the most optimistic among the two hundred lawyers who participated in the 1942-43 effort could not have anticipated the tremendous growth of international law and organization in the intervening period. The United Nations and its specialized agencies have developed elaborate programs in practically every area of interest to the human race: agriculture and land reform, health, labor, aviation, shipping, weather and outer space. These international organizations, and some hundred and fifty smaller ones, have devised a variety of ingenious procedures for coping with such problems as freedom of association, air navigation, sanitary regulations, commodity agreements and assistance to the developing nations. The patient work of the International Law Commission has led to the adoption of codes of international law dealing with such subjects as the regime of the high seas and of the territorial sea,<sup>4</sup> and diplomatic and consular privileges and immunities.<sup>5</sup> The Nuremberg experience resulted in the preparation of the Genocide Convention,<sup>6</sup> a Draft Code of Offenses against the Peace and Security of Mankind<sup>7</sup> and a Draft Statute for an International Criminal Court.<sup>8</sup>

<sup>1</sup> 38 A.J.I.L. Supp. 41-139 (1944).

<sup>2</sup> 44 A.J.I.L. Supp. 15 (1950).

<sup>3</sup> See Consensus of San José, 1961, and Consensus of Rome, 1962, 56 A.J.I.L. 1003, 1008 (1962).

<sup>4</sup> 52 A.J.I.L. 834, 842 (1958).

<sup>5</sup> 55 *ibid.* 1064 (1961); 57 *ibid.* 995 (1963).

<sup>6</sup> 45 A.J.I.L. Supp. 7 (1951).

<sup>7</sup> *Ibid.* 126.

<sup>8</sup> 46 *ibid.* 1 (1952); revised in 1953, U.N. General Assembly, 9th Sess., Official Records, Supp. 12, p. 23.

The scope of international law has also been broadened. It is no longer a specialized discipline, slightly esoteric, of interest only to a few experts and the legal advisers of foreign offices. Practicing lawyers throughout the world have become deeply involved in legal activities across national boundaries. A new branch of international law has grown up in order to keep pace with international transactions and investments. The three European Communities have established a whole elaborate system of "supra-national" law and a special court to interpret it. Various international organizations try to develop appropriate rules for dealing with the new international problems resulting from technical progress in such areas as peaceful utilization of atomic energy and peaceful use of outer space for international communications, weather observation, et cetera.

It might be necessary, therefore, to reassess the content of international law today and to reappraise some of the past attitudes toward that subject. In the first place, it has now become obvious that international law is "one" system of law only in the sense that common law constitutes a single system. International law is no longer a branch of law equal to contracts, torts or constitutional law. It is, on the contrary, a great conglomeration of subjects, equivalent in its scope to all domestic (municipal, national) law taken together. We have now in international law the equivalent of all branches of domestic law; for instance, we have constitutional law (the law of the United Nations), administrative law (the law of the international organizations, especially of the European Communities), law of torts (responsibility of states), law of contracts (law of treaties), and so on. In the second place, as in domestic law, each of the branches of international law has developed along slightly different lines, and it is dangerous to apply the same general principles or methods of interpretation indiscriminately in various areas. In particular, it is necessary to approach "public law" areas, such as United Nations law or the law of the European Communities in a different manner than such "private law" areas as ordinary international trade agreements. Finally, one must be more cautious than in the past about analogies from domestic law. In searching for the "common law of mankind," we often forget that common principles discovered in some areas of private law may be applied usually only in parallel areas of international law, and that, for instance, rules relating to the interpretation of private contracts may be as inapplicable to the interpretation of the Charter of the United Nations as they are inapplicable to the interpretation of the Constitution of the United States. More attention should be paid also to domestic rules of public law which have become increasingly relevant in the rapidly growing public-law areas of international law. Thus, the Court of Justice of the European Communities found it useful to follow some of the French (and other) rules of administrative law relating to *détournement de pouvoir*. The European Court of Human Rights is likely to apply various principles of constitutional law relating to the protection of human rights. In other areas, such as international transactions, public and private-law doctrines are interacting, and one has to be very careful in distinguishing clearly be-

tween the impact of such public fields as antitrust and taxation on the public side of these transactions, and the influence of the practices of the business community on the private-law aspects of the problem.

If anybody should try again to prepare a guide to the international law of the future, he would be faced with a much larger job than his predecessors. International lawyers can no longer be universalists; like domestic lawyers, they have become specialists. Only through intensive co-operation among many experts in various areas of international law would such reassessment become possible.

LOUIS B. SOHN



## NOTES AND COMMENTS

### THE INTERNATIONAL ASPECTS OF LAW—CONCEPTS AND TERMINOLOGY

Louis Sohn's pithy and perceptive editorial comment on "The Many Faces of International Law" in part identifies subject matter to which he proposes that increased and more discriminating attention be given by lawyers concerned with law in its international aspects, and in part proposes to expand the ambit of the designation "international law." Although the validity of his substantive proposals does not depend upon the acceptability of the extended nomenclature, the terminology and the substance are put forward as one. In this respect, his comment typifies much that has been said and written in recent years by scholars concerned with the legal aspects of international life.

Some commentators have tended to stress the importance of new subject matter while manifesting relatively little concern for whether or where the new subjects might fall within the fields of law defined by prior scholarship. Others appear to have been primarily concerned to expand the accepted scope of one or another of the received fields of law—whether public international law, private international law or comparative law. Some have seemed to emphasize the importance of new and more suitable nomenclature. In most instances, considerations of substantive need or purpose, overlapping assertions of expanded scope for different fields of law, and arguments about terminology have blended in varying degree. All the commentators reflect an awareness that the horizons of law in its international aspects have been vastly extended. All reveal a belief that the conceptual patterns and the methodologies bequeathed to us by our predecessors must be supplemented, modified or replaced.

I venture herein to propose a way of defining our possibilities of choice in the hope that it may tend to clarify and facilitate the continuing discussion. I shall try to suggest an analytical scheme based upon an attempt to identify the primary functions of law in its international aspects and the principal sources to which lawyers have turned and should turn for principles, data, procedures and techniques to be applied in the performance or analysis of the functions. I shall do so at this point only in the broadest outline. In outlining the functions, I shall do so only in terms of the contribution which can be made toward their performance by law, taking it for granted that policy, diplomacy and many other branches of action or learning obviously are also highly relevant, in many cases more so than law. In outlining the sources, I shall do so only in terms of those yielding legal principles, data and methods, taking for granted the obvious relevance and significance of the social, economic and political contexts out of which the problems arise, as well as the moral and other normative factors. At this point, my limited purpose is to sketch the bare skeleton of an

analytical scheme. If it should be found useful, flesh and blood can perhaps be supplied later.

Subject to the foregoing observations, I suggest that the principal functions that have received or warrant receiving major attention from lawyers concerned with the international aspects of law are (1) the resolution of disputes among states as political entities; (2) the definition and maintenance of a framework for inter-governmental relations; (3) the development of legal and institutional bases for international trade; (4) the development of legal and institutional bases for international investment; (5) the establishment and adjustment of legal and institutional bases for economic, social and political development; (6) the definition and maintenance of a legal and institutional framework for the personal security and freedom of the individual in international life; (7) the development of legal and institutional bases for government under law (or constitutionalism) in international life; and (8) an understanding of the nature of law at the highest and widest levels of abstraction.

Subject again to the observations previously noted, I suggest that the principal sources of principle, doctrine, data and method to be applied in the analysis and performance of the foregoing functions are: (a) the corpus of state practice, writings of publicists and treaties to which the designation "international law" has traditionally attached; (b) the multilateral treaties, universal or regional, establishing the international organizations that are so prominent a feature of contemporary international life, together with the corpus of practice of such organizations; (c) the mature and highly tested municipal legal systems, notably the civil law of Europe and Latin America in its many variations, the Anglo-American common law in its variations, the law of Japan, Islamic law, the law of India, the classical law of China; (d) the law of the Soviet Union, the Communist states of Eastern Europe and Communist China, radical departures superimposed upon and purporting to replace ancient patterns; (e) the law of newly emerging states not rooted in an old, written and organized body of learning, such as the law of many of the societies of Africa; and (f) the comparative method in the study of law.

It may be revealing to essay to distribute "international law," "private international law," "comparative law," "the law of international transactions and relations," "transnational law," "international economic law," "international legal studies," et cetera, along the foregoing analytical framework. The distribution may help us to sort out substance from nomenclature, and to recognize when the same term is used to describe different concepts or procedures and different terms are used to describe essentially the same concept or procedure.

To illustrate: International law in the familiar traditional usage of the term is, I suggest, directed essentially toward objectives (1) and (2) and perhaps also, to a limited degree, toward objective (8). It draws essentially upon sources (a) and (b) and sporadically also upon source (c) under the rubric of "the general principles of law recognized by civilized nations." "International law," in the wider sense advocated

by Louis Sohn in his editorial comment, would be directed toward all the objectives comprised within the categories (1) to (7) inclusive, and perhaps also to those comprehended within category (8). As to sources, however, for aught that appears in Mr. Sohn's comment, they would appear in his scheme still to be essentially those within categories (a) and (b) and perhaps also to some extent in category (c). If Mr. Sohn were to expand his proposal to embrace all the source categories as well as all the categories of objectives, he would in effect be advocating the use of the term "international law" to cover the full range and sweep of law in all its international aspects and applications. In such a case, there would be many who would be happy to applaud the insistence upon full attention to all the international aspects and implications of law, among them the present writer; but not all who would be content to accept the substance of such a view would be equally content with the vastly extended use of the particular designation, "international law." In effect, in such a hypothetical use, "international law" would become co-extensive with "international legal studies" as the latter term is currently employed at many American law schools.

I offer no brief for either term. "International legal studies" contains its own ambiguities, and, even if the ambiguities could be eliminated, the term would be neither short enough nor elegant enough to be satisfactory. On the other hand, if "international law" should by general consent become the designation for the full reach of law in all its international aspects and applications, I take it that a new term would be required to describe the subject matter previously so designated.

To return to the core of the matter: our need is to clarify meanings and issues, whether for discussion or disputation, and to focus both disputation and discussion upon the issues that are significant and rewarding. I suggest that an analytical scheme along the lines herein outlined may be helpful toward this end.

MILTON KATZ

#### THE BERLIN TREATY AND THE RIVER NIGER COMMISSION

At a recent conference held in Niamey, the capital of the Republic of Niger, from February 14 to 16, 1963, seven of the nine riparian states<sup>1</sup> agreed on the text of a Convention and its annexed Statute to replace the Treaty of Berlin of 1885-1886 and the Convention of St. Germain-en-Laye of 1919 as the governing international instruments for the regime of the River Niger.

It is necessary to begin by giving the background to this conference. Under the auspices of the United Nations Commission for Technical Cooperation in Africa, four of its member states<sup>2</sup>—Nigeria, Niger, Mali and

<sup>1</sup> The nine states are: Guinea, Mali, Ivory Coast, Upper Volta, Dahomey, Niger, Nigeria, Chad and the Cameroons. Guinea, Mali and the Cameroons were unavoidably absent.

<sup>2</sup> The leader of the Dahomey Delegation claimed at the Conference that his country had also joined these four in the request.

Upper Volta—submitted a request to the United Nations to appoint a competent body of consultants to undertake a detailed and comprehensive survey and assessment of all the existing and future national projects of the riparian states relating to the exploitation of the waters of the River Niger and its affluents. The Italconsult Limited was duly appointed, and its Report was submitted to the United Nations and subsequently published in 1962. A total of fourteen national projects had been examined, of which the Niger Dams Project in Nigeria is the most ambitious as well as the most advanced in both planning and execution. Indeed, the necessary legislation had been enacted,<sup>3</sup> the Niger Dams Authority set up and preliminary work begun on the first phase of the scheme at Kainji, which is estimated to take some four or five years to complete. The second phase is the Jebba Dam which is expected to be completed by about 1972, while the third phase at the Shiroro Gorge should be completed within twenty years thereafter.<sup>4</sup> Included in the first phase is the construction of an hydro-electric power installation to dam the River Niger at Kainji—the confluence of the Niger and the Sokoto River, which flows entirely within Nigerian territory. These should generate enough electricity for both household and industrial consumption for most of the surrounding areas of Northern Nigeria and for neighboring territories like Dahomey, if these should want it. The Kainji Dam is also expected to make water available for purposes of irrigation and mechanized agriculture in the circumjacent areas on either side of the Niger. A third and equally significant benefit that will accrue from the construction of the first dam is the opening up of the river, for the first time in its history, to navigation by barges and other vessels drawing up to 4,000 tons for almost its whole course through Nigerian territory, for about eight months of the year. A number of cataracts that have hitherto impeded through navigation on the Niger will have been blasted out of its path, thus increasing the volume as well as the depth of the waters flowing down between the Republic of Niger and the delta on the Atlantic Ocean.

A matter of considerable interest in this connection is the categorical assertion in the Italconsult Report that nothing that any of the upstream riparian states might do to any portion of the River Niger lying within their own territories could adversely affect the Nigerian project until about 1992 and that, even then, there would be only about a 5 percent diminution in the volume of the waters reaching Kainji. In the words of the Report:

The loss in power generation is indicated as occurring only after 1992, when the entire group of plants will come into operation and all power generated will be absorbed. The limited reduction in discharges due to diversions upriver, far more limited than any natural variation from year to year, and the wide possibilities of a practical adjustment of the regulation at Kainji, in relation to requirements, permit us to state that a reduction in the flow volumes equalling about 5% of the total, cannot have an appreciable influence on the production capacity of a complex of plants like those under considera-

<sup>3</sup> See the Niger Dams Act, 1962.

<sup>4</sup> The entire scheme is estimated to cost about £80 million.

tion. And in any case the small production loss in the future, which can be made good from other power sources (if necessary and as indicated by the designers) is compensated for by the bringing under cultivation of large tracts of land. . . . In any case, apart from this, there are sound reasons to believe that diversions upriver for irrigation purposes, if carried out to the extent and in the manner described above, can only produce practically negligible influences, well within the order of approximation of any study of this kind, on power generation and navigation uses downriver.<sup>5</sup>

The Nigerian Federal Government has since supplemented this encouraging assessment of the United Nations experts by sponsoring an independent body of consultants, the Nedeco, to survey and recommend alternative sources for supplying this future deficiency. In its Report submitted towards the end of 1962, this Dutch firm has estimated that the quantity of water flowing into the Niger at Kainji from the Sokoto River, which lies entirely within Nigerian territory, would more than offset the estimated diminution which might possibly arise out of constructions which upstream riparian states might undertake on the River Niger in the next thirty years. This piece of information should make it easier for the International Bank for Reconstruction and Development to look more favorably upon Nigeria's request for financial assistance in the construction of her Niger Dam.

In view of the Italconsult Report regarding the various national schemes for the exploitation of the resources of the Niger basin, the nine states concerned agreed to meet in the Republic of Niger to devise practical measures of co-operation in the economic uses of the river. A draft convention with an annexed statute, which had been prepared by the Niger Republic, was made available to all the nine participating riparian states, to such ex-colonial Powers as Great Britain and France, to the International Bank for Reconstruction and Development, and to the United Nations Organization, the last two of which sent six observers<sup>6</sup> to the Conference in Niamey. This draft convention and its annexed statute envisaged the establishment of a Niger River Commission which would have been executive in character. The relevant portion was Article 4 of the Niger Republic's draft statute which read as follows:

The contracting parties are agreed that while national administration shall be the principal rule for each riparian, they may resort to bilateral or multilateral administration exercised by the community of riparian states, and to international management through the Niger River Commission.

The real nature of the organization contemplated in the draft becomes obvious from Article 5 which provided:

<sup>5</sup> At pp. 112, 113.

<sup>6</sup> These included the Chief Legal Adviser of the I.B.R.D., Dr. A. Broches; the Assistant Director of the Legal Division of the United Nations Organization, Dr. M. Schreiber; and the Director of the United Nations ECOSOC Department, Rev. Father Père de Breuver; Hydrologist-E.C.A., M. Dekker; C.C.T.A. representative, M. Lefevre. The Republic of Sudan was given special permission to be represented by Mr. Sayed Hassan Mohamed El Amin as an observer.

Without prejudice to the powers vested in the proposed Commission by Article Eleven and those following, the riparian states undertake to abstain from taking, without prior agreement, any measures likely to have an appreciable effect either on the extent of the losses of water or on the shape of the annual hydrogramme and certain other characteristics of the river, on the conditions subject to which other riparian states may exploit the river, on the sanitary conditions of its waters, or on the biological characteristics of its fauna and flora.

In particular, they bind themselves not to undertake on any portion of the river's course under their jurisdiction:

- (a) any hydraulic works such as irrigation, water supply, hydro-electric installation or dam;
- (b) any civil works;
- (c) any industrial installation likely to pollute the water of the river;
- (d) any soil scheme likely to affect the regime of the tributaries;
- (e) any modification likely to affect fisheries and fishing rights, without adequate notice to and prior consultation with the Commission referred to in Article 4.<sup>7</sup>

While there can be no doubt that there is urgent need for the harmonization of relationships among the riparian states through an organization that should be a clearing-house of information and a center for the resolution of inter-state conflicts, the provisions reproduced above from the first draft statute would appear to have gone beyond what one could reasonably expect newly independent states, jealous of their sovereignty and anxious to assure opportunity for individual action in their economic and industrial development, to accept as a basis for the new regime of the River Niger. As the Permanent Court of International Justice observed in the case of *The International Commission of the River Oder*:<sup>8</sup>

When consideration is given to the manner in which states have regarded the concrete situations arising out of the fact that a single waterway traverses or separates the territory of more than one state, and the possibility of fulfilling the requirements of justice and the considerations of utility which this fact places in relief, it is at once seen that a solution of the problem has been sought not in the idea of a right of passage in favour of upstream states, but in that of a community of interest of riparian states. This community of interest in a navigable river becomes a basis of a common legal right, the essential features of which are the perfect equality of all riparian states in the use of the whole course of the river and the exclusion of any preferential privilege of any riparian state in relation to others.

There are no universal principles of public international law governing the regime of international rivers,<sup>9</sup> although a number of similar features

<sup>7</sup> Among the functions conferred upon the Commission in Arts. 13 and 14 of that draft were the drawing up and enforcing of "General Regulations" and Resolutions, and the carrying out of "all the necessary works for the control of the river, the planning of which it has approved."

<sup>8</sup> P.C.I.J., Series A, No. 23, 1929.

<sup>9</sup> F. J. Berber, *Rivers in International Law* 148-159, 270 (1959).

are to be found in certain of the international conventions concluded for the regulation of such great rivers as the Rhine, the Danube and the Congo. Probably the earliest landmark in this respect was the International Commission of the Rhine, established under Article 116 of the Final Act of the Congress of Vienna, 1815, which was notable for laying down the principle of freedom of navigation for the River Rhine. But this was after Article 5 of the Paris Treaty of Peace, 1814, had declared the principle that a waterway navigable to the sea and separating or flowing through the territory of several states represents in a sense possession common to all, though each individually owns a part and exercises sovereignty over it. This Commission was made up of only the riparian states,<sup>10</sup> and its functions included the making of recommendations to the appropriate authorities of the different states with regard to the speeding up of works necessary to navigation on the river, and the fair and impartial application of all the regulations on navigation. It is accordingly an administrative body.

The European Commission of the Danube was established in 1855 as a temporary body until its functions should be transferred to a permanent riparian commission. It, however, managed to survive till it was recognized and strengthened by the Congress of Berlin in 1878. It had executive as well as administrative functions, as it was directly responsible for works, harbors, pilotage and the marking of the channel from the Black Sea up to Braila. Under its Statute, the European Commission consisted of Great Britain, France, Italy, and Rumania, although other states could join later, subject to certain conditions. By Article 331 of the Treaty of Versailles and by corresponding articles in the Treaties of St. Germain, Neuilly and Trianon, the Danube was declared an international river with respect to that stretch of it between Braila and Ulm, together with certain of its tributaries. A new body, the International Commission of the Danube, replaced the old one, and comprised two representatives of Germany, one each of the other riparian states, and such non-riparian states as had at any time been represented on the previous organization. It had power to make police and navigation regulations, to control the iron gates and execute works in certain circumstances. The implementation of its recommendations was left to the riparian states territorially concerned. Disputes could be settled either *inter partes*, by arbitration, or by ultimate recourse to the Permanent Court of International Justice (now the International Court of Justice). This body has been replaced by a new Danube River Commission, established by the Belgrade Convention of 1948, and composed only of representatives of the riparian states, excepting Germany.

But the most strongly executive river organization was the International Commission of the Congo provided for in Articles 17-25 of the General Act of the Conference of Berlin, 1885-1886. In addition to discharging the duty of supervising the observance of the regulations for

<sup>10</sup> An entirely new Commission consisting of both riparian and non-riparian states was instituted under Art. 355 of the Treaty of Versailles, 1919.

navigation and applying sanctions for their infringement, this Commission was empowered:

- (a) To decide what works are necessary to assure the navigability of the Congo in accordance with the needs of international trade. On those sections of the river where no Power exercises sovereign rights, the International Commission will itself take the necessary measures for assuring the navigability of the river.
- (b) To fix the pilot tariff and that of the general navigation dues as provided for by paragraphs 2 and 3 of Article 14.
- (c) To administer the revenue arising from the application of the preceding paragraph.
- (d) To superintend the quarantine establishment created in virtue of Article 24.
- (e) To appoint officials for the general service of navigation, and also its own proper employees.

The composition of this tight, executive body was to have been made up of all the signatory Powers of the General Act of Berlin, 1885-1886, and such other states as might subsequently adhere to it. This International Commission of the Congo, which might have served as a precedent in contemporary African context, was, however, never established. Even the signatory European Powers, having produced the blueprint, could not bring themselves round to setting up an organization of such a character.

Recalling these and other international antecedents, some of us at the Niamey Conference warned against the creation from the outset of an executive commission for the River Niger such as was implied in the original draft convention and statute. We may now turn to a consideration of the agreed text of the Convention and the annexed Statute of the proposed Commission of the River Niger.

As regards the Convention itself, the first point to note is that the high contracting parties to it are the nine states mentioned at the beginning. Of these, the Ivory Coast, the Cameroons and Chad are not directly riparian to the Niger, while Guinea's claim to membership is merely that the river rises in its territory without having any significant portion of its course lying within it. In order, however, to accommodate all the states in the basin of this great waterway, these four have been given equality of status with the five most directly concerned with the economic uses of the Niger.<sup>11</sup> This principle of equality is recognized in the provision for the coming into force of the treaty only after ratification by all the states. Article 5 provides:

The present Convention shall come into force after ratification by all the High Contracting Parties on the sixtieth day after the deposit with the Secretary-General of the last instrument of ratification.

The point of the reference to the Secretary General of the United Nations is that Article 3 makes him the depositary of the instruments of ratifica-

<sup>11</sup> This composition of the proposed River Niger Commission shows that the intention is to confine it to the riparian or basin states, at least at its inception.



tion under the Convention and obliges him to notify each of the participating states of the deposit of these instruments. Under Article 4, other states may subsequently adhere to the Convention only by the unanimous invitation of all the high contracting parties, and the instruments of adhesion must also be deposited with the United Nations Secretariat.

It is provided in Article 6 that any of the participating states may denounce the Convention at any time after the lapse of ten years from the date of its coming into force. Such denunciation must be notified in writing to the United Nations Secretary General and becomes effective one year after the date on which it is so notified with respect to the party which gave the notice. Unless otherwise specifically agreed, no denunciation will have any effect on any program of works agreed to previously.

Provision for the peaceful settlement of disputes as between the states parties to the Convention is made in Article 8 as follows:

Without prejudice to the provisions of Article 13 of the annexed Statute relating to the functions of the River Niger Commission and in the absence of direct agreement between the States concerned, any dispute that may arise between them concerning the interpretation or the application of the present Convention shall be brought before the International Court of Justice, unless by the terms of a special agreement or a general arbitration clause, the parties resort to settlement by arbitration or in any other way.

It is thus clear that this Commission has not been given any specific judicial powers similar to those conferred upon the Rhine or the Danube Commissions. Arbitration and other peaceful forms of resolving possible conflicts are duly stressed, and it is only after these have failed that there can be a recourse by either party to the International Court of Justice. There is a further provision in the same article to the effect that, in cases of emergency, the Commission may *recommend* the taking of measures aimed primarily at preserving the *status quo ante* until the settlement of a particular dispute.

The Convention as well as the annexed Statute may be amended from time to time at the request of at least one third of the high contracting parties addressed to the United Nations Secretary General, who will then notify every member state to the Convention.<sup>12</sup> Upon the coming into force of the Convention, Article 10 authorizes the Secretary General to register it in accordance with Article 102 of the United Nations Charter.

But the most significant provision, from the point of view of international law, is to be found in Article 9, which reads:

Subject to the provisions of this Convention and of the annexed Statute, the General Act of Berlin of 26 February 1885, the General Act and Declaration of Brussels of 2 July 1890, and the Convention of Saint-Germain-en-Laye of 10 September, 1919, shall be considered as abrogated in so far as they are binding between the States which are parties to the present Convention.

In these words, the Niamey Conference states declared their intention to be freed from any obligations that might still be thought to rest upon

<sup>12</sup> Art. 7.

them in virtue of having become the successor states to those that originally concluded the existing treaties relating to navigation on the Niger.<sup>13</sup> It will be noted that they took care not to make any sweeping generalization regarding the abrogation of those treaties, but merely to confine the legal effect to the nine participating states and those that might subsequently adhere to the present Convention. There were at the Conference those who felt that this particular clause on express abrogation of the Berlin and Brussels treaties was unnecessary and that the doctrine of *clausula rebus sic stantibus* already rendered them invalid from the respective dates of independence of the nine territories. The view that prevailed was that the clause was necessary, if only for the avoidance of doubt and the formal proclamation of a legal fact *ex abundanti cautela*. Indeed, there are precedents for this, the most immediately relevant being Article 13 of the Convention of St. Germain-en-Laye of September 10, 1919, by which the signatory Powers sought to abrogate the General Act of Berlin and the General Act and Declaration of Brussels in most respects.<sup>14</sup>

The Statute annexed to the Convention spells out the composition, the functions and the underlying principles of the Commission. It consists of nine commissioners, one for each riparian state; the headquarters, to be established at Niamey, will be under a Secretary General who is responsible to the Commission and who is assisted by such staff as are appointed in accordance with staff regulations approved by the Commission.<sup>15</sup> It will establish its budget at its first ordinary session, and the proportions of the contributions by the riparian states will be as determined by the Commission. It meets at least once a year in Niamey, or if it so decides, in any of the other riparian states. Its decisions are to be taken by a simple majority of the votes cast.<sup>16</sup> The international character of the Commission is emphasized by the provisions of Article 16 to the effect that the Secretary General and the Commissioners, when exercising the functions of their office, enjoy diplomatic privileges and immunities in the territories of the riparian states, and such immunities as are accorded by the state concerned to officials of the United Nations of equivalent rank.

Article 11 provides that the Commission is to be entrusted with the promotion and co-ordination of programs and studies relating to the exploitation of the resources of the basin of the River Niger. In particular, it has the following functions:

- (a) To draw up General Regulations for the application of the principles affirmed in the present Statute and the Convention to which it is annexed. The General Regulations and the other

<sup>13</sup> Other international agreements and conferences recited in the preamble to the convention are: Barcelona Convention of April 20, 1921; Geneva Convention of Dec. 9, 1923; United Nations Charter of June 26, 1945; Inter-African Hydrological Conference of Jan. 16-25, 1961, and of May 17-20, 1961; United Nations Economic and Social Council Resolutions from 1952 to 1958.

<sup>14</sup> See Cmd. 477, Treaty Series, 1919, No. 18, pp. 97-112.

<sup>15</sup> Arts. 12 and 14.

<sup>16</sup> Arts. 12 and 15. The idea of weighted voting was discussed, but was rejected in the end.

- decisions of the Commission shall, after approval by the States concerned, have binding force with regard to their mutual relations as well as their internal regulation.
- (b) To supervise the application of the above-mentioned Regulations.
  - (c) To give its opinion on all projects drawn up by the States with a view to the development of the River as set out in Article 4 of the present Statute; the Commission may also recommend studies and works which it regards as useful for the rational exploitation of the River.
  - (d) To undertake, at the request of one or more riparian States, the planning and execution of any project for the development of the River.
  - (e) To inform the riparian States of all schemes and questions concerning the development of the basin, to harmonize inter-state relations in this field, to examine complaints and to contribute to the settlement of disputes.<sup>17</sup>

These stated functions clearly describe a purely *consultative*, as opposed to an executive, commission for the lordly Niger. It is in this context that the Niamey Conference made its most radical departure from the Niger draft statute which envisaged an executive type of organization. In this connection, it is relevant to draw attention to the provisions of Article 5 of the original draft statute,<sup>18</sup> which required the prior *agreement* of all the other riparian states members of the Commission to the doing of any act or thing likely to affect the quality or quantity of the waters of the Niger so far as those states are concerned. In the equivalent of Articles 4 and 5 of the new draft Statute, the requirement of prior *consultation* is substituted for that of agreement, in order to ensure a reasonable degree of individual action on the part of the riparian states in regard to the judicious exploitation<sup>19</sup> of the resources of the basin of the River Niger. But the riparian states are required to inform the Commission, at the earliest stage, of all schemes and works on their portions of the river upon which they may propose to embark from time to time.

Chapter III, which re-affirms the principles of freedom of navigation and of equality of treatment of states, is in substance the same as Articles 5 to 10 of the Convention of St. Germain-en-Laye (1919), which in their turn reproduced the substance of Chapter V (Articles 26 to 33 of the General Act of Berlin (1885-1886)). In five carefully drafted Articles 6 to 10, the chapter entitled "Navigation and Transport" guarantees freedom of navigation of the Niger and its branches and outlets for the merchant vessels and for transport of goods and passengers of all nations, and stipulates that only "such taxes or duties shall be collected as may be an equivalent for services rendered to navigation itself." This must

<sup>17</sup> Cf. the typical functions of a river commission described by J. L. Brierly, *Law of Nations* 158 (1942), and by H. A. Smith, *Economic Uses of International Rivers* 143 ff. (1931).

<sup>18</sup> For which see pp. 875-876 above.

<sup>19</sup> The term "exploitation" is defined in Art. 3 of the Statute as follows: "The exploitation of the said River shall be taken in a wide sense, and refers in particular to agricultural and industrial uses, and to the collection of the products of its fauna and flora."

surely include levies towards the construction and maintenance of the locks of dams and other installations which facilitate through navigation over portions of the River Niger that were formerly non-navigable. The tributaries of rivers and lakes within the riparian states are also made subject to the same principles as those laid down for the Niger itself. Roads, railways and lateral canals constructed for the purpose of facilitating navigability or correcting imperfections of the water route on certain sections of the rivers and lakes in the Niger basin are made equally open to international traffic. On such roads only such tolls may be collected as are calculated on the cost of construction, maintenance and management, as well as on the profits reasonably accruing to the undertaking. The nationals of all states are subject to the same tariff. Each riparian state remains free to establish the rules which it may deem expedient for ensuring the safety and control of navigation, so long as the rules are designed to facilitate the circulation of merchant vessels. Where rivers and their tributaries, as well as lakes, are not normally utilized by more than one riparian state, the government exercising authority is free to establish any arrangements that may be necessary to maintain public safety and order. Regulations so made may not, however, discriminate between vessels or nationals of different states.

In matters relating to customs, public health, livestock and agricultural products, emigration, immigration, police and security laws, Article 17 provides that each riparian state continues to enjoy its existing sovereign right to make laws and take all necessary measures for policing its territory. The only reservations are that such laws and measures must not be discriminatory and that they must not interfere with the orderly and common utilization of the Niger. Even then, an exception to these two limitations is permitted by Article 18 in certain situations in which a riparian state may be obliged to take abnormal measures "by reason of serious events affecting the security of the State." The Commission must, however, be promptly informed of such exceptional action. The state concerned is enjoined to have due regard for the maintenance, as far as possible, of the principle of co-operation with respect to the use of rivers and, in particular, access between that state and the sea.

The Niamey Conference of the nine riparian states decided that each of the delegates should take back home the text of the Convention and its annexed Statute for detailed study and comments, and that at a resumed conference in a few months' time their duly accredited representatives should come prepared to sign an agreed text which, after necessary ratification, would establish the River Niger Commission and replace the General Act of Berlin of 1885-1886 and its successor treaties relating to the Niger.

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## EXTRADITION OF A SOVIET SAILOR

Only four days<sup>1</sup> had elapsed since the new Extradition Act<sup>2</sup> had come into force in India,<sup>3</sup> when the stage was set for an interesting trial under it. The trial aroused wide interest, not because of the personality of the accused, for there is nothing uncommon in a foreign sailor being brought before a court on a charge of committing theft on a foreign ship, but because to the general public it appeared like a cold-war issue between the United States and the Soviet Union, where the balance was held by an Indian judicial officer. To the legal mind the main issue was what should amount to sufficiency of evidence for proving a *prima facie* case in an extradition inquiry, and some ancillary points on the subject of extradition.

## I

V. S. Tarasov, a sailor of the Russian Tanker *Tcharnovzi I*, was first arrested on November 28, 1962, on a theft charge by Mr. V. Londarev, Soviet Vice Consul in Calcutta. He was alleged to have stolen Rs. 700 in Indian currency from the custody of the cashier on board the Russian vessel. The Calcutta High Court ordered the release on bail of the Soviet sailor on January 4, 1963. Immediately after this, the Soviet Embassy in New Delhi made a requisition for the extradition of Tarasov. The Embassy's letter to the Government of India said that, since Tarasov had committed the theft on the high seas, he was to be tried by a Russian court. The Government of India sent the application to a New Delhi Magistrate for inquiry under Section 5<sup>4</sup> of the Extradition Act. It was put before him on January 9, 1963, and he issued orders for the arrest of Tarasov.<sup>5</sup>

Consequently, when the case came before the Chief Presidency Magistrate, Calcutta, on January 10, 1963, the police prayed for the discharge of the accused on the ground that they had since ascertained from a report of Mr. N. V. Broun, the captain of the Soviet vessel, that the alleged theft of Rs. 700 had taken place approximately one hundred miles away from the port of Vizagapatnam, outside the territorial waters of India and outside the jurisdiction of that court. The Magistrate accordingly discharged the accused. But Tarasov was rearrested on the strength of the warrant of

<sup>1</sup> The extradition papers were put up before the New Delhi Magistrate on Jan. 9, 1963.

<sup>2</sup> The Extradition Act, 1962 (No. 34 of 1962).

<sup>3</sup> The Gazette of India, Extraordinary, Pt. II, Sec. 3, subsec. (1), No. 4, Jan. 5, 1963. G.S.R. 55: "In exercise of the powers conferred by sub-section (3) of Section 1 of the Extradition Act, 1962 (34 of 1962), the Central Government hereby appoints the 5th day of January, 1963, as the date on which the said Act shall come into force."

<sup>4</sup> Sec. 5 of the Extradition Act runs as follows: "Where such requisition (by a foreign State) is made, the Central Government may, if it thinks fit, issue an order to any magistrate who would have had jurisdiction to inquire into the offence if it had been an offence committed within the local limits of his jurisdiction, directing him to inquire into the case."

<sup>5</sup> Sec. 6 of the Act says: "On receipt of an order of the Central Government under section 5, the magistrate shall issue a warrant for the arrest of the fugitive criminal."

the Delhi Magistrate, and the scene of the trial shifted from Calcutta to New Delhi.

The judicial inquiry for extradition under Section 7<sup>6</sup> of the Extradition Act started on January 22, 1963. Tarasov's defense was that the charge of theft was a concocted story. He did not like the form of government of his own country, so he left his vessel at about 1 a.m. on November 25, 1962, swam across and boarded a nearby American ship, *S.S. Steel Surveyor*, anchored in the King George's Dock, Calcutta, and asked for political asylum from the United States Government. The Soviet Government wanted his extradition in order to try him, not for theft, but under Section 56<sup>7</sup> of the Ukrainian Penal Code. The inquiry came to an end on March 29, 1963, when the Magistrate declared that:

It would have to be commented that the foreign State has not produced satisfactory evidence to show that there was any theft. . . . Considering that there was no treaty between the two countries, the fugitive cannot be surrendered to the foreign State.<sup>8</sup>

Thus Tarasov was discharged and he was a free man to go wherever he liked.

## II

The first thing that attracts attention in this case is that the Soviet Government was neither very serious about the proceedings of this case, nor had it tried to bring forth any substantial evidence in support of its allegations against Tarasov. It appeared that the foreign state did not seem to think that the evidence mattered very much. Otherwise, how can the absence of such important witnesses as the Soviet Vice Consul at Calcutta, Mr. Londarev, who was the first informant in the case and who could have unfolded the narrative of the case better than any other witness, and the third mate, from whose cabin the money was stolen, be accounted for? Again, the first complaint against Tarasov, in the report to the Calcutta police by the Soviet Vice Consul, said nothing about a theft on the Soviet ship. He sought the aid of the police to locate the absconding sailor alone.

When that offense figured in subsequent extradition proceedings at New Delhi, even then the effort was not to prove that Tarasov had committed it, but to show that the competent authority under the Soviet law to fix the responsibility for the crime was the captain of the ship, and he had given his judgment against Tarasov. What precisely the Soviet law on the subject was and what precisely were the powers it conferred on the

<sup>6</sup> Sec. 7(1): "When the fugitive criminal appears or is brought before the magistrate, the magistrate shall inquire into the case in the same manner and shall have the same jurisdiction and powers as nearly as may be, as if the case were one triable by a court of session or High Court."

<sup>7</sup> Art. 56 of the Ukrainian Criminal Procedure Code lists a flight abroad or the refusal to return from abroad to the U.S.S.R. as treason punishable with ten to fifteen years' imprisonment, or confiscation of property, or with death or both death and confiscation of property.

<sup>8</sup> The Hindustan Times, March 30, 1963.

ship's captain were again points on which the Magistrate found the evidence lacking.

What can be the possible reason for this lukewarm conduct on behalf of the Soviet Government? Presumably the answer lies in the implied assumptions on the part of Russians, as was suggested at one point during the trial on behalf of the foreign state, that the evidence produced by it should be taken as "sufficient legal evidence," and credibility of the evidence must not be questioned. In other words, according to the Soviet notion, the relevant question in a case is not what evidence is produced but who produces it. No doubt this view is very near to the view of the Argentine Supreme Court:

. . . an extradition proceeding does not involve any interpretation of the relevant legislation of the requesting State nor any determination as to the guilt or lack thereof of the accused whose surrender has been requested. . . . Where the courts of the requesting State have ordered, for reasons submitted in the record, the detention and trial of a person whose extradition has been sought, an Argentine court does not have the authority to examine the merits of these charges nor to render a decision as to whether or not the charges have been proved against the accused, for these matters fall entirely within the jurisdiction of the courts of the State in which the charges were initiated.<sup>9</sup>

This may be in line with "Socialist legality" but it is certainly not according to the principles of justice as we know it. According to the practice prevailing in India, the demanding state must provide sufficient evidence to establish such a *prima facie* case as would warrant the committal for trial of the defendant if the offense were committed in India. In other words, ". . . there must be such evidence before the committing magistrate as would warrant him in sending the case for trial, if it were an ordinary case in this country."<sup>10</sup> As observed by the learned Magistrate: "Before convicting the accused evidence must be such that if it be uncontradicted at the trial, a reasonable-minded jury might convict him on it."<sup>11</sup> There should be a strong and probable case that the accused was guilty."<sup>12</sup> Not only that, the Magistrate went a step further and said that in extradition cases the degree of proof should be higher than in ordinary cases, for every country claimed that it had the sovereign right to give protection to its citizens as well as any foreigner who came under its protection.

<sup>9</sup> *Re Candino De Pepe*, 1956 Int. Law Rep. 412 at 413.

<sup>10</sup> L. C. Green, "Recent Practice in the Law of Extradition," 6 *Current Legal Problems* 274, 279 (1953).

<sup>11</sup> These observations are similar to those made in *Re Shalom Schtraks*, 233 L.T. 248, 249 (1962); digested in 56 A.J.I.L. 1111 (1962).

<sup>12</sup> *The Hindustan Times*, March 30, 1963. The observations in *re Mourat Mehmet*: "... the evidence which had been before the magistrate . . . [should] be sufficient for the finding of the fact—that there was a strong or probable presumption that the applicant had committed the offence . . ." (1962) Cr. L.R. 108, 109, are to the same effect.

## III

In his judgment the Magistrate stated that the fugitive could not be surrendered to the foreign state because there was no treaty of extradition between the Soviet Union and India. The view that a state is under no obligation to surrender a fugitive criminal to another state unless there is a treaty to that effect is well recognized.<sup>13</sup> In the United States the present view is that a treaty is essential for extradition.<sup>14</sup>

In England dating back to at least 1836, the English view has been that fugitives from the justice of foreign nations would not be surrendered to the demanding states in the absence of treaties or English legislation permitting such to be done, and that a person so detained in the absence of a treaty would be entitled to the benefits of a writ of habeas corpus.<sup>15</sup>

But a provision appears in the laws of many countries<sup>16</sup> for the surrender of fugitive criminals in the absence of treaty arrangement. Pantanjali Sastri, J., expressed the view that there was no universally recognized principle that there can be no extradition except under a treaty.<sup>17</sup> The most important point in this connection is that the view of the Magistrate is contrary to the view expressed by the Delegation of the Government of India at the meeting of the Asian-African Legal Consultative Committee that there could be no objection to voluntary extradition of offenders even in the absence of treaty arrangements.<sup>18</sup> This view of the Government of India was supported by the Japanese as well as the Indonesian Delegation, the latter restricting it only in case of crimes of a serious character.<sup>19</sup> Also, the definition of "extradition offense" in the Act,<sup>20</sup> as well as the heading of the Second Schedule running as "Extradition offenses in relation to foreign States other than treaty States . . ." indicate that extradition may be granted for the offenses mentioned therein to a state with which there is no treaty.

## IV

"Many national extradition statutes condition extradition on a guarantee (by treaty or municipal law of the requesting State) that the sur-

<sup>13</sup> Edwin D. Dickinson, "Extradition," 6 *Encyclopedia of Social Sciences* 41, 42: "While the obligation to extradite in the absence of treaty was supported by reputable opinion as late as the early 19th Century, it never became established in International Law"; 1 *Oppenheim, International Law* 696 (8th ed., 1955).

<sup>14</sup> *U. S. v. Rauscher*, 119 U. S. 407, 411-412; *Argento v. Horn et al.*, 1957 *Int. Law Rep.* 883, 884.

<sup>15</sup> *W. J. O'Hearn*, 8 C.B.R. 175, 177 (1930).

<sup>16</sup> Canada, Revised Statutes, 1952, Vol. V; France, Law of March 10, 1927, Art. 1.

<sup>17</sup> *Dr. Ram Babu Saksena v. The State*, A.I.R. 1950 S.C. 155 at 157.

<sup>18</sup> See the Report of the Third Session (Colombo, 1960), of the Asian-African Legal Consultative Committee 178.

<sup>19</sup> *Ibid.* 180.

<sup>20</sup> According to Sec. 2(c) of the Extradition Act, "extradition offense" means (1) in relation to a foreign state, being a treaty state, an offense provided for in the extradition treaty with that state; (2) in relation to a foreign state other than a treaty state or in relation to a commonwealth country, an offense which is specified in, or which may be specified by notification under, the Second Schedule.



rendered person will not be tried for any other act than that for which he was extradited.”<sup>21</sup> This is technically known as the doctrine of specialty and is provided for under Section 31(c)<sup>22</sup> of the Extradition Act. A point regarding this rule was raised on behalf of Tarasov during the inquiry. While the Soviet requisition was made to try him for the alleged offense of theft under the U.S.S.R. Penal Code, the communication from the investigator, Prosecuting Magistracy, Odessa, charged Tarasov with four offenses, including “plunder” of the state money, desertion of a Soviet ship and escaping the trial. Tarasov moved an application that the Soviet Government be asked about the subsisting laws in the Soviet Union for the purpose of showing that there existed law in that country regarding Section 31(c) of the Extradition Act. The Soviet Embassy did not produce, despite several orders of the court, any law relative to the aforesaid section of the Indian Act. It was argued on their behalf that the notification by the Government of India<sup>23</sup> may be taken as the application of the Indian Extradition Act of 1962 to the Soviet Union. The Magistrate rejected the argument and said that a notification could not hold good, since it would mean that the Indian legislature had powers to make laws binding on foreign countries and in that case there would have been no necessity for enacting Section 31(c) of the Act.

## V

The view of the Magistrate on the point of evidence offered by the Soviet Government is commendable. The presumption that a person is innocent until he is proved guilty is so deep-rooted in the Anglo-American and Indian legal systems, that for one educated in those systems it may seem incredible that a different system could exist. The Russians must have been caught by surprise, due to their preoccupation with the evidence of the established facts of the case. Perhaps the difference mainly lies in the two ways of life and not so much between the two types of legal systems. According to the Socialistic theory the state is all-important. It can make any demands on the individual, provided they are made in the name of the state by a duly constituted authority. But in a democratic country an individual has certain inherent rights. The state is competent to curtail them only by a prescribed process of law to be established beyond

<sup>21</sup> Harvard Research Draft Convention and Comment on Extradition, 29 A.J.I.L. Supp. 213 (1935).

<sup>22</sup> Sec. 31(c) of the Extradition Act: “A fugitive criminal shall not be surrendered or returned to a foreign State or commonwealth country unless provision is made by the law of the foreign State or commonwealth country or in the extradition treaty with the foreign State or extradition arrangement with the commonwealth country, that the fugitive criminal shall not, until he has been restored or has had an opportunity of returning to India be detained or tried in that State or country for any offence committed prior to his surrender or return, other than the extradition offence proved by the facts on which his surrender or return is based.”

<sup>23</sup> The Gazette of India, Extraordinary, Pt. II, Sec. 3, Subsec. (1), No. 4, Jan. 5, 1963. G.S.R. 56: “In exercise of the powers conferred by sub-section (1) of Section 3 of the Extradition Act, 1962, the Central Government hereby directs that the provisions of the said Act other than Chapter III, shall apply to the following countries with effect from the 5th January, 1963: . . . (3) Union of Soviet Socialist Republics.”

reasonable doubt. This is accepted by our legal and governmental systems without question and the fact that a totally different system might come in conflict with ours is not very material in our judgments.

The observations of the Magistrate on the matter of extradition in absence of a treaty cannot be supported to any great extent in view of the opinion expressed by the highest judicial organ (the Supreme Court) of the country, as well as the Government of India. It may be stated that the release of Tarasov on the ground that *prima facie* there was no case of theft against him, made it unnecessary for the Magistrate to consider whether or not there was an extradition treaty between India and the Soviet Union, especially when there is no definite principle of international law that extradition cannot be granted in absence of a treaty.

The Magistrate's insistence on the production of any law by the Soviet Union relative to Section 31(c) of the Indian Extradition Act is justifiable. It has in its support the authority of such a great person as Lord Coleridge, Chief Justice, who observed:

... but if subsection 2 of section 3 [of the United Kingdom Extradition Act, 1870, which is similar to section 31(c) of the Indian Extradition Act] has not been complied with, then it is equally clear that there should be a rule absolute, and that the Government of this country ought not to give up the fugitive to the Government of the United States.<sup>24</sup>

In fine, it may be said that the result of the inquiry created a sense of satisfaction in the Delhi public, and something was only added to it when Tarasov said: "I will carry many happy memories of your country which respects justice."<sup>25</sup>

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#### THE INTERNATIONAL COFFEE AGREEMENT, 1962

The recent entry into force among 37 countries of the International Coffee Agreement, 1962,<sup>1</sup> successfully culminates years of effort to establish

<sup>24</sup> Re Alice Woodall, (1888) 59 L.T. 549, 553. See also In Re Bouvier, (1872) 42 L.J.Q.B. 17. In both these cases it was indicated that a provision respecting the rule of specialty must be shown to be existing in the demanding state.

<sup>25</sup> The Hindustan Times, April 1, 1963.

<sup>1</sup> The Agreement provisionally entered into force on July 1, 1963, upon deposit with the U.N. Secretary General of instruments of ratification or notifications of intent to seek ratification by at least twenty exporting countries representing at least 80 percent of world coffee exports and at least ten importing countries representing at least 80 percent of world imports. Twenty-five exporting countries representing 89.5 percent of world exports and twelve importing countries representing 81.5 percent of world imports had deposited such instruments at the time the Agreement took effect. The Agreement will definitively enter into force when the above requirements are met by the deposit of instruments of ratification alone, which must occur before Dec. 31, 1963. See U.N. Press Release L/1094 of July 1, 1963.

On May 21, 1963, the U. S. Senate gave its advice and consent to ratification of the Agreement, and implementing legislation was shortly thereafter introduced in Congress. As of the date of this writing, this legislation has not yet been enacted and the

a global system regulating commerce in one of the world's most important and troublesome commodities<sup>2</sup> and lends increased emphasis to the need for international lawyers to give greater attention to developments in the international economic field.

The potential significance of the new Agreement, to which over 70 countries may eventually become parties, can hardly be exaggerated. Coffee is the leading agricultural commodity in world trade, with an export value in many years of over two billion dollars. It is grown in some 35 countries of Latin America, Africa, and Asia, and provides a means of livelihood for nearly twenty million people. Most of these producing countries are relatively poor and underdeveloped, and are typically heavily dependent on coffee exports for foreign exchange to maintain and improve their economies.<sup>3</sup> Consequently, few matters are as important to the economic and political stability and development of these nations as the maintenance of a healthy and expanding coffee market.

Unfortunately, in a world in which agricultural commodities have frequently been subject to serious economic difficulties, coffee has proved particularly troublesome. The international coffee market, especially since 1954, has been characterized by chronic overproduction, the accumulation of burdensome stocks, pronounced market instability, and continuing price decline. By 1962, the level of wholesale coffee prices was less than half that in 1954. This market deterioration resulted in a major foreign exchange loss to producing countries, disrupting their development plans and threatening broader economic dislocation. In view of the number and importance of the countries involved, the situation was clearly one of the most urgent international concern.

A series of efforts to find an effective solution to this problem culminated in the convening of a United Nations Coffee Conference, held in New York in the summer of 1962 and attended by representatives of 71 countries. Few multilateral conferences have been as difficult as the Coffee Conference in terms of the diversity of interests and viewpoints represented and the number and complexity of the issues requiring resolution. Until almost the last moment, the negotiation verged on failure. Finally, after more than six weeks of protracted debate, the Conference succeeded in producing an agreed text, which was eventually signed by 54 countries.

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United States has not as yet formally ratified the Agreement. However, on June 24, 1963, in order to permit the Agreement to provisionally enter into force in time for arrangements to be made for the Coffee Year commencing Oct. 1, 1963, the United States deposited a notification of intent to seek ratification. See Dept. of State Press Release No. 329 of June 24, 1963.

<sup>2</sup> For a more comprehensive discussion of the history and content of the Agreement, see Bilder, "The International Coffee Agreement: A Case History in Negotiation," 28 *Law and Contemporary Problems* 328 (Spring, 1963).

<sup>3</sup> For example, six of the producing countries (Colombia, Guatemala, El Salvador, Ethiopia, Brazil, and Costa Rica) derive 50 percent or more of their foreign exchange from coffee exports, and about a quarter of the total foreign exchange earnings of the 15 coffee-producing countries of Latin America comes from this single source. A 1¢ per pound decline in coffee prices has been estimated to mean a yearly foreign exchange loss to Latin America of about 50 million dollars.

As to form and substance, the Coffee Agreement is a long and complex instrument, consisting of 74 articles and 4 annexes. Its basic purpose is to assist in increasing the purchasing power of coffee-exporting countries by arresting the present downward trend in prices and by creating an economic climate in which the difficult problems of coffee overproduction and stock accumulation can be successfully attacked. The key features of the Agreement are as follows:

1. A new international institution—The International Coffee Organization—is created. It will have its headquarters in London and will function through a Council, an Executive Board, and an Executive Director. The Organization is given broad powers to administer the provisions of the Agreement and will also provide a multilateral forum for dealing generally with world coffee problems. Decisions of the Council and Board will require a concurrent simple or, for more important decisions, two-thirds majority of the votes of the group of exporting countries and the group of importing countries, voting separately. Voting power among the members of each group will be distributed according to a modified weighted voting formula whereby each member will receive votes within its group generally proportionate to its relative share in either world import or export trade. However, in order to prevent Brazil and the United States (by far the largest exporter and importer, respectively) from completely controlling the Organization, an upper limit is placed on the number of votes any one country may exercise. Moreover, no single country will be permitted to alone veto a proposal which all other members support.

2. A comprehensive system of export quotas is established, designed to limit total supplies put on the market by exporting members to estimated levels of world demand. Quotas will be set each year by the Council and may be adjusted quarterly to the needs of the market. Shipments of all coffee, in every form, are subject to the quota provisions, except that "ex-quota" shipments may be made under careful controls and specific conditions to certain designated "new market" areas.

3. Importing countries (such as the United States, the United Kingdom, and the Common Market countries) will bring their administrative machinery to bear on making the quota system effective and preventing quota violations. All coffee shipments from members of the Organization must be accompanied by certificates identifying the origin of the coffee, and members must refuse entry to coffee not accompanied by such certificates. Import statistics are to be quickly provided to the Organization for quota-enforcement purposes. Moreover, members will in certain circumstances restrict coffee imports from non-members in order to encourage countries to adhere to the Agreement and to prevent non-members from receiving the benefits of the Agreement without also sharing in its burdens.

4. Measures will be taken both to control excess coffee production and to increase coffee consumption. Specific production targets will be recommended for each producing member, and penalties are provided for countries failing to take measures to try to achieve these targets. A stock policy will also be identified for each producing country. Importing

countries may voluntarily assist producing countries to shift out of coffee production and diversify their economies. Steps will also be taken to reduce obstacles to coffee trade and consumption (such as tariffs, quantitative restrictions, and internal taxes), and to increase coffee marketings by means of promotion and advertising campaigns.

5. Consumers and the coffee trade will be protected against any substantial price increases. In line with the general purpose of the Agreement to stem the downward trend in coffee prices, a specific price objective is provided of assuring that the general level of coffee prices does not decline below the level of such prices in 1962. However, the undesirability of sharp price rises, particularly as a result of collusive producer action, is recognized, and specific administrative machinery is provided to deal with such a situation.

Perhaps the most significant feature of the Coffee Conference and the new Agreement is that importing countries have been willing not only to participate but also to affirmatively assume a number of substantial obligations essential to the Agreement's success. These consuming countries have, of course, little direct interest in stemming price declines in the coffee they buy; their interest in the coffee problem is instead primarily an indirect interest in the achievement of a stable and healthy world economy. Their co-operation thus demonstrates a growing international recognition of the fact that no one nation or group of nations can effectively insulate itself from the poverty and problems of others, and that in this interdependent modern world, the solution of such major problems has very much become every country's business and responsibility.

Whether the Agreement will succeed in providing a lasting solution to the coffee problem will depend more on the attitudes of the member countries than on the technical characteristics of the instrument itself. The tools are there if the parties will use them; the Agreement can work if the parties have the will to make it work. In particular, producing countries will have to be willing to make the sacrifices and exercise the self-discipline necessary to control and diversify production and reduce stock accumulations. However, the fact that the countries concerned could reach common understandings and acceptable compromises in as complex a negotiation as the Coffee Conference is itself encouraging evidence of their ability and, hopefully, determination to make the Agreement a success.

Apart from the Coffee Agreement's specific importance, it may serve as a further example of the growing rôle of international economic agreements in the organization of world trade and investment. The number, scope, and importance of such economic arrangements is not always appreciated. In the commodity field alone, agreements are now in effect with respect to coffee, wheat, sugar, tin, and olive oil, and a cocoa arrangement is currently under negotiation. Proposals have been made for other commodity agreements covering bananas, tea, and lead and zinc, as well as for more generalized agreements designed to handle the complex problems of agricultural trade relations between the Common Market and other countries. Outside of the primary commodity field, there are many other im-

portant multilateral economic agreements, such as the General Agreement on Tariffs and Trade (GATT); the Common Market Treaty; the Treaty establishing the Organization for Economic Cooperation and Development (O.E.C.D.); the Articles of Agreement of the International Bank and International Monetary Fund; the European Coal and Steel Community Agreement; and the Long-Term Cotton Textile Arrangement. And in the area of bilateral agreements, there is a worldwide network of trade and commercial arrangements. The collective impact on world trade of these numerous and diverse economic agreements is obviously of considerable significance and cannot properly be ignored by anyone seeking to understand the workings of the modern international economy.

The new Agreement also serves as a reminder that these economic arrangements represent a valuable source of experience in international legal and institutional techniques, thus far comparatively untapped by scholars or practitioners.<sup>4</sup> A comprehensive analysis of practice under these arrangements in such matters as weighted voting or waiver, for example, might add considerably to our understanding of the most appropriate use of these devices. One may hope that more studies in this area will be forthcoming.

RICHARD B. BILDER

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#### COUNCIL OF EUROPE ENDORSEMENT OF HAGUE ACADEMY OF INTERNATIONAL LAW

The Consultative Assembly of the Council of Europe recently adopted unanimously the following recommendation concerning the Hague Academy of International Law, which had been prepared by Hermod Lannung as Rapporteur and unanimously adopted by the Legal Committee of the Council of Europe on May 7, 1963:<sup>1</sup>

The Assembly,

Considering that The Hague Academy of International Law constitutes one of the best organized and most active centers for Advanced Studies of Public and Private International Law;

Considering the valuable and objective nature of the teaching given at the Academy by experts in international law of various nationalities to jurists, specialised students, young members of the teaching profession and diplomats from every part of the world;

Considering the high standard of the diploma awarded by the Academy to students who pass the annual examination;

Recommends that the Committee of Ministers:

- (a) draw the attention of member governments to the activities of The Hague Academy of International Law and the results achieved by it;

<sup>4</sup>For instance, international economic agreements and institutions have received almost no attention in articles in this JOURNAL. However, for examples of useful studies along this line, see Hexner, "Worldwide Economic Institutions: A Factual Review," 61 Columbia Law Rev. 854 (1961); and Metzger, "Settlement of International Disputes by Non-Judicial Methods," 48 A.J.I.L. 408 (1954).

<sup>1</sup>Council of Europe Doc. 1575, May 7, 1963. The Committee of Ministers adopted the resolution on June 21, 1963.

## (b) ask member governments

- (i) to encourage in particular their civil servants, members of the teaching profession, jurists and diplomats to take the courses, at the Academy, by granting them the necessary facilities such as special leave, travelling and subsistence allowances, etc.;
- (ii) to take, as far as possible, into account as in the case of other university diplomas, the diploma granted by the Academy, whenever they appoint civil servants specialised in the field of public or private international law.

The Report of the Legal Committee explained and discussed the work of the Hague Academy. It commented, *inter alia*, that:

The results obtained so far by the Academy have fully justified the expectations of its founders. It has been demonstrated that co-operative efforts for the study and development of international law lead to the formation of a genuine international mine. In spite of the diversity of origin of thought and language, the common aims of professors and students have made it possible to establish lasting academic intercourse and co-operation. The success of thirty-three sessions shows that the Academy can count upon the goodwill of governments, on the assistance of experts in international law and on increasing general support and attendance.

WILLIAM W. BISHOP, JR.

## LEGATUM VISSERIANUM

The Board of Curators of Leyden University, which administers the legacy of the late Dr. S. J. Visser to the University, providing for the periodical award of prizes amounting to 5,000 guilders in an international competition on questions of public and private international law, has made the following announcement, in agreement with the Faculty of Law of the University:

The Legatum Visserianum invites a critical examination of the question as to whether, and if so, to what extent, the traditional views on reprisals in time of peace need to be changed in the light of the customary practice of nations since the second world war. (See for example Oppenheim-Lauterpacht, *International Law*, II, 7th ed., pp. 135-144.)

Prizes will be awarded to those treatises which, in the opinion of the Board of Curators and the Faculty of Law of Leyden University, deserve an award. The Board reserves the right to divide the amount allocated for the present competition among several candidates. It also reserves the right to place entries not published by the competitors or by the Legatum Visserianum Foundation at the disposal of the public in the University Library.

Entries should be typewritten, in English, French, German, Dutch or South African. Each document should bear a motto, to be submitted also in a sealed envelope attached to the document and containing the name and address of the author or authors. Papers entered in the competition should be submitted to the Board of Curators of Leyden University before July 15, 1965.

ELEANOR H. FINCH

## CONTEMPORARY PRACTICE OF THE UNITED STATES RELATING TO INTERNATIONAL LAW

The material for this section has been prepared by a committee consisting of RICHARD B. BILDER, HAROLD S. BURMAN, STANLEY L. COHEN, THOMAS T. F. HUANG, SYLVIA E. NILSEN, and HERBERT K. REIS, under the chairmanship of ERNEST L. KERLEY, all of the Office of the Legal Adviser, Department of State. Mr. ALFRED P. RUBIN of the Office of General Counsel, Department of Defense, has provided the committee with material originating in the Department of Defense.

### TREATIES

#### *Interpretation—entry into force and effective dates*

In a communication to the Secretary of State, the Ambassador of Austria referred to the item in the Department of State publication *Treaties in Force* relating to the Convention of October 25, 1956, between the United States and Austria for the Avoidance of Double Taxation with Respect to Taxes on Income (T.I.A.S., No. 3923; 8 U. S. Treaties 1699), and requested that a rectification be made. In the publication it is stated that the convention entered into force on October 10, 1957. The Ambassador pointed out that, although that is the date of the exchange of instruments of ratification, the convention provides that it "shall have effect on and after the first day of January of the calendar year in which such exchange takes place" and that therefore the convention entered into force on January 1, 1957. In reply, the Secretary stated:

The question presented in the above-mentioned note is one which arises from differing interpretations of the terms "enter into force" and "effective". In the treaty practice of the United States Government, it has been considered that a treaty, which by its terms is operative or effective retroactively, enters into force on the date on which the final action has been taken to make the treaty a binding instrument, in full force and effect. As in the case of the 1956 convention, it is customary for a treaty to provide for exchange of instruments of ratification, such exchange being *de jure* the final action which brings into operation the provisions of the treaty. If, among the provisions, it is provided that the treaty shall have effect as of a date or during a specified period prior to the date of the exchange of instruments of ratification, it is considered that the treaty does, upon the exchange, become operative or effective as of that prior date or during the specified period in accordance with the relevant provisions.

The formula used in tax treaties has varied considerably, but the concept explained above has been understood to be applicable. In the income-tax convention of 1945 between the United States and the United Kingdom, for example, it is provided: "Upon exchange of ratifications, the present Convention shall have effect" et cetera. In the income-tax convention of 1957 between the United States and



Pakistan, it is provided: "The present Convention shall come into force on the date when the last of all such things shall have been done in the United States and Pakistan as are necessary to give the Convention the force of law in the United States and Pakistan, respectively, and shall thereupon have effect" et cetera. In the income-tax agreement of 1959 between the United States and India, it is provided: "The present Agreement shall come into force on the date of exchange of ratifications, and shall be applicable" et cetera. In an income-tax convention of 1960 between the United States and the United Arab Republic, not yet in force, it is provided: "Upon the entry into force of the present Convention, the provisions of the Convention shall be applicable" et cetera.

It is considered, therefore, that the income-tax convention of 1956 between the United States and Austria was brought into force by the exchange of instruments of ratification and accordingly entered into force on October 10, 1957, whereupon it had effect on and after January 1, 1957, in accordance with its provisions.

The question presented in His Excellency's note has, nevertheless resulted in further consideration of the information set forth in the Department's publication "Treaties in Force". In the next and succeeding issues of that publication, the information with respect to tax conventions will be augmented, wherever appropriate, by the addition of statements to indicate the retroactive effectiveness.

(Ambassador of Austria to the Secretary of State, March 6, 1963; the Secretary of State to the Ambassador of Austria, March 15, 1963.)

*Provisional entry into force—International Coffee Agreement*

The Department of State issued the following press release:

The United States today informed the Secretary-General of the United Nations that it intends to ratify the International Coffee Agreement. It is expected this notification will lead to the provisional coming into force of the new International Coffee Agreement at an early date.

For the Agreement to enter into force, it requires ratification by 20 coffee exporting countries having at least 80 percent of exports, and by 10 importing countries having at least 80 percent of imports. However, the Agreement may enter into force provisionally, when notifications by signatory governments stating their intention to ratify are received by the Secretary-General of the United Nations.<sup>1</sup>

<sup>1</sup> Art. 64 (1) and (2) of the International Coffee Agreement provides:

"(1) The Agreement shall enter into force between those Governments which have deposited instruments of ratification or acceptance when Governments representing at least twenty exporting countries having at least 80 percent of total exports in the year 1961, as specified in Annex D and Governments representing at least ten importing countries having at least 80 percent of world imports in the same year, as specified in the same Annex, have deposited such instruments. The Agreement shall enter into force for any Government which subsequently deposits an instrument of ratification, acceptance or accession on the date of such deposit.

"(2) The Agreement may enter into force provisionally. For this purpose, a notification by a signatory Government containing an undertaking to seek ratification or acceptance in accordance with its constitutional procedures as rapidly as possible, which is received by the Secretary-General of the United Nations not later than 30 December 1963, shall be regarded as equal in effect to an instrument of ratification

To date, 24 exporting countries representing 88.7 percent of coffee exports and 10 importing countries representing 26.8 percent of coffee imports have ratified the Agreement or formally declared their intention to do so. As the United States imports 51.7 percent of the world's coffee, today's action raises the total of importing countries to 11 representing 78.5 percent of world imports. It is understood that a number of other importing countries are in a position to quickly ratify the Agreement. The prospect is, therefore, that the new International Coffee Agreement will come into force provisionally in the next few weeks, and that the first meeting of the Coffee Council, administrative body of the Agreement, will be held in July. This will permit quota arrangements to be made well in advance of the new coffee year beginning October 1, 1963.

The Senate of the United States gave its advice and consent to ratification of the International Coffee Agreement on May 21, 1963. Implementing legislation is now before both Houses of Congress and consideration is expected shortly. (Department of State Press Release No. 329, June 24, 1963.)

#### *1953 Opium Protocol—continued application*

The following memorandum of April 4, 1963, has been prepared for distribution in reply to questions regarding the continued effectiveness of the Protocol for Limiting and Regulating the Cultivation of the Poppy Plant, the Production of, International and Wholesale Trade in, and Use of Opium, which protocol was dated at New York June 23, 1953, and entered into force on March 8, 1963:

#### THE CONTINUED APPLICATION OF THE 1953 OPIUM PROTOCOL

It appears to be the view in some quarters that the 1953 Opium Protocol will soon be replaced by the Single Convention of 1961. This view overlooks the slow progress that is being made with respect to the ratifications and accessions to the Single Convention, the manner in which the Single Convention is intended to affect the Protocol, and the special nature of the obligations undertaken in the Protocol.

As a matter of fact, it is clear that the 1953 Protocol will have wide application for at least five years and, in the absence of denunciations, will continue for a long period thereafter. The Single Convention will not relieve any of the parties to the Protocol from any of their obligations under the Protocol as long as at least one party to the protocol has not become a party to the Convention. The only manner in which parties to the Protocol can be relieved of their obligations under it is by all parties becoming parties to the Single Convention or by denunciation. Denunciation of the Protocol can take place only after the expiration of five years from the date of its entry into force.

The time when the Single Convention will be brought into force by the or acceptance. It is understood that a Government which gives such a notification will provisionally apply the Agreement and be provisionally regarded as a party thereto until either it deposits its instrument of ratification or acceptance or until 31 December 1963, whichever is earlier." (Senate Doc., Exec. H, 87th Cong., 2d Sess., at 82.)

deposit of forty ratifications or accessions may be several years from now. Two years have passed since the Single Convention was opened for signature and only sixteen nations have deposited their ratifications or accessions. Twenty-four more ratifications or accessions are required to bring the Convention into force.

The view that the Single Convention will, upon its entry into force, replace the 1953 Protocol is based upon the provisions of Article 44 of the Single Convention which reads as follows:

“The provisions of this Convention, upon its coming into force, shall, as between Parties hereto, terminate and replace the provisions of the following treaties:

“(i) Protocol for Limiting and Regulating the Cultivation of the Poppy Plant, the Production of, International and Wholesale Trade in, and Use of Opium, signed at New York on 23 June 1953, should the Protocol have come into force.”

As the 1953 Protocol entered into force on March 8, 1963, the entry into force of the Single Convention will require consideration of three categories of obligations between States parties to the Protocol, namely:

1. Obligations between parties to the Protocol that do not become parties to the Single Convention.
2. Obligations between parties to the Protocol that do not become parties to the Single Convention and Parties to the Protocol that becomes parties to the Single Convention.
3. Obligations between parties to the Protocol that become parties to the Single Convention.

The obligations among the first group of parties to the Protocol, those that do not ratify the Single Convention, are not affected in any manner by the Single Convention. The intent of the Single Convention is to terminate and replace the Protocol *only as between parties to the Convention*.

The obligations in the second group, namely, those involved in relations between the parties to the Protocol that do not become parties to the Convention, on the one hand, and the parties to the Protocol that become parties to the Single Convention, on the other hand, are likewise unaffected by the provisions of the Single Convention. As long as at least one State remains a party to the Protocol without becoming a party to the Single Convention, that one State can demand that all the other parties to the Protocol, even though they have become parties to the Single Convention, must observe their obligations under the Protocol to that one State. It should again be noted that the Single Convention does not attempt to relieve parties to the Protocol that become parties to the Single Convention from their obligations to parties to the Protocol that have not become parties to the Single Convention.

In considering the third group of obligations, namely, those between States parties to the Protocol that become parties to the Single Convention,

we are immediately faced with the language that the Convention shall replace and terminate the Protocol as between parties to the Convention. A question arises whether that language is binding upon any State that does not become a party to the Convention. For example, how can States parties to the Protocol be bound by that language in the Convention unless and until they become parties to the Convention? In view of the continuing treaty obligations between the parties to the Protocol that do not become parties to the Single Convention and the parties to the Protocol that become parties to the Single Convention, the latter group will be required, in their relations with each other, to continue to observe their obligations under the Protocol. The Protocol, like most of the earlier international instruments regarding narcotic drugs, is intended to be world-wide in its application. It is intended to impose obligations upon each party not only with respect to their relations with other parties to those instruments but also obligations with respect to their relations with States that have not become parties.

Heretofore, except for certain provisions of the 1912 narcotics convention being replaced by the 1925 Convention, and certain depositary provisions being changed by the 1946 Protocol, each of the international narcotics agreements that has been brought into force has simply added to, rather than changed, existing obligations. None of the narcotics agreements concluded prior to the Single Convention of 1961 has in any manner relaxed controls previously established; they have added to and strengthened the existing controls. The Single Convention of 1961 has, however, omitted several of the controls embodied in the 1953 Protocol; for example, the closed list of producers of opium for export, and the provisions on limitations on stocks. In view of this, along with the intended world-wide application of the Protocol, the states that remain parties to the Protocol but do not ratify the Single Convention have a perfect right under international law to insist that all States parties to the Protocol continue to observe, with respect to every other State, the restrictions imposed by the Protocol, even though some of those States become parties to the Single Convention.

The provisions of Article 44 of the Single Convention, relating to the replacement of the Protocol as between States parties to the Single Convention, cannot apply in certain respects, for the simple reason that those provisions do not relieve those States of their obligations *vis-a-vis* the parties to the Protocol that are not parties to the Single Convention. It may be true that States parties to the Single Convention can, as between themselves, give effect to certain provisions thereof, but only to the extent that the rights and obligations involved are of concern solely to them and do not affect in any way the rights and obligations under the Protocol of States that, being parties to the Protocol, have not become parties to the Single Convention. If any action by States parties to the Single Convention is contrary to the terms of the Protocol, even though entirely in accord with the terms of the Single Convention, any State a party to the Protocol and not to the Single Convention will have a right to protest

against violation of the terms of the Protocol, particularly if its rights under the Protocol are being contravened. To put it another way, States parties to the Single Convention cannot appropriately do anything under the terms of that Convention if what is done is contrary to any of the terms of the Protocol as applied to States that are parties to the Protocol and not to the Single Convention.

Accordingly, the entry into force of the Single Convention will not relieve States parties to that Convention from any of the obligations they entered into under the Protocol. The same principle applies to all the other existing international agreements on narcotics. In the case of those other instruments, parties can now withdraw on one year's notice or less, but notice of termination of the Protocol can be given only after five years have elapsed from March 8, 1963, the date of its entry into force.

(Office of the Legal Adviser, Department of State.)

#### STATE RESPONSIBILITY AND INTERNATIONAL CLAIMS

##### *Acts of civil authorities—territorial waters—seizure of vessels—United States legislation concerning international claims*

On February 8, 1962, the American vessel, "Valley Gold," was seized by authorities of the Mexican Government on the basis of rights or claims in territorial waters not recognized by the United States. In order to obtain the prompt release of the vessel, bonds in the amount of 30,000 pesos (\$2,400.00) were posted by the owner of the vessel. These bonds were later converted into fines by the Mexican authorities. The Department of State thereafter made the necessary certification to the Secretary of the Treasury of the United States pursuant to the provisions of Section 3 of Public Law 680, 83d Congress, approved on August 27, 1954, enabling the owners of the vessel to be reimbursed for the amount of the fines.

Public Law 680, 22 U.S.C. Chapter 25, Sections 1971-1976,<sup>1</sup> an Act "To protect the rights of vessels<sup>2</sup> of the United States on the high seas and in territorial waters of foreign countries," provides *inter alia* that

§ 1972. Action by Secretary of State upon seizure of vessel by foreign country.

In any case where—

(a) a vessel of the United States is seized<sup>3</sup> by a foreign country on the basis of rights or claims in territorial waters or the high seas which are not recognized by the United States; and

<sup>1</sup> H.R. 9584, 68 Stat. 883.

<sup>2</sup> Sec. 1971 provides that "For the purposes of this chapter the term 'vessel of the United States' shall mean any private vessel documented or certificated under the laws of the United States."

<sup>3</sup> Sec. 1974, "Inapplicability of Chapter to certain seizures," states:

"The provisions of this chapter shall not apply with respect to a seizure made by a country at war with the United States or a seizure made in accordance with the provisions of any fishery convention or treaty to which the United States is a party."

(b) there is no dispute of material facts with respect to the location or activity of such vessel at the time of such seizure,

the Secretary of State shall as soon as practicable take such action as he deems appropriate to attend to the welfare of such vessel and its crew while it is held by such country and to secure the release of such vessel and crew.

§ 1973. Reimbursement of owner for fine paid to secure release of vessel and crew.

In any case where a vessel of the United States is seized by a foreign country under the conditions of section 1972 of this title and a fine must be paid in order to secure the prompt release of the vessel and crew, the owners of the vessel shall be reimbursed by the Secretary of the Treasury in the amount certified to him by the Secretary of State as being the amount of the fine actually paid.

A Memorandum of the Office of the Legal Adviser, dated January 18, 1963, stated that

The Governments of the United States and Mexico agree that the seizure occurred within the 9 mile territorial sea claimed by the Government of Mexico and outside the 3 mile territorial limit recognized by the Government of the United States. In this connection, the Government of the United States based its note of protest of May 15, 1962, to the Mexican Government on the findings of Mexican authorities that the seizure occurred . . . 4.9 miles from the Mexican coast. The claimant also admits that the seizure occurred at such coordinates.

There is no dispute of material facts regarding the activity of the vessel at the time of seizure.

Section 3 of Public Law 680 provides that the owners of vessels seized under the above-mentioned circumstances shall be reimbursed by the Secretary of the Treasury in the amount certified to him by the Secretary of State as being the amount of the fine actually paid to secure the prompt release of the vessel. Delegation of Authority No. 94 dated October 4, 1957, delegates such authority to the Legal Adviser and Deputy Legal Adviser.

In another case, that of the American vessel, the "Valley Ace," seized by authorities of the Mexican Government on April 5, 1962, Section 1972 (b) of the Act was construed by the Department of State in the following manner:

There is no dispute of material facts between the Governments of the United States and Mexico regarding the location or activity of the vessel at the time of seizure. The Government of the United States in its note of protest accepted the findings of Mexican authorities that the "Valley Ace" was 4½ miles from the Mexican coast when it was seized. There is conflicting testimony, however, between the captains of the American and Mexican vessels regarding the location of the vessel at the time of seizure. The Mexican captain testified that the seizure occurred 4½ miles from the Mexican coast while the American captain stated that he believed he was outside Mexican waters (9 miles) when seized. . . . There is agreement that the vessel was fishing when seized.

Notwithstanding the testimony of the captain of the American vessel, we believe the claim should be certified for payment because there is no dispute of material facts between the Governments of the United States and Mexico about the location and activity of the vessel at the time of seizure. While Public Law 680 does not specifically state that the dispute must be between the Government of the United States and the government seizing the vessel, the legislative history of the law establishes that such was the intent of Congress. In this connection, the Senate in its Report No. 2214 (83d Congress, 2d Session) stated in its analysis of H. R. 9584 (the bill which became Public Law 680) that "The Secretary of State shall take these actions where there is no dispute of material fact between the two countries with respect to the location or activity of the vessel at the time of its seizure." The same statement was also made by the House in its Report No. 2449 on the same bill.

(Memorandum of the Office of the Legal Adviser, dated Nov. 23, 1962.

The Department of State certified the claim to the Secretary of the Treasury on Nov. 30, 1962.)

Sections 1972 (b) and 1973 provide that the Secretary of the Treasury shall reimburse the owners of seized vessels upon certification by the Secretary of State as to the "amount of the fine actually paid," and that "no dispute of material facts" exists with respect to the location or activity of the vessel at the time of seizure. The certification of the Secretary of State is therefore stated in terms of the absence of such a dispute.

In the evaluation of the case, it is the practice of the Department of State to examine the evidence presented both by the owners of the vessels and the seizing state in order to make a determination as to the location of the vessel, the activities engaged in by the vessel, and the amounts actually forfeited by the owners of the vessels. Thus the material facts in the *Valley Gold* case were determined in the following manner:

The ownership of the vessel and its documentation or certification under the laws of the United States at the time of seizure were established by a certificate issued by the Bureau of Customs, Department of the Treasury, on July 27, 1962;

The time of seizure and amount of the bonds were established by reports from the American Consulate at Veracruz, a transcript of the hearings afforded the captain of the vessel at Coatzacoalcas, the findings and judgment of Mexican authorities, and the affidavit of the owner of the vessel;

The conversion of the bonds to fines was established by a report from the American Embassy at Mexico City (airgram No. A-549 of October 24, 1962), and a sworn statement by the owner of the vessel that no remittances were received from the Mexican Government on the bonds.

(Memorandum of the Office of the Legal Adviser.)

The Department of State has further noted in these cases that

Compensation for that part of the claim based upon the confiscation of shrimping equipment can be obtained only by the successful

espousal of a formal claim against the Government of Mexico through diplomatic channels.<sup>4</sup>

(MS. Department of State, File L/C 611: 1246 Valley Gold/; Valley Ace/.)

*General criteria of responsibility—war losses—United States legislation on international claims—nationality of claimants*

An inquiry was presented to the Department of State concerning possibilities of compensation for war damage to the property of a naturalized United States citizen in Sofia as a result of bombing by United States armed forces during World War II. The claimant, at the time of the war damage to his property, was a Bulgarian national. In reply, it was stated that the Department "was not aware of any existing authority or procedure" whereby the claimant or persons in similar circumstances may receive compensation.

Section 303 of the International Claims Settlement Act of 1949<sup>1</sup> as amended, provided compensation for war damage in Bulgaria out of funds derived from proceeds of certain vested Bulgarian assets in the United States. Claims, however, which were not owned by United States citizens at the time of loss of or damage to property were not allowed.

As you know, it has always been the policy of the United States Government not to permit citizens of the United States who did not have that status at the time of loss or damage to share in funds paid by foreign governments or funds derived from vested assets either for the taking of property or for war damage.<sup>2</sup> This policy rests

<sup>4</sup> Sec. 1975:

"The Secretary of State shall take such action as he may deem appropriate to make and collect on claims against a foreign country for amounts expended by the United States under the provisions of this chapter because of the seizure of a United States vessel by such country."

<sup>1</sup> Public Law 455, 81st Cong. (H.R. 4406), 64 Stat. 12; 22 U.S.C. Ch. 21, § 1621.

<sup>2</sup> In reply to a similar inquiry concerning the taking by the Government of Yugoslavia in 1948 of property owned by persons who later acquired United States citizenship in 1956, the Department of State noted:

"The United States Government has always adhered to this principle and, accordingly, does not intervene on behalf of persons who were not citizens of the United States at the time of loss or damage, even though such persons became citizens at some later time. Also, it has been the policy of the United States Government not to permit citizens of the United States who did not have that status at the time of loss or damage to share in lump sums paid by foreign governments in settlement of nationalization or war damage claims."

(Letter dated Jan. 29, 1963, from Assistant Secretary of State Dutton to Senator Javits.)

On the other hand, an obligation has been assumed by one state, under certain circumstances, to compensate nationals of another state who did not have nationality of the latter state at the time the alleged loss or damage occurred. Thus an Agreement between the Governments of the United States and Yugoslavia, on July 19, 1948, 62 Stat. 2658, T.I.A.S., No. 1803, settling and discharging all claims of citizens of the United States against Yugoslavia for the nationalization or other taking of their property prior to that date, provided in effect that:

"With respect to claims of persons who were not American nationals at the time



upon the universally accepted principle of international law that a state does not have the right to ask another state to pay compensation to it for losses or damages sustained by persons who were not its citizens at the time of loss or damage.

It may also be pointed out that the Congress in Public Law 87-846, approved October 22, 1962,<sup>3</sup> which provides for the payment of war damage claims against Germany, specifically excluded claims which were not national in origin by providing that a claim shall not be allowed "unless the property upon which it is based was owned by a national or nationals of the United States on the date of loss, damage, or destruction. . . ."

Since Mr. G . . . was a Bulgarian national at the time of his property loss, attention may be called to Article 28 of the treaty of peace with Bulgaria.<sup>4</sup> Under that Article, Bulgaria waived all claims of any description of its nationals for losses or damages sustained as a result of the war as a consequence of acts of forces or authorities of Allied or Associated Powers.

In view of the foregoing, the Department does not know of any way in which United States citizens who were Bulgarian nationals at the time of loss or damage to their property may obtain compensation.

(Reply dated Feb. 11, 1963, from Assistant Secretary of State Dutton to Senator Humphrey.)

On the other hand, unilateral action by a state to compensate its nationals for losses suffered as a result of the taking of property by another state, does not preclude the former from presenting formal diplomatic claims for compensation based on those losses to the latter.

The taking by the Government of Hungary prior to August 9, 1955 of property owned by United States nationals at the time of taking gave rise to a claim for compensation under an Act of Congress ap-

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their property was nationalized but who had acquired American citizenship by July 19, 1948, the date of the above-mentioned agreement, Yugoslavia undertook to compensate such claimants either by direct negotiation with them or according to compensation procedures established by Yugoslav law. Such claims had to be filed with Yugoslav authorities by April 14, 1961."

(Letter from the Deputy Assistant Legal Adviser (Misey) to the American Consulate General at Zagreb on Jan. 23, 1963.)

<sup>3</sup> H.R. 7283. See 57 A.J.I.L. 354-372 (1963). The proposed legislation, as printed in the Senate on Sept. 13, 1962, contained certain amendments which were not incorporated in the final Act, which would have, *inter alia*, included in the definition of "nationality of claimants" those persons who had become nationals after the date on which the loss or damage occurred but on or before the date of enactment of the legislation. Cf. Sec. 204 of the Act.

Another proposed amendment, which was not enacted, would have extended the categories of claimants under the nationality rule to provide for the determination of claims of those persons who were refugees from specified Eastern European countries or areas and who had suffered loss or damage to property located in such areas in the postwar period beginning May 8, 1945, and ending Jan. 1, 1952. Proposed Sec. 219, Report 2513 (Oct. 2, 1962), House of Representatives; see also proposed Sec. 218 a-f, *ibid.* The Foreign Claims Settlement Commission, acting on behalf of the Executive Branch, had opposed the amendments. (Letters on file in the Office of the Legal Adviser.)

<sup>4</sup> Signed at Paris, Feb. 10, 1947, 61 Stat. 1915, T.I.A.S., No. 1650, 41 U.N. Treaty Series 21; 42 A.J.I.L. Supp. 179 (1948).

proved by the President on August 9, 1955.<sup>5</sup> Such claims had to be filed with the Foreign Claims Settlement Commission of the United States prior to September 30, 1956. All legally valid claims were paid in accordance with the Act from Hungarian property sequestered by the Government of the United States. Nevertheless, the Act does not preclude the Department of State from presenting formal diplomatic claims to the Government of Hungary on behalf of United States nationals who have legally valid claims which were not filed with the Foreign Claims Settlement Commission or which arose after August 9, 1955.

Under generally accepted principles of international law, a legally valid claim arises if the property of a national of one country is taken by the government of another country without the payment of prompt, adequate and effective compensation.

(Letter dated March 29, 1963, from the Office of the Legal Adviser, MS Department of State, File L/C PS 8-4 US-Hungary/Low, Rose.)

#### RECOGNITION OF GOVERNMENTS

##### *Criteria for recognition—United States recognition of Provisional Government of Togo*

The Department of State issued the following press release:

The Government of the United States received a request for recognition from the Provisional Government of the Republic of Togo. In this request the Provisional Government stated that its first goal was to "re-establish legality" rapidly by organizing general elections. On May 5 the Togolese people adopted a new constitution, chose deputies representing all political parties to the National Assembly, and elected a new president and vice-president. The Togolese Government has also stated that it is prepared to respect its international obligations.

Believing that these declarations and events provide a basis for democratic rule in Togo and expressing the hope that all of the elements in Togo will cooperate toward that end, the United States has decided to recognize the Government of the Republic of Togo. The United States has instructed its representatives in Togo to confirm this decision in writing to the Ministry of Foreign Affairs of the Republic of Togo.

(Department of State Press Release No. 305, June 6, 1963.)

#### TERRITORIAL LIMITS

##### *Boundary between India and Communist China—McMahon Line*

On October 27, 1962, Professor Kenneth Galbraith, the American Ambassador to India, made the following statement:

In recent weeks we have been asked on numerous occasions for the American position on the McMahon Line. As I have several times said it is not the policy of the United States to make any statement or initiate any action which might make settlement of this conflict more difficult. However we have concluded that on this particular issue there should be no ambiguity whatever in our position.

<sup>5</sup> International Claims Settlement Act of 1949, *op. cit.*, as Amended by Public Law 285, 84th Cong. (H.R. 6882), 69 Stat. 562.

The McMahon Line is the accepted international border and is sanctioned by modern usage. Accordingly we regard it as the northern border of the NEFA area.

(Unclassified Embassy telegram 1419, Oct. 27, 1962.)

#### STATE-OWNED PROPERTY

##### *Abandonment*

A representative of one of the news media inquired whether there is any legal bar to Russian efforts to salvage the *USS Thresher*, a nuclear submarine which sank in the North Atlantic. In response, the Department of Defense stated:

It is a well established principle of maritime law that governmental property is not legally abandoned in the absence of a specific statement of abandonment. For example, sunken warships are never regarded as abandoned property.

(Statement on file in the Office of the Assistant General Counsel  
(International Affairs), Department of Defense.)

#### MILITARY OCCUPATION

##### *Laws in force in occupied territory—protection of industrial property*

Under Article 3 of the Treaty of Peace with Japan, September 8, 1951, 3 U. S. Treaties 3169, T.I.A.S., No. 2490, the United States has "the right to exercise all and any powers of administration, legislation and jurisdiction over the territory and inhabitants" of the Ryukyu Islands. Okinawa is one of the Ryukyu Islands. In reply to a letter from a representative of a United States corporation inquiring as to the industrial property law applicable in Okinawa, the Assistant General Counsel (International Affairs), Department of Defense wrote in part:

Since Okinawa is not a territory or possession of the United States and is not subject to post-war patent laws of Japan, the necessary local protection for patentees and owners of other intangible industrial property has been provided by the Legislature of the Government of the Ryukyu Islands.

(Letter on file in the Office of the Assistant General Counsel  
(International Affairs), Department of Defense.)

#### DIPLOMATIC MISSIONS

##### *Departure of persons deemed unacceptable—attempted espionage by diplomatic agent*

On July 1, 1963, the Acting Assistant Secretary of State for European Affairs handed the following note to the Charge d'Affaires of the Soviet Embassy:

The Department of State wishes to inform the Embassy of the Union of Soviet Socialist Republics that Attache Gennadiy G.

Sevastyanov has engaged in highly improper activities incompatible with his diplomatic status. Beginning on April 28 of this year, Sevastyanov attempted to recruit for espionage purposes an alien resident who is an employee of the United States Government. Sevastyanov in this effort tried to coerce the United States Government employee by threatening reprisal to members of his family resident in the Soviet Union if he did not cooperate.

The United States Government cannot permit such unacceptable behavior on the part of an official of the Soviet Embassy and therefore Mr. Sevastyanov's continued presence in the United States is no longer acceptable. The Embassy is requested to arrange for his immediate departure.

(Department of State Press Release No. 350, July 1, 1963.)

#### CONSULS

##### *Functions—representation of heirs—diplomatic officers*

In a reply, dated April 3, 1963, to a letter of the Attorney General of Oregon inquiring as to the right of a Czechoslovak consular officer to represent or to appear for or on behalf of nationals of Czechoslovakia claiming interests in estates being administered in Oregon, the Department pointed out that there are no Czechoslovak consular officers in the United States at this time, and that no officer of the Czechoslovak Embassy had been recognized by the United States Government in a consular capacity. The Department concluded, however:

[I]n the absence of consular relations as such between two countries, diplomatic officers customarily perform various functions normally performed by consular officers, provided the receiving state makes no objection. In accordance with current international practice, therefore, the Department considers that duly accredited officers of the Czechoslovak Embassy may represent, in their diplomatic capacity, the interests of their countrymen to whatever extent the laws and practice of the relevant State or Federal jurisdiction may permit.

(Letter on file in the Office of the Legal Adviser, Department of State.)

##### *Consulate General—Commercial Adviser—subjection to civil jurisdiction—convention between United States and Germany*

In a reply, dated June 5, 1963, to an inquiry from a private attorney concerning prospective civil actions in Louisiana against a commercial adviser to the Consulate General of Germany, the Department noted that the commercial adviser is a German national. Under Article XVIII of the Treaty of Friendship, Commerce and Consular Rights with Germany, December 8, 1923, 44 Stat. 2132, Treaty Series, No. 725, if a consular officer is a national of the sending state, "his testimony shall be taken orally or in writing at his residence or office and with due regard for his convenience." Article XX of the treaty provides, in part:

Upon the death, incapacity, or absence of a consular officer having no subordinate consular officer at his post, secretaries or chancellors,

whose official character may have previously been made known to the Government of the State where the consular function was exercised, may temporarily exercise the consular function of the deceased or incapacitated or absent consular officer; and while so acting shall enjoy all the rights, prerogatives and immunities granted to the incumbent.

While the commercial adviser in question had not been notified to the Department as a consular officer, she had been notified as a commercial adviser. The Department therefore concluded that from time to time it may be that she would enjoy the protection of Article XVIII because of the wording of Article XX.

(Letter on file in Office of Legal Adviser, Department of State.)

#### PASSPORTS

##### *Grounds for refusal—student travel in Cuba*

The Department of State issued the following press release:

The Department announced today that it has recently received information that American students have been offered subsidized travel grants from an agency of the Cuban Government (Federation of University Students in Havana) for travel to Cuba during June and July 1963. Since their travel does not meet the established criteria, their passports have not been validated for such travel.

On January 16, 1961, the Department of State announced that United States citizens desiring to go to Cuba must obtain passports specifically endorsed by the Department of State for such travel. This requirement is still in effect.

Passports of United States citizens may be validated for travel to Cuba only when their travel may be regarded as being in the best interests of the United States, such as newsmen.

The Department warns all concerned that travel to Cuba by a United States citizen without a passport specifically validated by the Department of State for that purpose constitutes a violation of the Travel Control Law and Regulations. (Title 8 U. S. Code, Sec. 1185; Title 22 Code of Federal Regulations, Sec. 53.3). A willful violation of the law is punishable by fine and/or imprisonment.

(Department of State Press Release No. 334, June 26, 1963.)

#### INTERNATIONAL LAW

##### *Views of the newer states*

On April 25, 1963, the Department of State's Assistant Legal Adviser for United Nations Affairs, Stephen M. Schwebel, made a statement to the American Society of International Law at the Society's annual meeting, held in Washington. An excerpt follows:

Now granting that, by and large, the free world stands together in developing the law of international organization, is it split apart in its ap-

preciation of the remainder of international law? In particular, do the less developed countries tend to view much of customary international law as colonialist and obsolete, as a Western creation which does not, or at least should not, bind those who often had little and in many cases nothing to do with its creation?

There is unquestionably sentiment of this kind. There is even some thought of this kind, though more sentiment than thought. As a rule, questioning of whether the newer states should be bound by the rules and institutions of the international community to which they have acceded is on a high level of generality. When one comes to specifics, one finds that the newer states and the less developed countries, some of which are not "new," do not offer a great deal which illustrates such vague feelings of discomfort as they may have or are alleged to have.

It is all very well to say that that Western creature, international law, is colonialist and obsolete, but, when one takes a closer look at the body of international law, there is less certainty about what in the Western legacy one should discard and what in another tradition one should add. We can all do without letters of marque and reprisal and without a regime of capitulations. In fact, we do do without them. Now what else? Someone is certain to say: the minimum standard in international law, particularly as it applies to the treatment of foreign property; surely here we have an area in which the less developed countries challenge the rule of customary international law, and with some precision.

For the most part, that is true. What is equally true, however, is that, in this area as in others, the less developed countries approach international law with a pragmatic self-interest (which does not characterize their approach alone). Consider the resolution<sup>1</sup> which the United Nations General Assembly adopted at its last session on the subject of permanent sovereignty over natural resources. Having its source in one of their favorite themes—self-determination—the resolution incants another favorite theme of the less developed countries—sovereignty. The real issue posed by the resolution, however, is not whether nations have sovereignty over the resources within their jurisdiction—obviously they do—but how that sovereignty shall be exercised. The Communist bloc maintained, in the words of the delegate of Hungary, that the state "was sole judge in the matter and could brook no outside interference whatever in the exercise of its sovereignty."

Essentially its view was that there is no international law governing the treatment of foreign property. The Western members naturally took a contrary stand. What did the less developed countries do? Joining with the West, they adopted, by a vote of 87 in favor, 2 opposed, and 12 abstentions, a resolution which, the delegate of Bulgaria complained, comprised "a charter of foreign investment." The resolution provides that, where foreign property is taken, the owner "shall" be paid "appropriate compensation"—a standard which the United States delegation defined as prompt, adequate, and effective compensation. The resolution further

<sup>1</sup> General Assembly Resolution 1803 (XVII), Dec. 14, 1962.

provides that: "Foreign investment agreements freely entered into by or between sovereign States shall be observed in good faith," thus placing the authority of the General Assembly behind the view that contracts between states and foreign investors are made to be upheld.

Now, it could be true, as Professor Oliver Lissitzyn suggests in his perceptive paper on "International Law in a Divided World," that this happy result stemmed largely from "fear of offending states that extend economic . . . assistance" and from the desire to achieve the largest possible majority for an affirmation of permanent sovereignty over natural resources, "rather than solicitude for the existing norms of international law." If this be the case, this shows that the less developed countries, while not responding to existing international norms for their own sake, nevertheless uphold them because, in this case at any rate, they believe that their content makes sense—sense for their self-interest in attracting foreign capital. Such an enlightened sense of the national interest is no mean basis for a progressive and meaningful international law. Presumably it was an aspect of what gave birth to the rule of the minimum standard in the first place.

Differences between the approach to international law of the less developed countries and of the West and Japan should not be minimized. But neither should they be exaggerated. Customary international law is largely Western in origin. But much of it, such as the law of diplomatic immunities, springs not from a specifically Western tradition but from the necessities of a law regulating states. Other elements of it, such as the minimum standard in the treatment of aliens, have close connections with the rule of law and respect for human rights—elements of the Western tradition of which every man may be proud and which have, or should have, universal appeal. As the states of the world join together in the continuing United Nations process of codification and progressive development of international law, newer as well as older states should be afforded a sense of participation in the refinement and growth of international law which should conduce to its relatively universal acceptance and application.

(Department of State Press Release No. 219, April 24, 1963.)

#### OUTER SPACE

##### *Principles of international law*

At the concluding meeting of the second session of the Legal Subcommittee of the United Nations Committee on the Peaceful Uses of Outer Space on May 3, 1963, the United States representative, Leonard C. Meeker, made the following statement:

When the second session of this Subcommittee began in mid-April, the membership of the United Nations looked to us to make and record sub-

stantial gains in the building of law for outer space. The discussions we have engaged in have been valuable, and have carried us forward from the point where the Legal Subcommittee left off last year.

Our discussions have gone farther into the substance of many questions than we had gone at any time previously. Clarifications have been obtained on some issues. In a number of cases virtual agreement has been reached. In others, differences have been narrowed. With respect to a relatively small number of questions, we all recognize that wide divergences remain.

Let us look for a moment at the picture following our 1962 session in comparison with the situation at the close of the 1963 session. One year ago a consensus existed that we should have an agreement on liability for space vehicle accidents. There was also agreement that the international community should express itself in some appropriate form on the matter of assistance to astronauts in distress and the return of space vehicles, or parts, and the personnel of space vehicles.

Today the consensus extends over a considerably larger area. For example, members of this Subcommittee quite generally agree on the appropriateness of a formal international instrument covering the subject of assistance and return. They also agree on the desirability of a declaration setting forth basic principles of law to guide States in their exploration and use of outer space. Even the contents of such a declaration are largely agreed.

To be specific, there is a consensus on the freedom of outer space for exploration and use by all States, on a basis of equality and in accordance with international law; on the unavailability of celestial bodies for national appropriation; on the applicability of international law, including the Charter of the United Nations, to relations among States in outer space; on retention by the launching authority of jurisdiction over and ownership of space vehicles; on assistance to astronauts in distress and return of space vehicles and their personnel; on liability for injury or damage caused by space vehicle accidents.

With respect to certain other questions of principle, our debates in the past three weeks have clarified points of view and narrowed differences. For example, a number of delegations, including the United States, have endorsed the idea of appropriate international consultation to study the problems of interference and contamination in outer space and to provide for discussion in relation to particular proposed projects. We have welcomed the establishment of a Consultative Group by the Committee on Space Research of the International Council of Scientific Unions. We think the working of this group, which held its most recent meeting in March 1963, represents a sound approach.

Another area in which the debate of the second session has carried us forward is the question of what entities may engage in outer space activities. Here it may be observed that no one could expect the international community to impose the tenets of a single economic and social system on outer space and restrict activities in space to governments alone. At the



same time our debates have disclosed a widely shared recognition that governments bear responsibility and are accountable for national activities in space.

At this point, I should like to refer to the statement yesterday of the distinguished representative of the United Arab Republic, when he spoke of the working paper which was introduced by his Delegation during the session of the full Committee last September. In the view of the United States Delegation, the introduction of this paper was a constructive step. In his statement, Mr. Fahmy mentioned specifically several paragraphs of the UAR working paper. Putting aside, for the present, questions of drafting and formulation—which of course would require very careful consideration—I should like simply to record that the basic ideas embodied in these elements of the UAR draft represent propositions to which the United States Government has been committed from the beginning of the space age. Declarations in legislation enacted by the Congress and statements by the President and by high officers and representatives of the United States have made this clear.

I have spoken thus far about the positive aspects of this year's session of the Legal Subcommittee. I should also note at the same time that we have not made optimum use of the opportunity afforded by our meetings. We have failed to take the further step of preparing agreed texts and formulations which we could forward to the full Committee and to the General Assembly for adoption in appropriate form.

In order for the Subcommittee to succeed in completing its task, it is necessary for all members to be ready and willing to engage in the give and take of international discourse, to modify previous positions, and to make the adjustments necessary for the achievement of consensus. It is necessary to refrain from insisting that all of one's original demands must be satisfied before there is agreement on a particular instrument. It is necessary to refrain from insisting that a declaration of general principles must be agreed and completed in a particular mold before progress is made, or indeed before work is done, in other areas such as the practical questions of liability and assistance and return.

Ordinarily, in the General Assembly and its subordinate bodies, when sustained negotiating effort has not resolved a difference of opinion on a subject under debate or on the best procedure for dealing with it, a vote is taken to dispose of an issue or to determine what the next steps shall be. We have not yet done this in the Outer Space Committee or its Subcommittees. When the full Committee was organized in 1962, the Chairman made the following statement on procedure:

“... I should like to place on record that through informal consultation it has been agreed among the members of the Committee that it will be the aim of all members of the Committee and its sub-Committees to conduct the Committee's work in such a way that the Committee will be able to reach agreement in its work without need for voting. . . .”

The United States continues to support this aim. Up to the present, the Legal Subcommittee has been proceeding on this basis and has sought to go forward in its work without resort to formal voting. Special efforts have been made by most members of the Subcommittee to arrive at agreed conclusions and to make progress without voting. It is necessary that such efforts be made on all sides. If they are not, we are confronted by an attempt to import the veto into a forum where it was never intended to operate and where the Members of the United Nations have not agreed to accept it.

It has sometimes been urged that there are only two space powers and that, therefore, satisfaction of all the positions of each of them in all matters before the Subcommittee is essential if progress on any matter is to be achieved. The United States does not believe that such a claim is likely to be accepted by the Members of the United Nations. Questions of outer space law are of deep concern to all the United Nations—whether in their capacity as members of the international community, or as present and future participants in man's venture forth into space.

World events are moving—not least of all in the new realm of space exploration. We cannot allow our interest or our effort to falter, and we will not permit ourselves to be discouraged by a temporary lack of progress. With intelligence, patience, and good will, the international community will be able to order its efforts in space so as to benefit all mankind.

(United States Delegation Press Release No. 4198, May 3, 1963.)

#### UNITED NATIONS

##### *Financial obligations of Member States to the Organization*

On July 3, 1963, the Legal Adviser of the Department of State, Abram Chayes, delivered an address to the World Peace Through Law Conference, held at Athens. Excerpts from his statement, entitled "The Rule of Law—Now," follow:

#### I

Since the beginning of the 16th General Assembly in the fall of 1961 we have heard about the financial crisis at the United Nations. Of course, there is a financial crisis in the UN. The bills that the Organization is incurring—largely on account of its operations to keep the peace in the Congo and in the Middle East—have been outrunning by a very large amount, the funds it has been able to collect from its members. . . .

Thus the financial crisis at the UN is a real one. But as is often the case with controversies over the power of the purse, financial questions cover more deep-seated issues of constitutional dimensions. And in this case, I believe the resolution of the financial questions now being debated in the United Nations will tell us a great deal about the rule of law in our world and about our ability to make it prevail.

We are met here not as national or governmental representatives but as lawyers, members of a common profession that in many ways transcends

national boundaries. Our purpose is to consider how this profession, as a profession, can contribute to the maintenance of world peace. The agenda of the conference covers a familiar range of topics: strengthening the UN, third-party settlement of international disputes, fuller use of the World Court, respect for agreed procedures in resolving international issues. All of these go to make up the ideal of the rule of law in international affairs.

Through its discussions, this conference will seek to develop ways of approaching this ideal more nearly in the future. Yet, in the question of UN finances, all of the elements I have listed are implicated. And if the nations of the world cannot bring themselves in this matter to act in accordance with the dictates of the rule of law, it is hard to have any very great hope for our capacity to improve and extend it in the future. For this is not a situation where international law, on either its substantive or procedural side, was rudimentary or ill-adapted to the situation. The legal issues did not turn on the opinions of publicists or hypothetical reasoning. The question of UN finances brought into play a developed corpus of law and legal materials that were dealt with by the most advanced of international legal institutions.

## II

The United Nations undertook the burdens of keeping the peace in the Middle East in 1956 and in the Congo in 1960. In each case, the action represented a broad consensus of the States Members as to the duties and responsibilities of the Organization in the circumstances. The original resolution establishing the UN Emergency Force in the Middle East passed the General Assembly without a dissenting vote. The Congo operation, authorized in the first instance by unanimous vote of the Security Council, was later confirmed and expanded by the General Assembly, also without a dissenting vote.

The financing resolution in each case too, were the product of extensive consideration of the issues, legal as well as political, and registered broad consensus. Nevertheless, when the Secretary General first called to the attention of the General Assembly that many Members were increasingly in arrears in paying their assessments for these operations, some Members questioned the legal liability to pay these assessments. A number of grounds were advanced: that the operations themselves were *ultra vires* or had not been properly authorized by the Organization; that the Assembly was without power to compel money contributions in support of such operations, or in any case had not intended to do so in its assessment resolutions.

International legal institutions provide a formal method for resolving such controversies. The UN Charter provides in Article 96: "The General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question." The Court's competence to render such an opinion is not affected by the adherence or nonadherence of any Member of the United Nations to the

compulsory jurisdiction of the Court. Article 96 is a part of the Charter agreed to by all signatory nations. And by force of Article 93 of the Charter, "All Members of the United Nations are *ipso facto* parties to the Statute of the International Court of Justice." Pursuant to Article 96 the General Assembly, by a vote of 52 to 11, with 32 abstentions, after full and careful debate, adopted resolution 1731 (XVI) requesting the advice of the Court. The question as put in the resolution was whether the expenses authorized in the assessment resolutions covering the UN operations in the Congo and Middle East were "expenses of the Organization" within the meaning of Article 17 of the Charter, so that, by virtue of Article 17, they "*shall be borne* by the Members as apportioned by the General Assembly."

As is required in such cases, the International Court of Justice gave notice of the proceedings to all States Members and gave each the opportunity to submit views on the issues in writing or in oral pleadings.

It was not an empty offer. In no other proceeding before the Court have so many States participated. They represented many parts of the globe and all legal systems. The official volume of the Court reporting the case includes written submissions in various forms from twenty different countries: Upper Volta, Italy, France, Denmark, the Netherlands, Czechoslovakia, the United States, Canada, Japan, Portugal, Australia, the United Kingdom, Spain, Ireland, South Africa, the U.S.S.R., Byelorussia, Bulgaria, the Ukraine, and Rumania.

In the oral arguments which began on the 14th of May, 1962 and proceeded through the 21st, nine of the nations pleaded orally before the Court: Canada, the Netherlands, Italy, the United Kingdom, Norway, Australia, Ireland, the U.S.S.R. and the United States. The United Kingdom and Ireland were represented by their Attorneys General; Australia by its Solicitor General; Canada, the Netherlands, Italy, Norway and the United States sent the Legal Advisers of their respective Foreign Offices. The U.S.S.R. argued orally before the Court for the first time in history and was represented by the distinguished lawyer, Mr. Grigory Tunkin, former Chairman of the International Law Commission, and Director of the Juridical-Treaty Branch of the Soviet Ministry of Foreign Affairs.

Two months after the oral arguments, the Court—acting with commendable dispatch in view of the importance of the case and the difficulty of the issues—rendered its opinion. By a vote of 9 to 5 it gave an affirmative answer to the question presented. It held that the expenditures authorized in the financing resolutions were indeed "expenses of the Organization" within the meaning of Article 17, with the consequence that assessment of those expenses by the General Assembly was binding on the members.

. . . . .

I have said that the decision of this Court so constituted and so composed was rendered by a vote of 9 to 5. Some have said that this absence of unanimity somehow derogates from the force of the decision. Of

course that cannot be so. The very existence of a court with more than one judge implies the possibility of differences of view among the judges. In my own country, we are accustomed to seeing questions of grave public and political importance decided by narrow majorities—often a majority of one—in our highest Court. The International Court itself, in the recent Southwest Africa decision, decided in favor of its own jurisdiction by a single vote. In that case judges of United States and Soviet nationality found themselves together in the majority, while the President of the Court, a Polish national, and the British, French and Australian judges, were in the minority. Although the division was thus as narrow as it could possibly be, we as lawyers would expect that South Africa would abide by the decision and appear on the merits of the case. And she has done so.

The opinion of the Court in a case such as the *U.N. Assessments* case is characterized as “advisory”. It cannot be “binding” in a juridical sense because there are no parties before the Court upon whom a judgment could operate. But for all other purposes, I would myself suppose that the opinion of the Court, in an advisory case properly before it where the issue is justiciable, is an authoritative statement of the law. In the *U.N. Assessments* case, all the conditions were met. The case was before the Court at the request of the General Assembly under Article 96 of the Charter. The issue was a narrowly defined question of legal liability, fully matured and ripe for adjudication on concrete facts comprehensively developed before the tribunal.

But whether or not the opinion by its own force establishes the law we need not debate here. The General Assembly itself has removed any possible question about the status of the Court’s advisory opinion. The opinion was transmitted to the Secretary-General and by him to the General Assembly at its 17th session. And after consideration and debate both in the appropriate committee and on the floor, the Assembly, by a vote of 76 to 17, with 8 abstentions, declared that it “accepts the Court’s opinion on the question submitted to it.” Thus this phase of the case came to a close.

### III

The experience in the United Nations since the decision of the Court has not been altogether disheartening. I am informed that approximately \$16 million in arrearages has been paid by forty-six countries. Although these countries are for the most part small and the amounts owing were correspondingly small, their action to comply with the decision of the Court represents a commendable example of the rule of law in action in international affairs.

Another development is worth noting. As you know Article 19 of the Charter provides that:

“A member of the United Nations which is in arrears in the payment of its financial contributions to the Organization shall have no vote in the

General Assembly if the amount of its arrears equals or exceeds the amount of the contributions due from it for the preceding two full years."

Just prior to the beginning of the 17th session of the General Assembly six countries were in such a situation, and again just prior to the special session that began this spring, ten countries were in arrears more than two full years, taking into account the Congo and Middle East assessments. In all of these cases but one, the States concerned, by appropriate payment in advance of the convening of the General Assembly, removed themselves from the scope of Article 19. And it should be remarked that these countries were not confined to any single quarter of the globe or any single political system.

The one exception was Haiti, which, as you may know, was in arrears for more than the total of two years contributions when the recent special session opened. Haiti made no payments against its arrears until May 24, ten days after the special session began. The Secretary General, in a letter dated May 14, the day the Assembly convened, informed the Assembly President, Sir Mohammed Zafrulla Khan of Pakistan, that Haiti was in arrears in an amount exceeding that specified in Article 19. At the opening of the General Assembly, the Haitian delegate absented himself from the hall. Sir Zafrulla, a former judge of the International Court of Justice, replied to the Secretary General's letter the following day. He said:

"I have received your letter of 14 May 1963, informing me that, at the opening of the Fourth Special Session of the General Assembly, Haiti was in arrears in the payment of its financial contribution to the United Nations within terms of Article 19 of the Charter. I would have made an announcement drawing the attention of the Assembly to the loss of voting rights in the Assembly of the Member State just mentioned, under the first sentence of Article 19, had a formal count of vote taken place in the presence of a representative of that State at the opening plenary meeting. As no such vote took place, and as the representative of Haiti was not present, this announcement became unnecessary."

The Secretary General's letter and the President's reply were circulated as formal UN documents.

Finally, the General Assembly just a few days ago, in bringing to a close an intensive seven-week special review of the financing of peace-keeping operations, re-emphasized the obligation of members to pay their arrearages. A resolution adopted by the overwhelming vote of the Assembly requests the Member States in arrears for the Congo and Middle East operations to make arrangements with the Secretary General "within the letter and spirit of the Charter of the United Nations, including the possibility of payment by installment, for bringing the payment of these accounts up-to-date as soon as possible; . . ." The deadline for making such arrangements is set at October 31, 1963.

## IV

I said earlier that the experience in the UN since the Court's decision is not wholly disheartening. There is a record of payment of arrearages by certain smaller nations, and in particular the record reflects a healthy respect on the part of the States Members for the sanction of Article 19. But if the experience is not wholly disheartening, it cannot be said to be altogether cheering, either. For a number of States remain, and among them the most substantial delinquents, that have as yet made no payments against their arrearages. Again I should say that this group of states is confined to no single geographical region and no single political or social system.

It must be said then that the implications of the present financial controversy in the United Nations for the rule of law remain in doubt. I hope, and we must all hope—as lawyers interested in the vindication of the processes and procedures of a system of law—that the States remaining in arrears will find some way to meet their obligations and pay the assessments which the Court has found are binding upon them. If so, the rule of law to which we all stand dedicated will have won a notable victory.

But if they persist in their refusal to pay, whatever may be the positions of our Governments, I hope we as lawyers will not blink what is at stake. After the course of events that I have outlined here today, there can be no question that the obligations are lawfully owing. That issue was properly presented to a tribunal that all of us, whatever system of law we are familiar with, would recognize as a fully competent Court. It was decided by that Court after hearing comporting with the highest standards of justice, a hearing in which there was full opportunity for all interested parties to participate and be heard. The decision of that Court was overwhelmingly accepted by the General Assembly to which it was reported. States may, of course, continue to persist in their refusal to pay. But they cannot ask us to accept that their refusal is based on legal grounds. When they argue for a result different from that pronounced by the Court, they assert the right to be judges in their own case. And that, as we all know, is fundamentally at odds with the rule of law.

We must all hope that it does not come to this. But if it does, the processes of the law have not yet been exhausted. In this situation, unlike most, the international legal system provides its own sanction for breach of duty. As we have seen, Article 19 provides that when delinquency reaches a certain point, the delinquent "*shall have no vote*" in the General Assembly. The terms of that Article are clear. It represents the considered judgment of the States that framed the Charter or have since adhered to it as to the sanction appropriate to continued financial irresponsibility on the part of a Member. Each Member State has bound itself to the Charter containing this sanction—knowingly, solemnly, and with full appreciation of its meaning. The President of the General As-

sembly by his official act has affirmed the import of Article 19: when the arrearages of a Member State exceed two years' contributions, that State, automatically and by operation of the Charter, has no vote in the General Assembly. Specialized agencies of the UN have interpreted similar provisions in their own charters in the same way. The sixteen Member States that have paid amounts sufficient to remove themselves from the ambit of this sanction have shown their understanding of it by their acts.

If some of the States now in arrears persist in their refusal to pay, their arrearages will exceed two years contributions at the beginning of 1964, and we will face the question of the application of the sanction prescribed by the Charter. The issue of fidelity of law is, I submit, as much involved in this question as in the question of payment itself.

. . . . .

. . . the International Court cannot enforce its judgment. Only the Assembly can ensure that the sanction for nonpayment of assessments is applied according to its terms. This being the case, to vote against enforcement according to the terms of Article 19 is to betray the rule of law as surely as to fail to pay.

## V

Where States have agreed to instruments governing their relations and have established rational and orderly procedures for interpreting those instruments in case of doubt, where those procedures have been duly resorted to and have produced a result, we are entitled to ask that they accept and give effect to that result. And where sanctions are duly prescribed for failure to comply, we are entitled to see that they are applied according to their terms. Unless the nations are prepared to grant this measure of assent to the institutions of law, unless we as lawyers, whatever our nation, are prepared to demand it, the work of this conference will be empty. Far more important, the rule of law, one of the handful of saving ideals that man pursues, will have suffered a grievous blow.

(Dept. of State Press Release No. 356, July 2, 1963; 49 Dept. of State Bulletin 162 (1963).

## PERMANENT COURT OF ARBITRATION

### *Designations of two members of United States national group*

On June 5, the Department of State issued a press release reading as follows:

The Secretary of State has designated Louis Henkin of New York, New York, and Myres S. McDougal of New Haven, Connecticut, as United States members of the Permanent Court of Arbitration. Mr. Henkin and Mr. McDougal succeed Herman Phleger and Judge David W. Peck whose terms expired on May 7, 1963.



The Permanent Court of Arbitration was created by the Hague Conventions for the Pacific Settlement of International Disputes of 1899 and 1907. The Permanent Court was organized "with the object of facilitating an immediate recourse to arbitration for international differences, which it has not been possible to settle by diplomacy." In accordance with the two Hague Conventions, each signatory power selects four persons as arbitrators. The persons thus selected are inscribed as members of the Permanent Court in a list which is notified to all contracting powers. The Hague Conventions further provide that when any contracting powers desire to seek recourse to the Court for the settlement of a difference that has arisen between them, the arbitrators called upon to form the competent tribunal to decide the difference must be chosen from the general list of the members of the Court. The secretariat of the Court maintains quarters in the Peace Palace at The Hague, Netherlands.

The members of the Permanent Court of Arbitration also nominate persons for election by the United Nations Security Council and the General Assembly as judges to the International Court of Justice, in accordance with the Statute of that Court.

Louis Henkin is Professor of Law and of International Law and Diplomacy at Columbia University. He attended Yeshiva University and the Harvard Law School. He has been clerk to Judge Learned Hand and Justice Felix Frankfurter, a consultant to the United Nations Legal Department and an officer of the Department of State. He has also taught at the University of Pennsylvania Law School. He is the author of various books and articles, including *Arms Control and Inspection in American Law*, *The Berlin Crisis and the United Nations*, *Arms Control: Issues for the Public*, and *Disarmament: The Lawyer's Interests*.

Myres S. McDougal is Sterling Professor of Law at Yale University. Educated at the University of Mississippi, Oxford and Yale, he has taught at the Universities of Mississippi and Illinois, Yale University and the Hague Academy of International Law. He has also served as Assistant General Counsel of the Lend-Lease Administration and General Counsel of the Office of Foreign Relief and Rehabilitation Operations, Department of State. He is the author of many books and articles, including *Power and Society*, *Studies in World Public Order*, *Law and Minimum World Public Order*, and *The Public Order of the Oceans*.

Members of the Permanent Court of Arbitration are designated for terms of six years. They serve in their personal capacities and are not officers of the United States. The other two members of the United States national group on the Permanent Court of Arbitration are Harold Armstrong Smith of Chicago and Bethuel Matthew Webster of New York City. Their terms expire in 1965.

(Dept. of State Press Release No. 300, June 5, 1963; 49 Dept. of State Bulletin 32 (1963).

## JUDICIAL DECISIONS

BY JOHN R. STEVENSON \*

*Of the Board of Editors*

*Status of member of U.N. Mission charged with conspiracy to commit sabotage*

U. S. EX REL. CASANOVA v. FITZPATRICK. 214 F. Supp. 425.

Southern District, N. Y., Jan. 16, 1963. Weinfeld, D. J.

Petitioner, a resident member of Cuba's Permanent Mission to the United Nations, was charged with conspiracy to commit sabotage and to violate the Foreign Agents Registration Act. He sought release from custody on habeas corpus on the ground of the court's lack of personal jurisdiction over him, asserting that he was either entitled to diplomatic immunity under the U.N. Charter, the Headquarters Agreement and international law, or that the Supreme Court of the United States had exclusive and original jurisdiction to try him. The court, in dismissing the writ of habeas corpus, held as follows:

(1) Article 105 of the U.N. Charter (providing that representatives of Member states shall enjoy privileges and immunities necessary for the independent exercise of their functions) did not purport to, nor did it, confer diplomatic immunity upon those representatives; even if the article is self-executing with respect to the functional activities of U.N. representatives, a conspiracy to commit sabotage against the United States was not a function of any U.N. mission or representative.

(2) The certificate by the Department of State that the petitioner had not been "agreed upon" by the Government of the United States as a person entitled, under Section 15(2) of the Headquarters Agreement, to diplomatic privileges and immunities was not conclusive.

Whether, upon the facts presented by both the Government and the individual involved or his government, immunity exists by reason of the agreement, is not a political question, but a justiciable controversy involving the interpretation of the agreement and its application to the particular facts. In this instance the decision is for the Court and it is not concluded by the unilateral statement of the Government, a party to that agreement and to this controversy, that the individual is not entitled to immunity thereunder.

(3) The phrase in Section 15(2) of the Headquarters Agreement, "such resident members of their staffs as may be agreed upon," does not contemplate agreement with respect to categories of staff persons but

\* Assisted by Peter S. Paine, Jr., and William J. Williams, Jr., of the New York Bar.

rather with respect to each individual member of the staff. In this respect it contrasts with Section 15(1), which grants immunity to Member nations' principal resident representatives to the United Nations without agreement by the United States.

(4) The Government of the United States did not, by the issuance of a non-immigrant visa (of the classification applicable to the staff of U.N. representatives) and a landing permit, give its agreement that the petitioner, on his entry into the United States to assume his duties as a member of the Cuban Mission, was thereby entitled to diplomatic immunity under Section 15(2).

(5) Under international law petitioner was not entitled to diplomatic immunity from the time of his entry pending determination of his status, as his position was not analogous to that of diplomats awaiting acknowledgment by governments to which they are accredited; international law would come into play in this case only to define the nature and scope of diplomatic immunity, once it was found that the petitioner was entitled thereto under the applicable agreement.

(6) The petitioner was not an ambassador or other public minister of a foreign state accredited to the United States within the contemplation of the Constitutional or statutory provisions vesting original and exclusive jurisdiction in the United States Supreme Court.

*Cuban claims—effect given to Cuban currency legislation and decrees*

CONFEDERATION LIFE ASSOCIATION v. UGALDE. 151 So. 2d 315.

Florida, Dist. Ct. of Appeal, 3rd Dist., March 26, 1963. Carroll, J.

Appellant Canadian corporation issued a \$20,000 life insurance policy in 1948 to a resident of Havana, Cuba. When asked to pay the cash surrender value thirteen years later, appellant offered to pay in Cuban pesos in Havana but refused to pay in U. S. dollars. Insured sued the company in Florida, both parties moving for summary judgment. Defendant company's motion was supported by an affidavit of an expert to the effect that, under Cuban law, defendant was authorized and required to pay in Cuban currency. It was stipulated that \$13,825.53 was the cash value. The court gave judgment for plaintiff for this amount of U. S. dollars, and defendant appealed, claiming the right to pay only in Cuban pesos.

The application and the policy were both written in Spanish, and were made in Cuba; the policy provided that all payments be made in U. S. dollars and the place for making payments was specified as Havana. Although U. S. dollars had been legal tender in Cuba at the time the policy was issued, Cuban legislation, commencing with the law of December 23, 1948, provided for U. S. dollars no longer to be legal tender after a certain date in 1951. By Cuban Decree No. 1384 of April 19, 1951, debtors of obligations payable in U. S. dollars were to

settle such obligations at par through the delivery of national currency in the same amounts as those previously expressed in United States dollars.

Defendant company notified its policy-holders that it would pay on this basis.

The court said in part:

On October 2, 1959, the government of Cuba, under the rule of the dictatorship of Fidel Castro, enacted Law No. 568, which forbade the export of currency or transfer of funds abroad except for cases authorized by the Currency Stabilization Fund of Cuba. Unauthorized transfers were made felonies and it was provided that companies which are "presumed to have infringed the provisions of this law" may be "intervened." Thereafter, on February 23, 1961, the Cuban government enacted Law No. 930, which provided that the Banco Nacional de Cuba should regulate the issuance of currency, and such currency (Cuban pesos) was to be the only legal tender and was to be accepted in payment of any obligation payable in Cuba, and further provided that obligations which by agreement were made payable in another currency must be settled and paid in Cuban legal tender. The demand for payment of the cash surrender value was made October 11, 1961, after enactment of the laws referred to above. The complaint in this suit was filed November 3, 1961.

The appellant contends that the contract is controlled by Cuban law, and that payments thereunder may and in fact must be with Cuban pesos at par with the dollar.

Appellee argues that the contract is governed by the law of Florida, and that it would be against the public policy of the State of Florida to recognize and enforce in behalf of the defendant insurance company the right, as conferred by Cuban law, to discharge the obligation in pesos.

The policy did not specify the law of any particular jurisdiction to govern it. The contract was made in Cuba and by its terms was to be performed there. Neither Florida nor any jurisdiction other than Cuba had any significant contacts with regard to the obligations of the insurance policy so as to justify or require the contract to be governed by the law of Florida or such other jurisdiction. Under the above conditions, it is held uniformly, and in Florida, that when the place of the making and the place of the performance are the same, the law of that jurisdiction determines and controls the validity, interpretation, and the rights and obligations under such a contract. . . .

When a suit is brought on a contract in a jurisdiction other than the one which governs the rights and obligations thereunder, a defense lawfully vested under the law of the latter jurisdiction may not be ignored by the forum if that state had no significant connection with the contract obligations. Rejection of such rights under the contract, asserted as a defense, is a deprivation of due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States and Section 12 of the Declaration of Rights of Florida.

In the instant case, the defendant asserted as a defense its right to pay in Cuban pesos at par and the obligation of the insured to accept payment in such form, as provided for in the insurance contract as modified by the laws and executive decrees of Cuba. The trial court rejected the defense. In so doing, the trial court erred and deprived appellant of due process of law.

As a sovereign nation, Cuba was entitled to establish a national currency and require its use in discharge of obligations governed by

its law. . . . And Cuba had the power to declare that which was legal tender for the discharge of such obligations. . . . That power could be exercised by Cuba in its sovereign capacity even though to do so altered the terms and impaired the obligations of such contracts theretofore made. . . . First, the Cuban government in furtherance of its fiscal policy was entitled to and did make laws relating to its currency and legal tender which effectively changed the contract from one payable in dollars to one payable in Cuban legal tender at one unit (peso) per dollar. Second, as a result thereof, under the terms of the insurance contract as so altered, the obligation of the defendant insurance company to pay the cash surrender value under the policy became an obligation to pay in Cuban legal tender. . . .

The court then discussed *Guaranty Trust Co. v. Henwood*, 307 U. S. 247 (1939), and *Norman v. Baltimore & Ohio R. Co.*, 294 U. S. 240 (1935), 30 A.J.I.L. 300 (1936), both of which involved United States abrogation of the "gold clause" in contracts, referring to the *Norman* case as upholding "the inherent power of a national government over its monetary system." The court added:

The argument that the Cuban government, in providing a uniform currency and making obligations of contracts payable there dischargeable in its designated legal tender, was taking action repugnant to the policy of this country, is wholly without merit. There is no Florida Statute defining a policy on which the court could deprive the defendant of its rights under the Cuban contract as such rights are fixed and determined under Cuban law. But even were there such a statute, its effectiveness would be open to question. . . . Not only is there an absence of any Florida law or policy against a sovereign nation prescribing its legal tender and making all obligations payable there dischargeable only therein, but the same process when employed by the United States government in 1933 was held by our Supreme Court to be dictated by our government's policy favoring it.<sup>1</sup> This is also shown by the opinion in the *Norman* case, where the court . . . said . . . "If the gold clauses interfered with the congressional policy, and hence could be invalidated, there appears no constitutional objection to that action by the Congress in anticipation of the determination of the value of the currency". . . .

. . . Thus the government of Cuba was entitled to provide by law as it did in 1949 and later for a uniform currency, eliminating United States dollars as legal tender in Cuba, specifying its own currency legal tender and first authorizing then later requiring that obligations payable there be discharged in Cuban pesos at par, one for one with the dollar. This contract between a Cuban national and a Canadian company was indigenous to Cuba. Its provision for payments in United States dollars was eliminated by the sovereign and there were substituted contract provisions that United States dollars would not be legal tender for discharge of the obligations under the policy and that such obligations were payable in Cuban pesos at par. The insured availed himself of that right by paying premiums

<sup>1</sup> "Furthermore, appellee was a citizen of Cuba who had made a contract in that country for performance there. '[I]t cannot be against the public policy of this state to hold nationals to the contracts which they have made in their own country to be performed there according to the laws of that country.' *Dougherty v. Equitable Life Assur. Soc. of United States of America*, 266 N. Y. 71, 90, 193 N.E. 897, 903 (1934). . . ." (Renumbered footnote by the Court).

in Cuban pesos. No lawful basis has been disclosed on which the trial court could reject unliked terms of the contract as modified by the Cuban currency laws or deny to the defendant its asserted right to meet its obligations under the policy in such pesos.

The Court of Appeal affirmed in part and reversed in part, saying that the courts were open to Cuban citizens and that plaintiff was entitled to summary judgment, but in a different amount. The cause was remanded to the trial court, with directions to

enter judgment for the plaintiff in United States dollars for such sum as shall represent and equal the value, based on the rate of exchange on the date of the original demand, of the 13,825.53 Cuban pesos with which under the contract as controlled by Cuban law the defendant insurance company was entitled and required to pay the demanded cash surrender value under the policy.<sup>2</sup>

#### NOTES

##### *Brazilian exchange controls—Bretton Woods Agreement*

Article VIII, §2(b), of the Bretton Woods Agreement provides:

Exchange contracts which involve the currency of any member and which are contrary to the exchange control regulations of that member maintained or imposed consistently with this Agreement shall be unenforceable in the territories of any member.

Relying on this provision of the Bretton Woods Agreement, to which both Brazil and the United States are parties, Banco do Brazil, S. A., an instrumentality of the Government of Brazil, brought an action to recover damages for a conspiracy to defraud the Government of Brazil of American dollars by illegally circumventing its foreign exchange regulations. Defendant was alleged to have conspired with a Brazilian exporter of coffee to pay the exporter American dollars, which the exporter could sell in the Brazilian free market for 220 Brazilian cruzeiros each, instead of complying with Brazil's foreign exchange regulations which in effect required a forced sale of the dollars to the Government of Brazil for 90 Brazilian cruzeiros each.

The court expressed its doubt that the contract for the sale of coffee in New York for American dollars constituted an exchange contract involving the currency of, and contrary to the exchange control regulations of, Brazil within the meaning of Article VIII of the Agreement, but preferred to

<sup>2</sup> Of the four-judge Court of Appeal, Horton, J., dissented in part. He said: "The provisions of a life insurance policy concerning payment of a cash surrender value constitute no more than a continuing irrevocable offer by the company, and no completed contract to pay such value exists unless and until this offer is accepted by the insured in accordance with its tenor and terms." This second contract was made when insured in Florida in 1961 accepted the offer by asking for the cash surrender value. In his opinion, this contract was governed by Florida law and the amount was payable in United States dollars rather than in Cuban pesos. He pointed out that the insurance company had funds in the United States and would not be required to violate any Cuban laws or decrees by exporting currency or transporting funds from Cuba to the United States.

rest its decision, holding that the action was not maintainable, on other grounds:

(1) Article VIII requires New York courts to refrain from enforcing contracts between individuals which are contrary to the exchange controls of a member, or awarding damages for breach of such contracts, but does not obligate New York courts to hold that persons entering into such contracts commit a tort for which they must respond in damages.

(2) The action was an action to enforce a revenue law of Brazil and New York does not enforce the revenue laws of other jurisdictions.

Three judges dissented on the ground that, as a result of the adherence of the United States to the Bretton Woods Agreement and its membership in the International Monetary Fund, the currency control laws of other members may not be treated as contrary to New York's public policy, the action was not a suit to collect the internal taxes of Brazil, and the refusal to entertain the suit did violence to the policy of the United States to cooperate with other signatories of the Bretton Woods Agreement and was not required by anything in New York policy. *Banco do Brasil, S.A. v. A.C. Israel Commodity Co.*, 12 N. Y. 2d 371, 239 N. Y. S. 2d 872 (Ct. App. N. Y., April 4, 1963).

*Brazilian exchange controls—possession of bills of lading to guarantee compliance*

In a carrier's interpleader action, the American consignee of Brazilian coffee, allegedly sold to him by a Brazilian company, moved for summary judgment awarding him possession of the bills of lading made out in his name but held in the United States by the Brazilian Coffee Institute, a Brazilian Government agency. The bills had been originally delivered to the Institute in Brazil to guarantee the Brazilian consignor's performance of its written undertakings (and its duty under Brazil's foreign exchange control laws) to remit to Brazil the dollar proceeds of the sale and accept the cruzeiro equivalent at prevailing official rates of exchange. The court held that the Institute's possessory interest would be recognized and it would be entitled to continue to hold the bills of lading until performance of these undertakings. *Oetker v. Goldsmith*, 213 F. Supp. 421 (E.D. N.Y., June 14, 1962).

*Territorial waters—validity of California claim to Santa Barbara channel*

In a wrongful death action for loss of persons aboard a vessel which sank in the waters of the Santa Barbara channel more than one marine league (three nautical miles) from the California mainland and more than one marine league from the closest channel island, it was questioned whether the death occurred on the high seas within the meaning of the Death on the High Seas Act (46 U.S.C. §761-768) or in California territorial waters. The Santa Barbara channel lies between offshore islands

and the California coast and varies between 12 and 30 miles in width. The offshore islands are part of the State of California.

The California Legislature had determined that the territorial waters of the State extended "three English nautical miles" from base lines drawn from headland to headland of bays and estuaries and from the outermost points of islands, reefs and rocks. The court found that the provisions of the California law clearly placed all of the waters of the Santa Barbara channel within California territorial waters.

Following an extensive review of United States cases and reference to a few international law treatises, the court concluded that international law would "appear to limit the territorial waters of a state (country) to a belt one marine league off the shores of the mainland and a similar belt around off-shore islands which are a part of the state." Accordingly, the court held that the waters of the Santa Barbara channel outside of the two recognized belts were not territorial waters of the State of California, and the deaths involved occurred on the high seas. *Hooker v. The Raytheon Company*, 212 F. Supp. 687 (S.D. Calif., Dec. 27, 1962).

*Cuban claims—appointment of receiver of New York assets of Cuban corporation*

Pursuant to the Agrarian Reform Law of June 3, 1959, Cuban Law No. 851 of July 6, 1960, and Resolution No. 1 promulgated by the Cuban President and Prime Minister on August 6, 1960, pursuant to the authority vested in them by Law No. 851, the Cuban Government seized all the Cuban properties of defendant Compania Azucarera Vertientes-Camaguey de Cuba, a Cuban corporation. Plaintiff, a stockholder of the corporation, brought an action in New York under Section 977-b of the New York Civil Practice Act to obtain the appointment of a permanent receiver of the New York assets of the corporation, principally \$2,800,000 in cash held by a court-appointed temporary receiver. Section 977-b provides that an action may be brought for the appointment of a receiver of the New York assets of a foreign corporation when the corporation has assets or property of any kind in New York, and (a) it is dissolved, liquidated or nationalized; or (b) its charter or organic law is suspended, repealed, revoked or annulled; or (c) it has ceased to do business whether voluntarily or otherwise.

The Supreme Court, Appellate Division, previously held in the same case that the corporation had not been nationalized within the meaning of the New York statute, inasmuch as the Cuban Government had not "absorbed the corporation unto itself in such manner or to such an extent as to put the corporation completely out of existence" or "preserve[d] the corporation merely as a corporate entity in the ownership and complete control of the government." 14 App. Div. 2d 582, 217 N.Y.S. 2d 711 (Sup. Ct., App. Div., New York, July 17, 1961), digested in 56 A.J.I.L. 216 (1962). Treating the question whether the corporation was nationalized as a matter to be determined under Cuban law, the Supreme



Court concluded that, although all its properties and assets in Cuba had been expropriated, Law No. 851 and Resolution No. 1 had not dissolved, liquidated or nationalized the corporation.

Article 221 of the Cuban Code of Commerce provides that a corporation shall be completely dissolved upon the conclusion of the enterprise which constitutes its purpose or the entire loss of its capital. The court concluded that, although the corporation no longer had a right to pursue its enterprises in Cuba, it was free under Cuban law to do business elsewhere, and its claim filed with the United States Department of State and its right to receive bonds of the Republic of Cuba pursuant to provisions of Law No. 851 were part of its capital. Finally, the court found that, on the basis of various activities carried on in New York after the expropriation, the corporation had not ceased to do business. *Schwartz v. Compania Azucarera Vertientes-Camaguey de Cuba*, 240 N.Y.S. 2d 247 (Sup. Ct., Kings County, N. Y., Sept. 17, 1962).

*Jurisdiction—extraterritorial application of injunction*

In *United States v. Omar, S. A.*, 210 F. Supp. 773 (S.D.N.Y., Nov. 14, 1962), 57 A.J.I.L. 670 (1963), the district court enjoined First National City Bank from transferring or disposing of any property or rights to property, whether or not located within the United States, held for the account of Omar, S. A., a Uruguayan corporation and an alleged delinquent taxpayer. On appeal, the circuit court held that the injunction issued by the district court was beyond its jurisdiction as to deposits held abroad that are collectible only outside the United States, but not as to accounts which are in fact payable in New York.

Inasmuch as no personal jurisdiction had been obtained over Omar, S. A., the jurisdiction of the district court over Omar depended upon the existence of property of Omar within the district court's jurisdiction, Omar's rights to which might be extinguished in a judgment *quasi in rem*. Although First National City Bank was before the court, under Section 6322 of the Internal Revenue Code it would be liable personally only if it wrongfully refused to surrender property on which the United States Government held a lien, and the court construed Section 6321 of the Code, which gives to the Government a lien on "all property and rights to property" belonging to a taxpayer who has refused or neglected to pay any tax, as limited to property and rights to property within the territorial jurisdiction of the United States.

Absent an explicit indication to the contrary, there should not be attributed to Congress an intent to give the courts of this nation, in this highly sensitive area of intergovernmental relations, the power to affect rights to property wherever located in the world.

The controlling question, therefore, was whether First National City Bank held property or rights to property of the taxpayer Omar subject to the jurisdiction of the district court. Looking to New York law that, absent special agreement, accounts in foreign branches are not collectible

at the New York main office of the bank unless the foreign branch is closed or refuses a demand for payment, the court concluded that, unless Omar's accounts were in fact payable in New York, First National City Bank did not hold property or rights to property subject to the jurisdiction of the district court.

The court recognized that the policy consideration underlying the New York law (i.e., "that to require any branch to respond to the demand of a depositor in another branch anywhere in the world would impose an intolerable burden on the banking community"), has little to do with the collection of revenue. It pointed out, however, that a different rule would not in the long run provide much consolation to the Internal Revenue Service:

The artful tax dodger would not have to be too sophisticated to realize that all he need do to escape liability is place his deposits in a bank of local origin that is beyond the power of our courts. This would lead only to harmful consequences for our banking system abroad without any concomitant benefits here at home.

The dissent took the position that the order of the district court directing the bank, which was subject to the *in personam* jurisdiction of the court, to keep the property which it held for Omar pending determination of Omar's tax liability, did not purport to establish or enforce any lien, and its validity did not depend upon the existence of property of Omar subject to the jurisdiction of the district court. The only issue was the bank's power, which it did not deny, to prevent its foreign branches from releasing the property. *United States v. First National City Bank* (U. S. Cir. Ct., 2d Cir., June 26, 1963).

*Treaties—power of Treasury to issue regulations affecting U. S.-Switzerland Income Tax Convention.*

The Income Tax Convention of 1951 between the United States and Switzerland exempts from Federal taxation royalties derived from sources in the United States by a Swiss resident "not having a permanent establishment in this country." S, a Canadian citizen and a bona fide resident of Switzerland for the entire tax year in question, maintained a "permanent establishment" in the United States for a period of two and a half months during that year. He was assessed at the full United States tax rates on all royalty payments to him from United States sources during such year on the basis of Treasury Regulation §509.101 (1955), which provided that the condition of "not having a permanent establishment" in the United States required that there be no such establishment at any time during such taxable year.

S challenged the Treasury Regulation as an unwarranted narrowing of the convention. While the court agreed that the convention as a treaty was constitutionally the supreme law of the land, which the Treasury could not contract or expand, it held that the Treasury Regulation in question was a proper exposition of the meaning which the parties must

by their conduct be deemed to have given the convention. The convention itself contemplated that regulations might be made to give effect to its terms, and the disputed regulation had been submitted to the Swiss Government for its comments prior to publication in the United States. No objection had been made to the proposed regulation. Also Treasury Regulations in similar form existed prior to the 1951 Convention, and the parties in Article II(2) expressly stipulated that, unless the context otherwise required, the terms used in the treaty should bear the meaning attributable to them under the domestic law of the party applying the treaty provision. *Samann v. C.I.R.*, 313 F. 2d 461 (2d Cir., Jan. 16, 1963).

*Treaties—Income Tax Convention between the United States of America and the United Kingdom*

Resolving a conflict between *American Trust Co. v. Smyth*, 247 F. 2d 149 (9th Cir., 1957), 52 A.J.I.L. 523 (1958), and *Maximov v. United States*, 299 F. 2d 565 (2d Cir., 1962), noted in 56 A.J.I.L. 1108 (1962), the United States Supreme Court held that Article XIV of the Income Tax Convention between the United States of America and the United Kingdom, April 16, 1945, 60 Stat. 1377, 1384, which provides that "A resident of the United Kingdom not engaged in trade or business in the United States shall be exempt from United States tax on gains from the sale or exchange of capital assets," does not exempt from the United States income tax retained capital gains income realized in the United States by a trust established in the United States, governed by the laws of one of the States, and administered in the United States by an American trustee, even though all of its beneficiaries are British subjects and residents. *Maximov, Trustee, v. United States*, 373 U. S. 49 (U. S. Sup. Ct., April 29, 1963. Goldberg, J.).

*Jurisdiction—conspiracy with foreign cartel to violate U. S. antitrust laws*

Defendants were exporters of scrap iron from Hawaii to Japan. The Government alleged they had conspired with a Japanese cartel, other U. S. companies and persons unknown to control the export of scrap iron to Japan. The scope of this conspiracy was alleged to extend to price-fixing of scrap sold to Japanese buyers, exclusion of other "outside" U. S. exporters of scrap iron, and allocation of territories among the "inside" exporters, and to involve acts within the United States and affecting United States foreign commerce.

Defendants moved to dismiss the indictment on the ground that there was no violation of the Sherman Act involved in dealing with a foreign cartel not illegal in the foreign country. The court held that the indictment charged offenses under the Sherman Act which were within the jurisdiction of the United States. *U. S. v. Learner Company et al.*, 215 F. Supp. 603 (D.C. Hawaii, March 29, 1963).

*Sovereign immunity—instrumentality of a foreign government*

In a suit against the Banco Industrial de la República Argentina, a bank created by special law decree of the Republic of Argentina, the Bank moved to vacate a warrant of attachment on the ground, *inter alia*, that it, as an instrumentality of the Republic of Argentina, and its property were immune from suit and attachment. The Republic of Argentina by its Embassy interposed a motion raising the question of sovereign immunity. The Department of State advised the Republic of Argentina that it declined to recognize the immunity of the Bank because the activities "of the Bank which are the basis of the suit must be regarded as acts of a private nature, *jure gestionis*, regardless of the relationship of the Bank to the Government of Argentina," and the Republic of Argentina withdrew its motion. The court treated this as dispositive of the Bank's motion based on the same ground. *Mirabella v. Banco Industrial de la República Argentina*, 38 Misc. 2d 128, 237 N.Y.S. 2d 499 (Sup. Ct., New York County, N. Y., Jan. 3, 1963).

*Admiralty—claim for damage to Lend-Lease cargo*

In admiralty proceedings, involving, *inter alia*, a claim with respect to negligent damage to cargo consigned to the British Government under the Lend-Lease Act, it was held that, having regard to the nature and objects of the Lend-Lease program and the type of interest the British Government possessed in the Lend-Lease cargo, no claim could be made on behalf of the British Government against the United States with respect to such damage. *Luckenbach Steamship Company, Inc. v. U. S.*, 315 F. 2d 598 (2d Cir., March 22, 1963).

*Aliens—entry into United States—return of resident alien from brief excursion outside United States*

Fleuti, originally admitted to the United States for permanent residence on October 9, 1952, resided continuously in the United States except for one afternoon in August, 1956, when he visited Ensenada, Mexico, for "about a couple of hours." In April, 1959, the Immigration and Naturalization Service sought to deport Fleuti on the ground that his return from Mexico in 1956 constituted an "entry" into the United States within the meaning of Section 101(a)(13) of the Immigration and Nationality Act of 1952, 66 Stat. 167, 8 U.S.C. §1101(a)(13); that at the time of this entry he was excludable from admission into the United States under Section 212(a)(4) of the same Act because he was "afflicted with psychopathic personality" and that, accordingly, he was deportable under Section 241(a)(1) of the same Act, which provides that an alien in the United States shall be deported, who at the time of entry was within one or more of the classes of aliens excludable by the law existing at the time of such entry.

Section 101(a)(13) defines "entry" as

. . . any coming of an alien into the United States, from a foreign port or place or from an outlying possession, whether voluntarily or otherwise, except that an alien having a lawful permanent residence in the United States shall not be regarded as making an entry into the United States for the purposes of the immigration laws if the alien proves to the satisfaction of the Attorney General that his departure to a foreign port or place or to an outlying possession was not intended or reasonably to be expected by him. . . .

Speaking for a majority of five Justices, Mr. Justice Goldberg concluded that, to effectuate the Congressional purpose in enacting the definition of "entry," the intent exception must be construed to mean "an intent to depart in a manner which can be regarded as meaningfully interruptive of the alien's permanent residence." Whether such intent can be inferred depends on a variety of factors, including the length of time the alien is absent, the purpose of leaving the country and the necessity of procuring travel documents in order to make the trip. Declaring that "an innocent, casual, and brief excursion by a resident alien outside this country's borders may not have been 'intended' as a departure disruptive of his resident alien status and therefore may not subject him to the consequences of an 'entry' into the country on his return," the Court remanded the case for a determination of Fleuti's intent in leaving the country.

Mr. Justice Clark, speaking for the minority of four Justices, felt compelled by the plain meaning of the statute, its legislative history and the consistent interpretations of it by the Federal courts, to find that Fleuti's return to the United States after his brief trip to Mexico constituted an "entry" within the meaning of the statute. Referring to the opinion of the majority, he stated:

. . . The Court today decides that one does not really intend to leave the country unless he plans a long trip, or his journey is for an illegal purpose, or he needs travel documents in order to make the trip. This is clearly contrary to the definition in the Act and to any definition of "intent" that I was taught.

*Rosenberg v. Fleuti*, 374 U. S. 449 (U. S. Sup. Ct., June 17, 1963).

*Loss of citizenship—service in armed forces of foreign state*

In 1958, Marks, a native-born American citizen, went to Cuba to fight with Fidel Castro in the successful overthrow of the Batista Government, remaining on after the revolution as a captain in the Cuban Rebel Army. In 1960 he lost favor with Castro and returned to the United States without the proper alien immigrant papers. Marks was later seized and detained as a deportable alien. On an application for habeas corpus, the court held that Marks lost his citizenship by virtue of continuing on in Castro's armed forces after the successful completion of the revolution, which constituted "serving in the armed forces of a foreign state" within the meaning of 8 U.S.C. §1481 (a) (3). The court rejected the argument that Marks lost his citizenship only when his alienage was judicially determined. Marks' entry into the United States after his extended military service and

without the necessary alien documentation therefore made him subject to deportation. *U. S. ex. rel. Marks v. Esperdy*, 315 F. 2d 673 (2d Cir., Jan. 28, 1963).<sup>1</sup>

#### NOTES ON PRIVATE INTERNATIONAL LAW CASES

##### *Law of situs of personal property governs status of joint bank accounts*

The Duke and Duchess of Arion, residents of Spain, established bank accounts in New York subject to agreements that, upon the death of either, such bank accounts should become the property of the survivor. Upon the Duke's death, the ancillary administrator of the Duke's estate claimed that the Duke and Duchess were domiciliaries of Spain, that the law of the domicile governed the rights to the property in question, and that under Spanish law such property constituted community property, half of which vested in the Duke's estate immediately upon his death, notwithstanding any agreement, gift or other transaction between the Duke and the Duchess. The defendant contended that the law of the situs governed the rights to the property, and that pursuant to New York law and the agreements signed by the Duke and Duchess, the Duchess became the sole owner of the property immediately upon the Duke's death.

Relying on *Hutchinson v. Ross*, 262 N. Y. 381, 187 N.E. 65 (1933), in which New York law was applied to uphold the validity of a trust created in New York by a husband and wife domiciled in Quebec, where such an agreement would have been invalid, the court held that New York law governed the right to the property. In reaching this decision, the court stated that it was giving effect to a public policy of New York to encourage non-residents to do business with New York banks and the desire of the parties that New York law govern as evidenced by the acts of the parties in placing property in New York banks, entering into agreements repugnant to Spanish law and stipulating in one of the agreements that New York law govern. The court also referred to the fact that Section 134(3) of the New York Banking Law, which provides for survivorship in joint bank accounts, does not distinguish between resident and non-resident depositors.

As to assets held in a joint bank account in London and transferred to New York after the Duke's death, the ancillary administrator urged that an English court would look to the law of the domicile, Spanish law, and hold that the Duke's estate was entitled to half of such property. However, the court stated that New York courts do not follow the *renvoi* doctrine but look only to the internal law of the foreign jurisdiction, according to which in this case the Duchess as the survivor became entitled to all the property in the joint bank account. *Wyatt v. Fulrath*, 38 Misc. 2d 1012, 239 N.Y.S. 2d 486 (Sup. Ct., New York County, N. Y., April 16, 1963).

<sup>1</sup> For decision of the district court in this case (203 F. Supp. 389), see 56 A.J.I.L. 1109 (1962).

*Proper law of will of movables*

In *re Levick's Will Trusts*, [1963] 1 All E.R. 95, the Chancery Division held that the material or essential validity of a will of movables is governed by the law of the testator's domicile at the time of his death and a testator may not select the proper law governing a will of movables.

*Recognition of foreign marriage not in accordance with formalities of lex loci*

In *Preston v. Preston*, [1963] 2 W.L.R. 1435, the Court of Appeal held that all members of a group of Allied soldiers, organized under military command for the military purposes of the Allies, one of whom was in actual control of the conquered territory in which the group was situated, were in the same privileged position so far as concerned the marriage formalities of the *lex loci* as members of the belligerent army itself. While members of such a group might deliberately seek to marry according to the local law and therefore choose to be governed by it, if they did not do so, their peculiar position exempted them from complying with its formalities. Since it had been found that the husband was a member of such a group of Allied soldiers and the parties had not by their conduct elected to be governed by German law, the marriage was not void at its inception by failure to comply with the German formalities, and was valid as an English common-law marriage.

*Non-recognition of foreign nullity decree*

In *Lepre v. Lepre*, [1963] 2 W.L.R. 735, the Probate Division held that a decree of a Maltese court, nullifying a civil marriage in England of a Maltese domiciliary on the ground that the marriage did not comply with Canon law, would not be recognized because "it offends intolerably against the concept of justice which prevails in our courts."

*Taxability in England of shares distributed in foreign "spin-off"*

C, a Maryland corporation, effected a "spin-off" of one of two separate businesses it carried on by creating a new subsidiary and transferring to it the assets used in one business in exchange for shares in the subsidiary, and distributing those shares to C's shareholders as a distribution in partial liquidation under Maryland law. On the issue of whether the subsidiary's shares were taxable as income in the hands of an English investment company, the House of Lords held that the character of a payment in the hands of a shareholder must be determined under the law of the place of incorporation. It having been found as a fact that under Maryland law the distribution was a capital one and the shareholders received capital, not income, the receipt of the shares by an English investment company was therefore a capital transaction and not subject to taxation. *Rae v. Lazard Investment Co. Ltd.*, [1963] 2 W.L.R. 555.

## DECISIONS OF THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES \*

*European Coal and Steel Community Treaty—third-party proceeding by Belgium to modify prior judgment—infringement of sovereignty and injury to government's reputation not proved*

GOVERNMENT OF BELGIUM v. SOCIÉTÉ COMMERCIALE ANTOINE VLOEBERGHES AND HIGH AUTHORITY. Joint Cases No. 9 and 12/60. 8 Sammlung der Rechtsprechung des Gerichtshofes 347 (1962).

Court of Justice of the European Communities. Judgment of July 12, 1962.

This was a third-party proceeding instituted by the Belgian Government, seeking modification of the judgment rendered by the Court of Justice in the case of *Société Commerciale Antoine Vloeberghs v. High Authority of the European Coal and Steel Community*.<sup>1</sup> In that case plaintiff claimed, *inter alia*, to have sustained damages from a so-called "official fault" of the Community, due to the failure of the High Authority to assure the admission by France of coal imported by the plaintiff into Belgium from the United States. That appeal was rejected by the Community Court on the theory that the plaintiff had no standing to invoke the protection of the principle governing the free movement of goods as contained in the treaty. The Court reached this conclusion on the basis of its finding that the coal was not imported for use in Belgium, but solely for shipment to France, that its importation into Belgium was achieved without any expense or effort, and that the transaction taking place in Belgium was merely an attempt to disguise a direct import into France.

In the present appeal, the Belgian Government, which had not intervened in the prior suit, charged that this part of the challenged judgment in its holding and wording (a) infringed upon Belgian governmental powers and sovereignty in contravention of Article 73 of the ECSC Treaty, which reserves "the administration of import and export licenses in relation with third countries" to the government of that Member State "on whose territory is situated the point of origin for exports or the point of destination for imports"; and (b) cast injurious suspicions upon the integrity of the Belgian Government. The Court rejected both arguments and dismissed the appeal. With regard to the first contention the Court held that the challenged ruling

did not address itself to the question whether the Belgian regulation pertaining to the free movement of coal emanating from third countries violated the Treaty. It was limited instead to a determination of the legal consequences resulting from the application of this regulation to the principle governing the free movement of goods in the particular case decided by the Court.

In the Court's view, such a determination could not be said to infringe upon the governmental powers or sovereignty of the Belgian Government.

\* Reported by Thomas Buergenthal, Assistant Professor of Law, School of Law, State University of New York at Buffalo.

<sup>1</sup> Reported in 56 A.J.I.L. 1083 (1962).



In addressing itself to the second contention advanced by Belgium, the Court implicitly accepted the Advocate-General's theory that a Member State, like an individual, has a legally cognizable interest in protecting its reputation, entitling it to institute a third-party proceeding to set aside or modify a judgment injurious to its reputation. The Court concluded, however, that the Belgian contention was not justified, since the findings and the wording of the judgment to which the Belgian Government objected were neither directed at the Belgian Government nor intended to pass upon the legality of its conduct.

*European Coal and Steel Community—transportation policy—Article 70—High Authority recommendation pertaining to non-discriminatory transportation rates upheld*

GOVERNMENT OF THE NETHERLANDS *v.* HIGH AUTHORITY. Case No. 9/61. 8 Sammlung der Rechtsprechung des Gerichtshofes 433 (1962).

Court of Justice of the European Communities. Judgment of July 12, 1962.

The appeal here in question is the latest in a series of governmental suits challenging the power of the High Authority of the European Coal and Steel Community to bring about the establishment of non-discriminatory transportation rates for coal and steel within the Community. In this action the Dutch Government sought the annulment of a recommendation promulgated by the High Authority in 1961. Article 1 of this recommendation calls upon the Member States to take all necessary general and particular steps providing for the publication by carriers of their coal and steel transportation rates and cost schedules in order (a) to assure that consumers in comparable positions are offered comparable price conditions, and (b) to facilitate the achievement of direct international transportation rates and the harmonization of freight and shipping charges. Article 2 requires Member States to take all steps necessary to prevent violations of the legal and administrative regulations enacted or to be enacted in implementing the policies outlined in Article 1 of the recommendation.

The Dutch Government charged that the High Authority had exceeded its powers in promulgating this recommendation, since it allegedly imposed duties on the Member States not authorized by Article 70 of the treaty.<sup>1</sup>

<sup>1</sup> Article 70 of the ECSC Treaty, reprinted in 46 A.J.I.L. Supp. 107 at 139 (1952), provides:

"It is recognized that the establishment of the common market requires the application of such transport rates for coal and steel as will make possible comparable price conditions to consumers in comparable positions.

"For traffic among the member States, discriminations in transport rates and conditions of any kind, which are based on the country of origin or of destination of the products in question are especially forbidden. The suppression of these discriminations involves in particular the obligation to apply to the transport of coal and steel, coming from or going to another country of the Community, the rates, prices and

The Court accordingly considered whether Article 70 imposes obligations upon the Member States whose compliance the High Authority is to assure, or whether this provision is a mere policy statement having no binding effect. Upon an examination of its wording, the Court concluded that Article 70 formulates a concrete rule binding upon the Member States, and that the High Authority is authorized thereunder to direct its implementation by the governments in question. But, the Court pointed out, in doing so the High Authority may not impose new obligations upon the Member States. It may, however, by means of recommendations<sup>2</sup> addressed to the governments, articulate and clarify the duties incumbent upon them under Article 70(3). Here it should be remembered, the Court emphasized, that Article 70(3) is not to be narrowly construed by divorcing it from the remaining provisions of the treaty, since it is designed to deal with transportation policies in the context of the over-all framework of the treaty and the common market for coal and steel. Viewing the challenged recommendation in this light, the Court concluded that it constituted a valid exercise of the powers vested in the High Authority.

The Court also rejected the plaintiff's contention that the recommendation infringes upon the sovereignty of the Member States. The plaintiff sought to substantiate this allegation by pointing to the fact that the recommendation requires the Member States to take all appropriate steps to prevent the violation of any legal and administrative regulations enacted or to be enacted for the purpose of implementing the policies described in Article 1 of the recommendation. This argument, the Court reasoned, overlooked the fact that the requested enforcement measures were necessary to assure that the obligations assumed by the Member States were fully implemented, "because they are not only required to enact the measures stipulated in Article 70 [of the treaty], but are also duty-bound to assure compliance therewith." Accordingly, the Court upheld the legality of the recommendation and dismissed the appeal.

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tariff provisions of all types applicable to internal transport of the same products over the same route.

"The rates, prices, and tariff provisions of all sorts applied to the transport of coal and steel within each member State, and among the member States shall be published or brought to the knowledge of the High Authority.

"The application of special domestic tariff measures in the interest of one or several coal- or steel-producing enterprises shall be subject to the prior agreement of the High Authority, which shall ensure that such measures are in accordance with the principles of this Treaty; it may give a temporary or conditional agreement.

"Subject to the provisions of this article, as well as to the other provisions of this Treaty, commercial policy for transport, in particular the fixing and modification of rates and conditions of transport of any type as well as the arrangement of transport prices required to assure the financial equilibrium of the transport enterprises themselves, remains subject to the legislative or administrative provisions of each of the member States; the same is true for the measures of co-ordination or competition among different types of transport or among different routes."

<sup>2</sup> ECSC Treaty, Art. 14(3), provides that "recommendations shall be binding with respect to the objectives which they specify but shall leave to those to whom they are directed the choice of appropriate means for attaining these objectives."

## INDIA AND PAKISTAN CASES \*

*Extradition—offense committed in Ceylon, escape to India*

Petitioner had committed an extraditable offense in Ceylon and escaped to India. Ceylon considered the Fugitive Offenders Act, 1881, to be applicable in its relations with India. The court held that, although the Fugitive Offenders Act was no longer applicable to India, the Indian Extradition Act, 1903, was applicable, having been continued by Article 372 of the Indian Constitution. The 1903 Act gives effect to the moral duty to surrender an offender. It is an accepted view of international law that the emergence of a new state or a change of sovereign in a state does not bring about a break or interregnum in law. A law, once established, continues until changed by some competent legislative body. *In re Chockalingam Chettier*, 47 A.I.R. (Madras) 548 (1960) (Full Bench, Somasundaram, Ramanvami and Anatanarayanam, JJ.).

*State succession—continuity of obligation—adequacy of pension—act of state*

The appellant, a younger brother of the former ruler of Dhenkanal State (a sovereign state under the paramountcy of the British Crown), had certain lands assigned to him by his brother free from revenue charges. The former ruler also authorized payment of an allowance to his brother by the Dhenkanal District Treasury. The paramountcy of the British Crown ended in 1947 and Dhenkanal merged with the Dominion of India on December 15, 1947. It was later taken over by the Orissa Government as the delegated authority of the Dominion Government. After the merger, the District Magistrate of Dhenkanal informed the appellant that his allowance would continue, and the Chief Minister of Orissa gave an assurance that

all bona fide and legal commitments of the Rulers as Government of their States entered into before January 1, 1948, will be scrupulously respected by the Orissa Government.

The allowance having been discontinued, since appellant had adequate lands, appellant claimed that he was entitled to the allowance not merely by virtue of the Order of 1931 made by his brother, but also by virtue of the statutory recognition of customary rights to such payments. The Court of Appeal held that: It is a well-settled rule of international law that, when a territory is ceded by one sovereign to another, the rights which the inhabitants of that territory enjoyed against their former ruler avail them nothing against the new sovereign and cannot be asserted in the courts established by the new sovereign except to the extent to which they have been recognized by the new sovereign. Such recognition may be either by legislation or by express or implied agreement. The right to adequate maintenance was recognized, but a succeeding sovereign

\* Digested by Prof. Egon Guttman, Howard University Law School, Washington, D. C.

was not bound by the opinion of the preceding one as to what would be adequate. A refusal to grant the same amount was an act of state which will not be justiciable in the municipal courts. *Raj Kumar Narasingh Pratap Singh Deo v. State of Orissa*, 49 A.I.R. (Orissa) 60 (1962) (C.A., R.L. Narasimham, C.J., and R. K. Das, J., Nov. 17, 1960).

*State succession—recognition of rights granted by former sovereign  
—“paramountcy”—rights of citizen and act of state*

The Ruler of Miraj State had granted appellant certain lands and the right to exercise civil and criminal jurisdiction therein. In 1941 these jurisdictions were revoked, but the British Resident restored the land rights. A claim to both the political and land rights was rejected.

By 1947, when the India Independence Act was passed, the British Crown had acquired certain rights in relation to the Indian States, called paramountcy, by treaty, usage, enjoyment and “sanads.” Although political power was transferred to the Indian Government, paramountcy was not and could not be transferred, being by its very nature incapable of transfer. The concept of paramountcy is a creature of the peculiar historical circumstances in India and defies any attempt at definition. When the Indian Independence Act declared that British suzerainty over the Indian States had lapsed, these rights of paramountcy or suzerainty were assumed by the Indian Government, and the Central Legislature passed the Extra-Provincial Jurisdiction Act, 1947, providing for the way in which the rights of paramountcy were to be exercised. The preamble of the Act referred to the rights which were acquired by treaty, agreement, grant, usage, suffrage and other lawful means, as describing those rights which had been acquired by the British Crown. The preamble also referred to similar rights which may be acquired in the course of time by the Central Government in relation to the areas outside the Provinces of India. It does not follow, however, that, inasmuch as the assets of a merging state were taken over by the Dominion Government, the liabilities of the former government were also taken over by the succeeding state. Financial liabilities are liabilities incurred by the Dominion Government in the process of the governance of the merged state. The rights of private citizens against the merged state which accrued prior to its merger have no relation to the governance of the state. They are therefore not obligations which pass on to the successor government, unless the liability has been accepted by the successor. The mere fact that certain laws have been allowed to continue by the succeeding state does not mean that the liabilities of the citizen against the state were also recognized by the succeeding state. There must be shown express or implied recognition, or recognition by conduct, of a specific right before the successor is bound thereby. A right so carried over after the Constitution, when the Republic of India was formed, could no longer be repudiated by a claim of act of state. Proper constitutional and valid legislation would be required to deny such right. If, however, a right, though provided for in a treaty of cession, has not been so carried over, then denial of such right is not actionable by the subject. It is a

matter between independent sovereigns, and any dispute arising therefrom must be settled by recourse, not to the municipal law of either state, but by diplomatic action or force. That is an act of state pure and simple, and that is its character until the process of acquisition is complete by conquest or by union. *Vinayak Shripatrao Patwardhan v. State of Bombay*, 48 A.I.R. (Bombay) 11 (1961) (C.A., Mudholkar and Naik, JJ.).

*State succession—liability of Pakistan for debt of former British India—power of local courts to grant relief*

Land had been requisitioned in 1941 for the defense of India. The amount of compensation being in dispute, this question was reserved for arbitration. During the pendency of the arbitration India was partitioned into the Dominions of India and Pakistan. The arbitrator held the Government of India to be liable, but the respondent filed an appeal in the Pakistan High Court under the Defence of India Act, impleading the Union of India and the Federation of Pakistan, and claiming the amount awarded to be insufficient. India declined to submit itself to the jurisdiction of the High Court of Pakistan, but the judge nonetheless held both India and Pakistan liable under the Indian Independence (Rights, Property and Liabilities) Order, 1947, and increased the award. The Supreme Court held that the liability to pay compensation for land acquired under the Defence of India Act before partition cannot be one of the "financial obligations" of the Governor General in Council mentioned in Article 9 of the Order, nor is it a liability in respect of an "actionable wrong, other than a breach of contract" under Article 10, and thus the liability did not pass to Pakistan. Under international law, a sovereign, when granting independence, has power to impose on the new state what terms and conditions he pleases in regard to his own obligations. Oppenheim-Lauterpacht receives the support of other academic writers in maintaining that, if nothing is said about a particular obligation, locally connected rights and duties continue. However, this cannot be regarded as established practice in international law. But even if the new state is bound by such obligation, it will not be possible to grant relief because, in the absence of statutory recognition, municipal courts have no authority to enforce such an obligation. *Federation of Pakistan v. Dalmia Cement Co. Ltd., Karachi and the Union of India*, 14 All Pakistan L. Dec. (S.C.) 260 (1962) (Sup. Ct., A.R. Cornelius, C. J., S. A. Rahman, Fazle-Akbar, B.Z. Kaikaus, and Hamoodur Rahman, J.J., Feb. 14, 1962).

*Sovereign immunity—monarchical states as opposed to republican states—comity—jure imperii—jure gestionis—waiver—reciprocity*  
*Indian Civil Procedure Code*

The plaintiff sued the United Arab Republic and its Ministry of Economics for breach of contract. Both defendants entered an appearance and took out summonses to have the complaint dismissed. On appeal from the decision of the lower court holding the defendants liable to

suit, the Court of Appeal held that defendants' appearance for the purpose of having the suit dismissed is not an unconditional appearance amounting to a waiver of immunity nor a submission to jurisdiction.

Under the Indian Civil Procedure Code, a "Ruler" is granted a partial immunity which can be taken away with the consent of the Central Government. The defendant here is not the President of the United Arab Republic but the Republic itself. The position may be different in monarchical states, where the state has no independent existence apart from its ruler, and where all the property and liabilities of the state vest in its ruler. In the case of a republic, however, the property, assets and liabilities vest in the government of the republic and not in its ruler. Consequently, a suit against a republic cannot be treated as equivalent to a suit against the head of the republic. A suit against a foreign state is authorized by the Indian Civil Procedure Code. The diplomatic immunity of the ruler is a personal privilege, especially as it enures to rulers of former Indian States who have no territorial rights to rule. Thus, a republic cannot claim diplomatic immunity under the Indian Civil Procedure Code. But such an action would be an infraction of the sovereignty of a foreign state. On the basis of comity, such an action should be refused. This is not a suit against a state-owned trading vessel, but one for breach of contract. The decisions of English courts are uniform that such an action is not possible. Any distinction between *jure imperii* and *jure gestionis* must be rejected, as it rests on an insecure foundation and cannot be accepted as the positive law of India. Nor is it clear that Egyptian courts would recognize such distinction. *U.A.R. and Another v. Mirza Ali Akbar Kashani*, 49 A.I.R. (Calcutta) 387 (1962) (C. A., Lahiri, C.J., and Bachawat, J., April 17, 1961).

## BOOK REVIEWS AND NOTES

LEO GROSS

*Book Review Editor*

*Académie de Droit International. Recueil des Cours, 1960.* Tomes I, II, III (Vols. 99, 100, 101 of the Collection.) Tome I: pp. 620; Tome II: pp. viii, 686; Tome III: pp. 493. Indices. Leiden: A. W. Sijthoff, 1961. Fl. 50 each.

These volumes open with a characteristically felicitous essay by Philip C. Jessup entitled "A Half Century of Efforts to Substitute Law for War,"<sup>1</sup> which might well be made required reading for all participants at conferences to achieve "world peace through law." At the very least, this essay should convey to those newly come to international law that their curious assumption that they are opening up virgin territory might usefully be replaced by some understanding of the efforts made in the past to control international violence and to regulate international transactions through law. Even more important, they would learn something of the facts of international law (it is remarkable how much is compressed in this essay), and perhaps in consequence no longer take their own experience as the measure of existing international law.<sup>2</sup> Appropriately, Judge Jessup reminds us of the continuing relevance of the series of Hague Academy lectures:

Where else than in the one hundred odd published volumes of its *Recueil des Cours* will one find an equivalent record of the best thought of the scholars and statesmen of many nations on the actualities of international law, its nature, its history, its usefulness and its defects, its procedures and organizational forms?

The 1960 lectures are further confirmation of this observation. The sixteen contributions, while varied in subject and style, are all products of skilled and sophisticated professional international lawyers. They may perhaps place too much emphasis on the formulation and semantics of legal norms, yet on the whole they recognize that norms do not operate in a vacuum and that their significance depends on their actual observance.

<sup>1</sup> The essay was originally delivered as an address at a special convention of the Hague Academy called to commemorate the 50th anniversary of the gift by Andrew Carnegie to establish the Carnegie Endowment for International Peace.

<sup>2</sup> See editorial, *New York Times*, June 29, 1963, p. 22, quoting the Chairman of the Athens Conference as stating that: "Every international law of worldwide application could be printed in one volume. And the tragedy is that even that hasn't been done." The editorial itself goes on to say that there can be no international law in the absence of a supernational body with enforcement power, and then says present international law fits into the category of the French Declaration on the Rights of Man or the American Bill of Rights. In reading this, one wonders about the assumptions of American lawyers in referring to their mission to spread international law elsewhere.

There is, of course, awareness of the shortcomings of international law and of its fragility in certain areas, but the extremes of pessimism and Utopianism are not apparent. As Professor Jessup observes in regard to the whole series of lectures, the authors "are content to describe, to analyze, to expound, and then to be hopeful without being prophetic."

The widening scope of international law is also evidenced in these lectures. Several of the contributions concentrate on the evolving law of international organizations. Professor Boutros-Ghali of Cairo has an informative study of the rule of equality of states in international organizations; Professor Dupuy of Aix-en-Provence expounds in considerable detail the network of legal arrangements governing the relations between international organizations, and Dr. E. A. Zimmermann, Counsel on Fiscal Problems of Münster, covers the fiscal problems of the Common Market in an article that is as filled with figures and charts as any in a journal of accountancy. The rôle of international organization is brought out also in other articles dealing with various aspects of international law. For example, the lectures by Dr. Coursier of the International Committee of the Red Cross, entitled "The Evolution of International Humanitarian Law," cover not only the developments relating to the protection of persons under the Red Cross Conventions but also the developments within the United Nations relating to the protection of refugees, and the continuing efforts to bring about the abolition of slavery and protection against "*les fléaux de l'humanité*."

A private lawyer occupied with international transactions of his clients will find these volumes a rich source of material of practical import. Professor Monaco of the University of Rome has dealt, for example, with the "bread-and-butter" subject of insurance in international law, covering in his three chapters insurance in the field of international transportation, insurance relating to nuclear installations, and the international regulation of insurance companies through the European Economic Community. International commercial arbitration has been comprehensively treated by Mr. Charles Carabiber, the President of the Court of Arbitration of the International Chamber of Commerce, who incidentally shows that many of the efforts to extend international commercial arbitration and to enhance its effectiveness are taking place within the framework of international governmental and non-governmental organizations.

A number of the contributions deal with conflict of laws problems. Noteworthy in this category is a wide-ranging and perceptive contribution of Professor Elliot Cheatham, entitled "Problems and Methods in Conflict of Laws." Although these lectures draw largely on the experience of the Federal system of the United States, they suggest methods and solutions that are appropriate for trans-national problems. The last four chapters are especially valuable for their lucid discussion of policies underlying choice of law and the specific ways in which such policies are given effect in rules and cases. The President of Stockholm University, Hakan Nial, also deals with conflict problems mainly in regard to commercial law problems arising in connection with sales, bankruptcy and limited com-



panies, and the late Professor Vallindas of Salonika treats the "structure of the rules of conflict of laws." Approaching the principles of conflicts from an historical perspective, Professor Graveson of London shows how various historical factors have brought about significant differences between English and American principles, noting, for example, that the United States has adhered more closely than England to the common-law rule of *locus regit actum*. He is far from parochial in his evaluation, finding that certain American solutions have been more successful than the English developments.

The standard course on "General Principles" given each year at the Academy finds ample justification in the lectures of Professor Max Sørensen of Aarhus who, as can be expected, has combined wide erudition with a keen sense of new direction. At times his treatment is inevitably too brief to do justice to the topic; for example, the conclusion that the effect of a General Assembly resolution outside of internal matters is declaratory rather than constitutive warrants more consideration and, in the reviewer's opinion, is probably stated too restrictively.

Professor V. A. Röling, who for many years was an outstanding figure in the legal committees of the United Nations, treats under the title of "The Law of War and National Jurisdiction since 1945" some of the disturbing problems raised by the postwar punishment of war criminals. The lectures manifest Judge Röling's sensitivity to considerations of justice and fairness and his deep conviction, expressed with vigor and some asperity, that a far-reaching revision of the laws of war is essential.

These volumes are also enriched by the learned contribution of Professor C. H. Alexandrowicz, now of Sydney and for many years at Madras, on "Treaty and Diplomatic Relations between European and South Asian Powers in the Seventeenth and Eighteenth Centuries." While the subject may seem esoteric, Professor Alexandrowicz's lectures have a distinct relevance to the much-discussed contemporary problem of the identification of the non-Western countries with international law. The painstaking research of Professor Alexandrowicz indicates that fundamental principles of the law of nations have been operative in Asia as well as in Europe since the beginning of the sixteenth century, and he concludes that Asian state practice in the seventeenth and eighteenth centuries (apparently known to Grotius, Freitas and Vattel) had a part in the shaping of important rules of general international law. Thanks to Professor Alexandrowicz, some well-worn clichés about international law can now be discarded.

OSCAR SCHACHTER

*The Role of International Law in the Elimination of War.* By Quincy Wright. Manchester, England: Manchester University Press; Dobbs Ferry, N. Y.: Oceana Publications, 1962. pp. vii, 119. Appendices. Index. \$4.00; 18 s.

In this interesting slim volume, the Schill Lectures at the University of Manchester in 1961, Professor Wright summarizes a lifetime of concern

with the rôle of international law in the elimination of war. There are nine appendices in which various important documents relating to the subject are reproduced.

In his first lecture the author discusses the dual functions of international law, as in any legal system, of maintaining order and seeking justice. From a survey of prior experience in certain nation states, and of the existing state of world organization, he suggests that order is the first goal of international law at this stage, and that, *inter alia*, clear rules defining aggression are essential. He rejects the view of Julius Stone and others that force may be used to seek justice in certain aggravated circumstances.

The second lecture traces the development of international law in the light of changing conditions from ancient times to the present, and concludes with an analysis of the "new principles" of international law, which are defined as the outlawry of war, the self-determination of peoples, respect for human rights, and the personality of international organizations. The first and fourth are characterized as principles of order, the second as essentially political, and the third as a principle of justice. He concludes that none of them are fully effective, and that all of them need further development.

The third lecture considers "modern" international law in the light of contemporary conditions. He begins by contrasting the views of the "realists" and the "idealists" in current polemics. In his analysis he suggests that the views of the opposing "schools" may be closer than is generally realized. Actual contemporary conditions as summarized by the author suggest to him a climate unfavorable to the rule of law and the development of democratic societies. But peaceful co-existence is possible. Peaceful co-existence is defined as mutual respect for the territorial integrity and political independence of equal sovereign states. The conditions for such a possibility are then enumerated. International law can play an important rôle in conjunction with other factors in facilitating the transition from the actual to the desirable.

The content of the international law required to maintain the minimum order necessary for peaceful co-existence is the subject of the fourth lecture. The first requisite is that the jural order be universal in scope. Possible structures for such a universal order are then discussed. After discarding a military balance, universal empire and world federation are likewise rejected as likely possibilities. International organization based on the territorial integrity of sovereign states is the basic structure which international law must maintain. That law's basic function is to protect that structure and, therefore, rules concerning recognition, aggression, disarmament and military necessity are the primary concern of the international order. These rules are described as basic, and the requisites of each are then discussed.

Of the four asserted basic rules, space permits mention only of some of the author's views on aggression. The Charter and the Kellogg Pact purport to outlaw war, and the former, in effect, forbids aggression in the

physical sense except pursuant to Charter authorization or in self-defense. The use of illegal force must be stopped, although disputes may not and frequently cannot be settled. Maintenance of order must precede justice. Principles of justice, which are also necessary, must develop within a framework of a more peaceful and secure world order.

The fifth and final lecture considers the prospects for development of international law in the light of two frequent major criticisms. The first, an alleged failure to achieve justice, is closely related to the problem of change. The author discusses the possibilities of supplementing order with justice with respect to modifying exclusive domestic jurisdiction, prohibiting intervention as well as aggression, and settling disputes justly by adjudication and other methods, as well as prohibiting the use of illegal force. Progressive change is called for, rather than merely peaceful change. Although inadequate, the United Nations provides processes for useful development in this direction.

The second major criticism, the charge of non-enforcement, must also be overcome. Various possibilities for improvement in methods of enforcement are indicated. Nonetheless, whatever the degree of non-enforcement of various rules of justice, the first order of business in law enforcement is the maintenance of order. The author concludes that international law, to fulfill its rôle, must establish rules of order and develop principles and procedures of justice. More than law is obviously required, but law, interdependently with other factors, has a large rôle to play.

The volume is a valuable summary of Professor Wright's years of thought devoted to this central problem of international law. It should be a useful book for laymen interested in the elimination of war. For devotees of power politics, the volume could serve as a profitable reminder that international law has a rôle to play in their drama.

BRUNSON MACCHESNEY

*Outer Space: Prospects for Man and Society.* Edited by Lincoln P. Bloomfield for the American Assembly. Englewood Cliffs, N. J.: Prentice-Hall, 1962. pp. xii, 202. \$1.95, paper; \$3.95, cloth.

Designed especially for laymen, this little book seeks "to render intelligible the complex issues and alternatives which confront us on the fantastic frontier beyond the earth." (p. v.) In an introduction styled "The Space Revolution—a Perspective," the editor, Lincoln P. Bloomfield, emphasizes the importance of a general understanding of space problems, pays deference to the myth of a "lag" between "scientific technology" and "social, economic, and political arrangements," and projects the major outlines of the book (p. 3). The opening chapter by H. Guyford Stever elaborates "The Technical Prospects," concluding, after a brief exposition of the history of the airplane and of some of the major problems of propulsion and boosters, that

achievement of the capability to use space profitably for mankind will depend upon the slow, expensive accumulation of engineering experi-

ence, not on spectacular breakthroughs in the realm of scientific principles." (p. 30.)

In a sequence of three chapters, focused primarily upon national interest, Donald N. Michael notes that the conquest of space "will more implacably confront us" with old problems and opportunities, and somewhat gingerly forecasts many new "Peaceful Uses" (p. 33); Leonard S. Silk describes "The Impact on the American Economy," making reference both to impressive costs and risks and to potentially impressive benefits; and T. Keith Glennan surveys "The Task for Government," drawing upon his experience as head of the National Aeronautics and Space Administration in defining goals and organizing management.

In another sequence of three chapters, more concerned with interests transcending national boundaries, Hugh Oldishaw considers the "opportunities and problems" of "International Cooperation in Space Science," and offers a most helpful appraisal, which lawyers could well ponder, of recent non-governmental activities; Donald G. Brennan depicts the complexities and difficulties of "Arms and Arms Control in Outer Space," finding that most of the alternatives for solution depend on major "political and military decisions not yet made"; and Mr. Bloomfield assays "The Prospects for Law and Order," which he regards as somewhat forbidding. The concluding chapter by James R. Killian, Jr., "Shaping a Public Policy for the Space Age," reviews some of the considerations—including prestige effects, costs and values, the military context, and organization and manpower—which should affect the formulation of a basic policy for the United States, and expresses the conviction that "space exploration is one of man's great adventures and the United States must participate in this adventure with brilliance and boldness." (p. 192.)

It would, of course, be too much to expect that a series of relatively unconnected essays, written by different authors and without benefit of a comprehensive guiding theory, could make significant contribution toward rendering more intelligible the difficult and complex problems of space and space law. The several essays do, however, offer many sharp insights and much information which could be useful to inquirers more seriously embarked upon search for intelligibility.

The least satisfactory essay, unfortunately, is perhaps that of most direct interest to international lawyers, the essay by Mr. Bloomfield upon "The Prospects for Law and Order." Though this essay offers wise and perceptive comments upon various particular problems, such as the determination of boundaries, the acquisition of resources, and the regulation of radio frequencies, there is no clear and comprehensive delimitation of particular types of problems or sustained employment of the relevant intellectual skills of the lawyer in the clarification of general community policies about these problems. The essay both moves from the premise that there is "no immediate prospect of bringing outer space fully into the world's legal and political system" (p. 151),<sup>1</sup> and tremendously undercuts the degree to which the peoples of the world have already achieved

<sup>1</sup> One can only wonder where else it could be.

the shared expectations of a customary consensus upon many important problems. Somewhat paradoxically, despite his clear recognition of the intensities of the contemporary struggle between contending world public orders, the author appears to remain hopeful about the potentialities of immediate "formal international agreement." (pp. 159, 162.)

The American Assembly, or some equivalent institution, could render important public service by bringing out annually a volume comparable in reach and purpose to that under review, but perhaps somewhat more systematic in its organization and more amply documented.

MYRES S. McDOUGAL

*The Proper Law of International Organisations.* By C. Wilfred Jenks. London: Stevens and Sons, Ltd.; Dobbs Ferry, N. Y.: Oceana Publications, 1962. pp. xli, 282. Index. \$7.95.

In this book, Wilfred Jenks makes still another important contribution to advancing the frontier of international law and organization. Students and practitioners of international law and organization are already heavily in his debt for the pioneering work that he has done in breaking down the artificial barriers that have hitherto been accepted as separating the domain of international public and private law.

In his introduction, the author emphasizes the need for

an approach to the problem of the law governing the legal transactions of international organisations which draws on, and in some measure fuses, the combined experience of public international lawyers, private international lawyers and administrative lawyers, in such a manner as to meet effectively newly emerging needs on a rapidly increasing scale.

The present volume is an attempt to explore some of the elements of this synthesis.

This volume is one of "a trilogy of three volumes" in which the author elaborates certain aspects of the thesis that international law has outgrown the limitations of a system limited to the relations of states, in its bearing on the law of international organizations. *Corporate Personality for International Purposes*, a volume not yet completed, is an attempt to explore the manner in which the increasingly complex pattern of international life has resulted in the development of an ever-increasing variety of associative forms. In *International Immunities* he has examined the problem of the "ever-increasing variety of forms of associative action from the point of view of needed legal status and facilities." In the present volume, he develops the general thesis that "the emergence of the international body corporate has made it necessary to rethink the whole question of law applicable to the internal legal relations and transactions of such bodies."

Students of international organization will find Part II of special interest and value, as in it the author gives us a systematic exposition of interna-

tional administrative law, based on detailed knowledge of, and citation of decisions, of the U.N. and I.L.O. Administrative Tribunals. This part by itself is a contribution to the literature greatly to be welcomed. Part III deals with matters, such as the property rights of international organizations and contracts of various kinds, which must be the day-to-day concern of the legal staff of international organizations but are not of the same degree of interest to students of international organization. The point that the author never tires of making, however, is that these are questions that fall within the expanding province of international law.

LELAND M. GOODRICH

*Derecho de Asilo Diplomático (Asilo Político)*. By Manuel Adolfo Vieira. Montevideo: Biblioteca de Publicaciones Oficiales de la Facultad de Derecho y Ciencias Sociales de la Universidad de la República, Sección III-CXVIII, 1961. pp. 573. Appendices. Bibliography.

"In a juridically perfect international society in which the rights of man were fully recognized in legal theory and judicial practice, right of asylum would be an aberration." (p. 11.) But in our less than ideal international society, right of asylum must be accepted by states as a surrogate for due process of law in regard to the protection of the rights of the individual against overt or covert infringement by his own state. As there can be no doubt about the utility of political asylum in general, according to Manuel Adolfo Vieira, Adjunct Professor of Public International Law at the University of Uruguay, neither can there be any question as to the utility of the most controversial form of the practice, the grant of asylum in a diplomatic mission.

The author devotes the bulk of his study to an examination of the nature of diplomatic asylum, which he considers to be established in customary international law, and to a critique of the decisions of the International Court of Justice in the *locus classicus* of asylum cases, the controversy between Colombia and Peru. Recognizing the political pressures attaching to any grant of diplomatic asylum, he argues for the adoption of a procedure which would guarantee the protection of the individual's rights as well as the interests of the states concerned, and which would transform a politically charged dispute into a legal controversy. Professor Vieira suggests that, where a fugitive has sought diplomatic asylum and the asylum state has reason to believe that he is a political offender, the asylum state should make a tentative determination (*calificación*) of this condition and so notify the territorial state, which would, in turn, issue a safe conduct to enable the fugitive to leave the embassy in order to go to the asylum state. The territorial state could then request the extradition of the fugitive from the asylum state. If extradition were denied on grounds that the charges against the fugitive were political in nature, the territorial state could then submit the issue to an international tribunal for adjudication. Considering the frequency of grants of diplomatic asylum, *e.g.*, the mass grants in embassies in Havana after the establishment of

the Castro regime, and the prolongation of some of these grants, *e.g.*, the stay of Cardinal Mindszenty in the American Legation at Budapest, there is merit in the author's recommendations for a regularization of the practice.

Beginning his study with a résumé of the history of political asylum, the author examines diplomatic asylum with regard to the subjects of the practice, the places in which it is invoked, and the special difficulties which it entails, such as the issues of *calificación* and termination. He concludes with a detailed account of Uruguayan practice regarding various forms of political asylum. The value of Professor Vieira's study is enhanced by several appendices, including the provisions concerning diplomatic asylum in the principal conventions on asylum which have been concluded by Latin American states, and the texts of a number of Latin American projects dealing with this subject. Some exception may be taken to aspects of the study, *e.g.*, the focus might better have been on diplomatic asylum with particular regard to Latin American practice and with less attention to other forms of asylum; there is a certain redundancy in the organization of the material; terminologically the author's use of "political asylum" for diplomatic asylum and of "refuge" for territorial asylum is more misleading than useful, given current practice in this field. But taken as a whole, this is a thoughtful, scholarly, and informative addition to the literature on political asylum to which Latin American publicists have been the leading contributors.

ALONA E. EVANS

*Flags of Convenience. An International Legal Study.* By Boleslaw Adam Boczek. Foreword by Myres S. McDougal. Cambridge: Harvard University Press, 1962. pp. xviii, 323. Bibliography. Index. \$8.00.

This able monograph deals with an important and fascinating problem of law and economics. It is well written and comprehensive. It is also amply documented and thus provides the reader with the necessary tools for forming his own opinion of the proper solution for the complex and serious policy questions posed by the growth of flags-of-convenience fleets, primarily in Panama and Liberia, and, to a lesser extent, in Honduras, hereinafter referred to as the Panlibhon Fleet. The author defines "flags of convenience" as

registration and operation under the flags of [Panlibhon] . . . of merchant vessels which are beneficially owned and controlled by nationals of other countries, primarily Americans and Greeks, are manned by foreign crews, and hardly ever put into their ports of registry. (p. 287.)

In the introductory chapter, the author describes the origin of these fleets, their growth, the trend from older to newer vessels, and provides statistical information on the size and ultimate ownership of these fleets and their relation to the fleets of other flags. United States and Greek nationals have been the major owners of Panlibhon vessels.

Chapter II analyzes the reasons for the flight from national flags. Initially, high operating costs, primarily wage costs, in the United States, for example, as compared to Panama, were the principal motivation. Subsequently, the chief advantages vis-à-vis European competitors were "liberal" incorporation and tax laws, although wage costs continued to militate against United States-flag operation. The author cites various United States statutory provisions and statements of policy as demonstration of a United States position favoring transfers to Liberian, Panamanian, or Honduran flags under specified conditions, as contrasted with a recent Greek policy of encouraging return to their flag. In this reviewer's opinion, the statement of Congressional policy relied on by the author is more ambiguous than he is willing to admit.

Chapter III discusses the efforts and arguments of the principal opponents of the flags of convenience, American seamen's unions and European ship-owners. On the rare occasion when these forces combined, the author characterizes their alliance as "unholy" without indicating why it was any more heinous than the alliances of other pressure groups. He traces the efforts of the opposition, primarily the European ship-owners, to combat the competition of Panlibhon through various proposals urged in the International Labor Organization, the International Law Commission, and the 1958 Geneva Conference on the Law of the Sea. He concludes that their effort to use the "genuine link" concept as a weapon was ineffectual. He discusses also the 1958 boycott and the 1961 strike, as well as the position of the National Labor Relations Board on the applicability of the Taft-Hartley Act to the organization of Panlibhon crews. He concludes that tax advantages offered by Panlibhon constitute the major competitive threat.

Chapter IV is devoted to the basic question of whether international law sustains the position of the Panlibhon states that they have unlimited discretion over registration requirements and that other states are under a duty to recognize vessels so registered under Panlibhon laws. The author purports to prove that international law does sustain their position. He cites nineteenth-century practice and the network of treaty provisions, both bilateral and multilateral, in support. Case law, principally American, is also relied on. He discusses the *Nottebohm* "genuine link" concept at length, and asserts its inapplicability to the "nationality" of ships. He concludes that certainty and clarity require recognition and respect by other states of Panlibhon registrations, and that the International Court's opinion in the *International Maritime Consultative Organization* (IMCO) case confirms the validity of his conclusions as to the international law rule in force. Chapter V is devoted to a detailed analysis of the origins and development of the IMCO controversy as well as its resolution in the IMCO opinion, which constituted a victory for the Panlibhon position.

Chapter VI considers the problems posed by the efforts of American labor unions to have the Taft-Hartley Act applied to the organization of crews of Panlibhon ships and the "control" test developed by the Na-



tional Labor Relations Board for the application of that Act. He quite properly points out that this issue of the extraterritorial effect of American statutes is fundamentally different from the international law issue previously discussed. He argues that the Taft-Hartley Act should not apply, distinguishing the cases which have applied the Jones Act to foreign-flag vessels owned by United States nationals. He asserts that the application of Taft-Hartley would cause transfers to other foreign flags *contra* United States policy. Since this chapter was written, his position on the Act has been sustained by the United States Supreme Court in *McCulloch v. Sociedad Nacional de Marineros de Honduras*.<sup>1</sup>

Chapter VII deals with the doctrine of "effective United States control" of Panlibhon vessels owned by United States nationals. In the reviewer's opinion, this is the critical question, and the author fails to make a convincing case. His arguments ultimately rest on pragmatic non-legal considerations, and inevitably conflict with the basic thesis of his book. He must acknowledge flag-state legal authority but then, in turn, rely on United States statutes as the basis for United States control, despite flag-state authority. The degree of uncertainty as to what actually happened to such vessels in World War II is noteworthy. What is even more singular is the vagueness of agreements, if any, between the United States and the flag-of-convenience countries on this important question. Despite the defense basis of United States policy, its effectiveness seems to depend on the practical inability of the Panlibhon countries to prevent United States recapture, whatever its legal justification. In fairness to the author, he strongly urges the conclusion of treaty arrangements in order to ensure effective United States control. Without such arrangements and, possibly, even if they existed, an important part of the over-all asserted United States policy seems to rest on a tenuous foundation.

Chapter VIII reviews the various legal attacks, institutional and individual, prior to the 1958 Geneva Conference, on the asserted traditional principle of exclusive competence of the registering state to determine conditions of registration, and the consequent duty of other states to recognize such registration. The 1896 ownership formula of the Institute of International Law and the views of numerous writers are presented and rejected. Detailed consideration of the "genuine link" concept for ships, developed in the International Law Commission's drafts and in the International Law Commission's final proposed provision on the subject, leads the author to conclude that Article 5 was a progressive development rather than codification, that the documentation before the Commission was inadequate, and that "genuine link" was not defined and left obscure. Finally, the possible sanctions were imprecise and left open the threat of unilateral non-recognition of registrations lacking the "genuine link."

Chapter IX takes up the story at the 1958 Geneva Conference. The struggle in the Second Committee resulted in adoption of both a "genuine link" requirement and a non-recognition clause. But in Plenary Session the non-recognition clause was deleted. The author argues that this de-

<sup>1</sup> 872 U. S. 10 (1963); 57 A.J.I.L. 659 (1963).

letion revealed an intent to bar unilateral sanctions. Article 5 of the Geneva Convention on the High Seas, as finally adopted, provides:

1. Each State shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag. Ships have the nationality of the State whose flag they are entitled to fly. There must exist a genuine link between the State and the ship; in particular, the State must effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag.

2. Each State shall issue to ships to which it has granted the right to fly its flag documents to that effect.

The author argues that "effective jurisdiction and control" is the definition of "genuine link" and not an additional test. Moreover, he asserts that effectiveness is a duty for the future, and not a condition precedent. After detailing the deleterious effects of unilateral non-recognition, he concludes that "genuine link" should be deleted from the article, and there should remain only the duty *in futuro* to exercise effective jurisdiction and control. If this were done, he asserts, the matter would then be governed by the responsibility of states, without explaining how this would be effective. He concludes that the Conference failed to solve the flags-of-convenience problem and that Panlibhon laws remain valid under international law.

Chapter X contains a summary and conclusions. Disagreement with the author's chapter on "effective United States control" has already been expressed. More generally, with respect to his main thesis, it may be suggested the author doth protest too much. If the anti-Panlibhon position is such a mouse, the heavy guns of the author and his foreworder, Professor McDougal, are hardly necessary. Even if the author's assertion that the existing principle is "the law" is correct, and conceding that he is clearly right in his argument that it represents a policy superior to the unilateral imposition of sanctions by other states, this surely does not foreclose a "progressive development" that would provide a better solution for the flags-of-convenience practice, which the author admits has created political and strategic difficulties with our friends and allies. This consideration, coupled with the weakness of the "effective United States control" argument, suggests the desirability of a fresh search for a more appropriate solution. The author's book will provide a useful background for this purpose. What must be regretted in this otherwise admirable study is the impression the author creates that he was writing a brief for a fixed position rather than considering alternative solutions for the problem. This reviewer, as a former teacher of corporation law and currently of conflict of laws in divorce, finds it hard to believe that an "international" Delaware or Reno should, as a matter of legal policy, set the standards for the international community. There are other jural values at least equal to "certainty and clarity." In a legislative frame of reference, national and international, a more equitable solution should be sought.

BRUNSON MACCHESNEY

*Anuario Hispano-Luso-Americano de Derecho Internacional.* Vol. 1, 1959.

(Publication of the Instituto Hispano-Luso-Americano de Derecho Internacional.) Saragossa: Editorial "El Noticiero, S. A.," 1959. pp. 463.

In 1892, on the fourth centenary of the discovery of America, an Ibero-American Juridical Congress was convoked in Madrid. Again, in 1951, this time the first Hispano-Luso-American Congress of International Law was, by the efforts of Spain, assembled at Madrid. It decided upon the foundation of the Hispano-Luso-American Institute of International Law, which has its seat at Madrid. In 1955 the "School of International Functionaries," which also has its seat in Madrid, was founded. The third congress (Quito, 1957) approved the establishment of the *Yearbook* as the scientific organ of the Institute and the Congresses. The book under review is the first volume, covering the period 1951-1958, and including the first three Congresses.

The Institute and the Congresses have a merely scientific task with no political connotations. They are devoted to international law and conflict of laws within what is called the "Hispanic-Luso-American Community of Nations," i.e., the mother countries, Spain and Portugal, all the Ibero-American Republics, the Republic of the Philippines and the Commonwealth of Puerto Rico. The Institute and the Congresses are destined to promote the solidarity of scholars in this field within this Community and to foster and make known the ideals and doctrine of the classic Spanish School of international law of Vitoria and Suárez.

To fulfill these tasks, the *Yearbook* is divided into three parts. The first part (pp. 13-200) is dedicated to brief articles in the field of doctrine: general subjects, as the universality of international law, international organization and state sovereignty, the law of supranational organizations, and topics, particularly interesting within this Community, such as territorial sea, continental shelf, diplomatic asylum, diplomatic protection of citizens abroad.

The second part (pp. 203-312) is devoted to bibliography. This part is intended to make international lawyers of this Community and of the world in general acquainted with the rich production in this field in Spanish and Portuguese. Many pages of book reviews on Hispanic books are preceded by particularly interesting bibliographical articles, such as an Hispanic bibliography on the law of the high seas or a bibliography on international law in Argentina. The writer of this latter article is also critical: he remarks that, however different doctrines are represented, they all are a little antiquated and no longer correspond to the present times, but rather to the beginning of this century. That is true, to a certain extent, of the literature on international law in all of Latin America. There are highly modern and up-to-date writers in Spain. In Latin America also, a younger generation of international lawyers shows great talent and a keen insight into the times in which we are living. Let us mention, for instance, Eduardo Jiménez de Aréchaga or García Amador.

The third part of the *Yearbook* (pp. 315-463) contains the reports on

the Institute, the School of International Functionaries, and on the three Congresses. The first Congress (Madrid, 1951) was followed by the second at São Paulo (1953), and the third at Quito in 1957. We read with sympathy the words of the Secretary General, Professor Luis García Arias of the University of Saragossa Law School, that this *Yearbook* went out "full of illusions and hopes, with the intention to accomplish an outstanding place among the great international Reviews." We can assure him that we have found this volume excellent and very interesting, and give him our best wishes for the future.

JOSEF L. KUNZ

*Some Newly Established Asian States and the Development of International Law.* By J. J. G. Syatauw. The Hague: Martinus Nijhoff, 1961. pp. xi, 249. Index. Fl. 19.

This book by an Indonesian scholar, who was educated at Leiden University and is now a member of its Law Faculty, and who holds two degrees from Yale Law School, is devoted to a timely and perplexing topic: the attitude of newly independent Asian states toward international law. The first one hundred pages, or more than one-third of the book, poses the issues, sets the stage historically, and examines the changing nature of the relations between the Western European and Asian states from the establishment of chartered companies through the colonial era to the recent achievement of independence. The author illustrates Asian state practices with three case studies: the Burma-China boundary dispute, the Kashmir question, and the Indonesian claims to large areas of the ocean. These three cases show, respectively, the influence of the past, a contemporary issue without a history, and the trend of the future. The problem of "peaceful co-existence" is examined briefly because it is "today regarded as the leading principle of Asian policy" (p. 28).

The question posed by the author is whether world conditions have changed so much that traditional international law has become inadequate to deal with major problems, at least from the viewpoint of some of the Asian states. According to Dr. Syatauw, these changes (identified as bi-polarization, technological progress, interdependence, and the emergence of a large number of newly independent states) are so far-reaching that classic, *i.e.*, "Western" international law finds it increasingly difficult to supply clear answers.

Dr. Syatauw offers some revealing and relevant findings. He correctly estimates that the trend in the United Nations and other international organizations is toward a non-Western, non-European, non-Christian majority. This raises the important question: *How* and *where* will the growing influence of Asian (and, we may add, African) states be reflected? Dr. Syatauw points out that, with intense nationalism, the concept of sovereignty predominates. Nationalism also brings to the surface indigenous traditions and creates resentment toward rules considered to have originated in foreign cultures. Since interdependence has an economic

rather than ideological base, its growing recognition is unlikely to counteract resentment toward Christian principles of international law (pp. 17-21). Other significant points on which the author properly insists are the Asian tradition of a moralistic approach to law in general; Asian preference for conciliation and compromise; and the relatively subordinate rôle of legal rules that explains, in part, Asian reluctance to accept the compulsory jurisdiction of the International Court of Justice.

Chapter II on the "Origin of the Problem" (pp. 29 ff.) should be interesting to Western students. Its premise is that anti-colonialism and nationalism will affect Asian (presumably also African) attitudes toward international law for some time to come ("the experience of 'three centuries' nightmare," still dominates Asian feelings," p. 41). The author also points out that, when an Asian state challenges European (or, more accurately, Western) superiority, it generally receives the moral, if not the actual, support of other Asian peoples. The question whether this will mean, in the long run, Asian preference for Communist China over the Soviet Union is not raised; the break-up of "bi-polarization" was not yet apparent when Dr. Syatauw completed his manuscript.

As to the participation of the new Asian states in the development of international law (Chapter III), the issue of prime importance for them is, according to the author, the allocation of, and control over, resources. These states ask whether traditional rules can satisfy their needs.

Dr. Syatauw's analysis of these complex problems is scholarly and, generally, objective. But some flaws in presentation and interpretation cannot be overlooked. In discussing the development and use of the atom bomb, he asserts that "President Truman intended to keep the secret of the atom bomb as long as possible in order to secure the dominant position of the USA" (p. 7). No reference is made to the U.S. proposal, rejected by the U.S.S.R., to put atomic weapons under international control.

The examination of "peaceful co-existence"—according to the author, one of the most important doctrines of our time—leaves much to be desired. Although he recognizes that the doctrine was not invented by the Soviet Union, he credits the U.S.S.R. with the initiative in propagating the concept. Dr. Syatauw distinguishes between the Soviet and Asian interpretations of the doctrine; according to him, the latter is not linked to Communist philosophy but is rather an extension of the concept of non-alignment. He believes that the Asian concept of "peaceful co-existence" is less suspect in Western countries, although it may be argued that the Asian interpretation is merely an Asian version of the Soviet concept. It would be interesting to know the author's appraisal of Indonesia's policy toward New Guinea and, more recently, toward the proposed Malaysian Federation in terms of "peaceful co-existence." Reconciliation of this doctrine with Chinese aggression against Tibet and India or with India's handling of Goa appears to be difficult.

Discussing Indonesia's position with regard to inland waters, territorial sea, and contiguous zone, and her advocacy of a special regime for archipelagos, the author misinterprets the Indonesian Government's declaration

of December 15, 1957. That declaration does not guarantee innocent passage, as the author contends (p. 174); it merely grants conditionally innocent passage (*cf.* p. 181). The author considers these extensive claims, which exceed traditional rules, justified, provided they are kept within reasonable limits and are not enforced arbitrarily. The question whether Indonesia does in fact keep within such limits and refrains from acting arbitrarily remains unanswered; the author does concede, however, that Indonesia has not yet advanced sufficient justification for her position (p. 189).

In conclusion, Dr. Syatauw points out one of the basic weaknesses of international law: that it does not provide adequately for peaceful change. No one can question the accuracy of this conclusion. What Dr. Syatauw fails to do is to point out that the newly independent nations, no less than the older states, have a responsibility to contribute, in an orderly and rational way, to the development of peaceful change under the law.

The most encouraging thesis advanced by the author is that the Asians do not arbitrarily reject international law on the ground that it was created before their independence. There are good reasons for such relative restraints. The protection that international law may give, however imperfectly, is needed principally by the militarily, economically, and financially weaker states—a fact which is slowly gaining recognition among the newly independent Asian and African states.

FRANCIS DEAK

*African One-Party States.* Edited by Gwendolen M. Carter. Ithaca, N. Y.: Cornell University Press, 1962. pp. xiv, 501. Index. \$7.25.

This is a book by seven authors. Such books are becoming more and more commonplace, another symptom of the corporate intellect; and it may be that the time is approaching for a re-evaluation of their purpose and their limitations. When the Great Sanhedrin compiled the Old Testament they began a vogue for the compendium which still remains in full *dernier cri*. Even they, however, could not avoid the questions: Should the Wisdom of Solomon or Judith be *in* or *out*? Is some of the apocryphal writing more valuable than some of the scriptural? Should Tobit have been included and Amos not? Above all, is the unifying theme of the Old Testament the relationship between the ancient Hebrews and their Jehovah, or is it the foretelling of future manifestation of the God-Head?

No wonder, then, that comparable questions arise in connection with Professor Carter's compendium: questions about its unifying theme and her selection of contributors. This in no way detracts from the reader's feeling of gratitude for her labors in a virgin field. It is a crucial issue she has tackled, of overweening concern to the new breed of international lawyer: the constitutional comparativist. "Within a few years has been compressed a variety of techniques and practices in the transfer of political power that offers rich opportunities for comparative analysis," she says. It does, indeed.

In selecting their way of government only 4 of the 29 new states which have been born in Africa during the past six years have chosen what could reasonably be called a multi-party system. All the rest have veered towards the one-party state, whether decreed by law, as in Tanganyika, or by events, as in Nyasaland. In this, the new states have followed the example of the old. Liberia has been dominated by the True Whigs since 1877, despite the assumption of a two-party system inherent in Harvard Professor Simon Greenleaf's American-style 1847 Constitution. Ethiopia has some distance to go before embracing even a political government, let alone a political opposition.

The comparative constitutionalists—the Sir Ivor Jennings, Felix Frankfurters, Monckton, Commissioners, Denis Cowens, and others less intimate to the nation-building process—are all deeply concerned over the new data being processed out of Africa on the fundamental question of our time: Is parliamentary democracy an unexportable historical by-product of Anglo-Saxon civilization? In evaluating the political monism of Africa and its overwhelming rejection in just half a decade of often carefully nurtured political dualism, it is difficult to escape an affirmative answer. Yet we know so little. Is the African one-party state a reflection of past tribal conditioning (the palaver, for example) or an indication of future Marxian intent? Does it rest on philosophical underpinnings or float on inflated power-aspiration? Does it sustain individual freedom and social mobility within its chosen instrument? Has it reconciled and embraced its opponents? What do we make of the seven actual or attempted coups of the past four months? What rôle do the national armies play in the one-party states?

Admittedly, the elephantine gestation period for this sort of data has scarcely had time to run its course. Nevertheless, some comparative analysis of the origins of the trend towards the one-party state is already possible. Neither Tunisia nor Tanganyika, for example, can really fall back on tribalism for justification. On the other hand, Kenya, Northern Rhodesia, Uganda, the Congo (Leopoldville) and Nigeria to a large extent owe their condition as multi-party states (or near-states in the case of Kenya and Zambia) to the very fact that their political parties have tribal or ethnic bases. Why have the Chagga of Tanganyika not developed politically like the Kikuyu and Luo of nearby Kenya? Why has Sierra Leone's class of black expatriate "honourables" failed to nail down the same degree of hegemony as in neighboring Liberia? If a shortage of trained personnel is at the root of Tanganyika's one-party system, how can it be explained in the context of Ghana, which has elite to export, to exile and to imprison, but not to man a parliamentary opposition? Again, if the relative level of voter-awareness is, hypothetically, in inverse ratio to political paternalism, there are numerous fascinating African deviations to be investigated and explained.

Such a comparative study of the factors in African political monism is not made in Professor Carter's book. What we have, instead, is six studies, varying greatly in approach, of six countries which are each

dominated by one party. There is little to help the reader understand what else these countries have in common, except that they are small (except Tanganyika) and that they are new (except Liberia). The contributors themselves did not, the introduction informs us, meet during the production of this book. Miss Carter, her roots in the Great Sanhedrin, nevertheless also resembles a charming television hostess who opens the program, lends it her name, and is nowhere else a visible part of the production. This is a matter of regret to her admirers, of which this reviewer is certainly one. Some of the contributors are very good, indeed, particularly Professor L. Gray Cowen, who comes to grips eloquently and perceptively with almost all of the fundamental questions, but he is, of course, limited to his subject: Guinea. Though some related problems are ably explored in the Tanganyikan context by Margaret Bates and in Senegal by Charles Gallagher, the over-all result is unsatisfactory, sacrificing genuinely comparative investigation to thumbnail sketches of the histories, economies, demographies and politics of the various countries.

The problem is still that of defining a rôle for the compendium. If a number of writers are brought together merely to provide the reader with several essays loosely related to a single topic, then we have little that differs from one of the "dedicated" issues of a law review. To merit hard covers, the authors should be harnessed into an interdisciplinary team, hitched to a clearly-defined hypothesis or issue, and made to pull together towards the common goal.

THOMAS M. FRANCK

*The Soviet Union at the United Nations. An Inquiry into Soviet Motives and Objectives.* By Alexander Dallin. New York: Frederick A. Praeger, 1962. pp. x, 246. \$1.95, paper; \$5.75, cloth.

This important book is well planned, well written and useful to the interested layman, the scholar and the government official. Its stated purpose is "to clarify some of the assumptions and expectations underlying Soviet policy" at the United Nations. It grew out of a paper prepared for the United Nations project of the Center for International Studies at the Massachusetts Institute of Technology, and the author acknowledges a debt not only to personnel at this important center but also to members of the Russian Institute of Columbia University, the Carnegie Endowment for International Peace, and students of Soviet affairs at other institutions. While there are no surprises in the author's analysis, the book unquestionably is required reading for students of international law and organization, particularly those not familiar with Soviet sources.

Part I deals with the development of Soviet attitudes towards international law, the League of Nations and the early years of the United Nations. A classic Communist outlook on history and international relations has guided Soviet participation in international organization because "doctrinal concerns have a reality for Soviet leaders, however odd this may seem to certain political practitioners abroad" (p. 5). Moscow's "selective



use" of international organization and international law has been guided by foreign-policy objectives and principles. The Soviet Union has remained a Member of the United Nations, even when conspicuously isolated "largely out of a practical calculation that in terms of risks and rewards, membership is preferable to non-membership" (p. 10). This section should help remind the reader that all states join the United Nations for essentially the same reason, even though their views on the nature of international conflict and co-operation rest on different premises.

Part II analyzes Soviet attitudes on a number of issues, including sovereignty, voting, membership, U.N. forces, the Specialized Agencies, Soviet officials in the Secretariat, and Soviet images of the United Nations. Consistently the Soviet Union has emphasized national sovereignty and opposed the quest for world law (an instrument of class exploitation) and compulsory jurisdiction. Soviet authorities are careful to monopolize their citizens' loyalties and will not tolerate conditions under which the United Nations could become a rival. The author was unable to find the location of the U.N. Information Center in Moscow; a colleague who succeeded reported "fundamental inactivity and almost minuscule value" (p. 93).

Part III, dealing with "Khrushchev and the United Nations," is particularly helpful and timely in providing perspective on such issues as "troika," financing, and international forces. The Congo was the "last straw" in convincing Moscow that controls beyond the veto were necessary if the United Nations was to serve Soviet objectives, hence "troika." The Soviet Union's decisions, that came after publication date, to accept U Thant as Secretary General and to hold "troika" in abeyance would seem to confirm the author's view that Moscow miscalculated the importance African leaders attach to the Organization.

By focusing on a major Power's motivations for participation and non-participation in the United Nations and its Specialized Agencies, the author has done much to clarify the potentialities and limitations of international organizations.

D. S. CHEEVER

*Power and International Relations.* By Inis L. Claude, Jr. New York: Random House, 1962. pp. x, 310. Index.

Of the making of books on world order there is no end, nor should there be. The issues at stake are critical issues, described fairly as the very survival of Western civilization; and it is to be expected that scholar after scholar with a constructive imagination will seek to analyze the issues and offer suggestions to a public largely bewildered by the conflicting forces at work. So it is with a warm greeting that we welcome Professor Claude's new volume, pursuing the general objective of his earlier volume, *Swords into Plowshares*, but approaching the problem not directly from the point of view of international organization, but from that of the management of power in international relations. Three leading theoretical approaches are presented: the balance of power; collective security; and world govern-

ment. Each of these is first analyzed as a system, then examined and criticized as a practical means of controlling power in terms of existing international relations.

The balance-of-power system, as it existed on the eve of the first World War, lacking in any organization that might have held the balance steady if momentarily shaken by minor disturbances, deserved the condemnation of President Wilson when he described it as "the great game, now forever discredited." But collective security was more complicated than Wilson had realized, and the absence of the United States from "the organized major force of mankind" left the system too weak to act collectively against the aggressor.

What, then, of the new "operative collective security arrangement," as the author describes the system which it was designed to create under the name, United Nations? The ideal was there and it dominated the delegates to the Conference. But the leaders at San Francisco knew well that it was impossible to create a system which could meet threats to the peace coming from the great Powers. Hence the veto system and its accompanying recognition of the "inherent right of self-defense."

World government as the third possible management of power is in like manner critically disposed of. But the contribution of the theory to world order is recognized in the wide variety of agencies working for the general welfare of the international community in economic, social, humanitarian and cultural fields.

The author has given us a stimulating and provocative volume, marked by critical insight and practical idealism. It belongs in the field of jurisprudence as applied to the constructive task of maintaining law and order in a community of sovereign states.

C. G. FENWICK

*The European Convention on Human Rights. Background, Development and Prospects.* By Gordon Lee Weil. Preface by Leland M. Goodrich. Leiden: A. W. Sijthoff, 1963. pp. 260. Appendices. Gld. 28.75.

This is the first book in English<sup>1</sup> devoted exclusively to the European Convention on Human Rights. It presents, in addition to a short but very informative outline of the background and history of the Convention of 1950 and the Protocol of 1952 (Part I), an article-by-article commentary on the substantive, organizational, procedural and final clauses of both instruments (Part II). Each article is explained in the light of its legislative history ("background"); of the relevant "jurisprudence," i.e., the case law of the European Commission of Human Rights and (in one case) of the European Court of Human Rights; and of the "practice" and "rules."

In Part III ("Evaluation") Dr. Weil draws a series of conclusions concerning the accomplishments, problems and prospects of the European

<sup>1</sup> See, however, Golsong, *Das Rechtsschutzsystem der Europäischen Menschenrechtskonvention*, reviewed by Sohn in 57 A.J.I.L. 168 (1963).

experiment in the international and institutional protection of human rights.

He sees in the work of the Commission the most significant element in the development of the Convention. He finds that in the first years of its activities the work of the Commission was characterized by judicial caution. The Commission clearly demonstrated that it was vitally concerned with the protection of states from frivolous petitions. This attitude of judicial caution has not disappeared; the author asserts, however, that more recent decisions rendered by the Commission indicate a notable change in its outlook; as guardian of the *ordre public européen* it is increasingly concerned with the effective application of the Convention and of the ideals underlying it. The dynamic element in the Commission's activities is, of course, its examination of individual petitions. The three cases of complaints by one state party against another (two complaints by Greece against the United Kingdom *re* Cyprus and one complaint by Austria against Italy *re* events in Bolzano Province) were by-products of the political conflicts concerning Cyprus and the South Tyrol, respectively.

While the author is fully aware of the fact that he is dealing with one of the most significant developments of our times, he does not claim that the European Convention, Commission and Court have brought about the millennium. The greatest weakness of the Convention even as a regional Western European institution, is the fact that France is not a party to it and that the United Kingdom and Italy have accepted neither the right of petition nor the jurisdiction of the Court, with the result that only the Federal Republic of Germany and the smaller states of Western Europe are full participants in the enterprise.

The book covers the case law of the Commission up to the summer of 1961, and follows two important cases to their conclusion. The most recent developments, *viz.*, the two Protocols to the Convention which were signed on May 6, 1963, and which, respectively, will confer on the Court the competence to give advisory opinions and will abolish the procedure through a Sub-Commission of the Commission, are foreshadowed but, of course, not dealt with in the book as *ex lata*.

In addition to the traditional sources of a work of legal scholarship, Dr. Weil has also made use of the method of interviewing persons who, as delegates or experts, participated in the *travaux préparatoires* of the Convention, or, as judges of the Court, members of the Commission or members of the Secretariat, in its application. He has used this novel method with restraint and responsibility. His book is a very useful contribution to the literature on the subject.

EGON SCHWELB

*The Fund Agreement in the Courts.* By Joseph Gold. Washington, D. C.: International Monetary Fund, 1962. pp. xvi, 159. Index. \$3.50.

The International Monetary Fund shall act, pursuant to its constituent instrument, as a center for the collection of information on international

monetary affairs. This obligation, no doubt, includes collection and study of legal material. In discharging that commitment the I.M.F. collects on a worldwide basis those decisions of national and international courts dealing with matters closely related to its organization and operation. A careful selection of these decisions, accompanied by concise, lucid and penetrating comments, has been published in the *Staff Papers* of the I.M.F. in a number of studies by Joseph Gold, General Counsel of the I.M.F., who joined its legal staff at an early stage of its operations. The critical analysis of the cases, based on professional experience and keen insight into the technical intricacies of monetary operations, has been necessarily somewhat tempered by the official position of the author. The volume here briefly reviewed contains a compilation of eight articles and two bibliographical lists published between 1951 and 1962.

The range of subject matters dealt with by courts affects only a very narrow sector of I.M.F. affairs. Most "cases" center on governmental controls of international payments, especially on the peculiar arrangement under the I.M.F. scheme which requires member states to give extra-territorial effect to other member states' exchange control regulations. Additional subjects dealt with in court decisions concern exchange rates, gold transactions and I.M.F. immunities and privileges. The volume presents and analyzes one single decision of the International Court of Justice (*Concerning Rights of Nationals of the U.S.A. in Morocco*, 1952)<sup>1</sup> and one decision of the Supreme Court of the United States (*Kolovrat v. Oregon*, 1961).<sup>2</sup> Neither of these high tribunals explored thoroughly the principles underlying the I.M.F. scheme. Conversely, a decision of a quasi-judicial agency, the Federal Communications Commission, gave detailed and profound consideration to the status of the I.M.F. within the legal system of the United States and to the effect (under U.S. domestic law) of interpretative decisions of the Executive Directors of the I.M.F. issued under Article XVIII of the Fund Agreement (*International Bank and I.M.F. v. All American Cables and Radio Inc. etc.*, F.C.C. Docket No. 9362, 1953).

The growing body of case law in which courts all over the world have taken cognizance of the I.M.F. scheme will be interesting and stimulating reading to the student of modern trends in international law. However, it cannot be stated emphatically enough that major legal problems governing I.M.F. policies (e.g., in regard to arrangements connected with the administration of financial resources) do not reach national or international courts and therefore did not find consideration within the framework of the volume here reviewed.

The particular merit of this volume is that it presents, in an up-to-date way, the complete body of court practice concerning the Fund. This presentation is done with great organizational skill. Delicate and frequently controversial issues have been handled with considerable legal

<sup>1</sup> [1952] I.C.J. Rep. 176; digested in 47 A.J.I.L. 186 (1953).

<sup>2</sup> 366 U. S. 187; digested in 55 A.J.I.L. 983 (1961).

erudition. The manner of analysis adroitly guides the reader's attention to fundamentals.

ERVIN P. HEXNER

*Law and Economic Power. Selected Essays.* By Heinrich Kronstein. (In German and English.) Edited by Kurt Hans Biedenkopf. Karlsruhe: Verlag C. F. Müller, 1962. pp. xx, 482. Index. DM. 37.

Since World War II, Heinrich Kronstein has played a unique rôle, in Washington, D. C. and Frankfurt am Main, as the cultural bridge whereby American concepts of law, economic liberalism and institutional analysis have been transmitted to Western Germany, and the German developments in achieving a competitive economy and economic integration with the rest of Western Europe have been communicated to the United States. It is therefore both gratifying and useful to have available, in a single volume, the trail-blazing articles which Dr. Kronstein has written over the past twenty years. A considerable number of the essays in the volume are in German, but, since about two-thirds of the volume is in English, it has considerable value even for the non-German reader.

In the section of the volume containing the articles on cartel and anti-trust law, the reviewer's favorite is the thorough analysis (co-authored with Gertrude Leighton) of the German experience with the regulation of cartels under the 1923 statute, which is described as "a record of failure" and which is compared unfavorably with the American approach of outright prohibition of cartels (pp. 119-155). Of almost equal significance is the extended analysis of the dynamics of German cartels and patents (pp. 157-203), in which the author relates German business and legal attitudes towards patents and cartels to the then current stage of German economic development and the international objectives of the German Government. The two articles in German interpreting U. S. anti-trust law to the German reader are, of course, primarily geared to the German audience and are more general in nature.

The longest section of the book deals with conflict of laws in relation to anti-trust law. In addition to the articles containing a more general discussion of this important and provocative field, the reader should take special note of the essays dealing with the International Patent Convention (co-authored with Irene Till, pp. 357-376); the nationality of international enterprises (pp. 317-336); and the effect of war on long-term contracts (pp. 253-288). All of these contain both detailed analysis and illuminating historical and legal insights.

The first part of this book deals specifically with a theme which is always in the background of Dr. Kronstein's thought: the relation between the economic power of business enterprises and the law which is supposed to regulate them. Most of the articles in this section, a few of which go back to 1928 and 1929, are in German, but the English reader will find much food for thought in the author's trenchant analysis of business arbitration as an instrument of private government (pp. 37-68).

The concluding and shortest part of this volume concerns itself with European and international economic union. With one exception, the articles reprinted in this section are for popular consumption and quite general in nature. The single exception is an article in German outlining the meaning and significance of the anti-trust rules of the European Coal and Steel Community and the European Common Market.

In the wide range of topics covered in this volume, the reader will not fail to be impressed by the way in which public policy issues and the working of economic and political institutions are brought into illuminating relationship with specific cases and legal doctrines.

SIGMUND TIMBERG

*Manual on Foreign Legal Periodicals and Their Index.* By Albert P. Blaustein. (Parker School Studies in Foreign and Comparative Law.) Dobbs Ferry, N. Y.: Oceana Publications, 1963. pp. 137. \$9.00.

Legal periodicals are intended to serve for the appraisal of old ideas in the field of law and for the communication of new ideas as they develop. Some periodicals have the primary purpose of being stimulants of current thought, but many periodicals retain their value for the future. The number of legal periodicals in the world has never been counted; yet it is safe to say that there are at least 1,000 current legal periodicals and the number of new periodicals exceeds that of those which are discontinued.

Because of the limited availability of these periodicals and the practical impossibility of reading or searching all or even the most important of them, the study of foreign, comparative and international law has suffered greatly. In the latter fields, articles are not read by some of those who should read them, research efforts have been duplicated unnecessarily, and it is appalling to note that it appears widely acceptable that one may limit one's research in these fields to certain publications, or articles published in certain languages or geographical areas. Contrary to other fields of human endeavor, the legal profession has taken scant notice of the device of using translators when necessary, and, contrary to French and Swiss universities, American universities as yet do not offer instruction in legal translations. Particularly in the field of international law, the result of these limitations is, on the one hand, a certain intellectual provincialism and, on the other hand, sheer wastefulness.

As an effort to provide greater accessibility to foreign legal periodicals, the *Index to Foreign Legal Periodicals* was established by the American Association of Law Libraries in 1960 for the current and cumulative indexing, by author, subject and geographical identification, of articles which are published in more than 300 of the world's outstanding or otherwise important legal periodicals outside of the common-law sphere, and in proceedings and yearbooks. Beginning in 1963, collections of essays are also indexed. This indexing is, of course, a departure from earlier methods of listing the contents of selected periodicals under the titles of the periodicals.

Mr. Blaustein's book is a careful analysis of the coverage of the *Index* and of the selective and technical methods used by its far-flung editorial staff at the time when the author was engaged in his study. Changes which the *Index* has undergone in the meantime are important, but its basic features have remained the same. The reader should bear in mind that Mr. Blaustein has analyzed only those legal periodicals which were selected for indexing by the Committee on Foreign Law Indexing of the American Association of Law Libraries after a process of careful screening and elaborate analyses, but that he did not intend to survey the whole field of foreign legal periodicals.

Mr. Blaustein's book is therefore useful as an introduction to the use of the *Index* and to the use of the periodicals indexed therein, regardless of whether the periodicals are locally available or may have to be obtained for short-time use. Whenever it is felt that legal research should be preceded by instruction in the use of research tools, Mr. Blaustein's book will be welcome.

WILLIAM B. STERN

*Staatslexikon. Recht, Wirtschaft, Gesellschaft.* Vol. 7. 6th ed. Edited by the Görres-Gesellschaft. Freiburg im Breisgau: Verlag Herder; New York: Herder Book Center, 1962. pp. viii, 1214. Index. \$21.50; DM. 88.

The *Staatslexikon*, which is to comprise eight volumes altogether, is nearing its completion. To the first six volumes, recently reviewed in this JOURNAL,<sup>1</sup> there was added the seventh volume in 1962. Like the previous volumes, the present one contains a host of articles on problems and issues that are of the greatest interest and value for the student and practitioner of international law and politics.

A considerable number of the entries are again devoted to questions of general significance. Thus, the articles on the state and theories of the state together cover some sixty columns. Equally lengthy are those on the social sciences, on sociology and on socialism. The entries on sovereignty and the principle of good faith are comparatively very brief, but the questions relating to them are, of course, broached in other entries as well. The discussion of criminal law, criminal procedure, and the theories of punishment is very elaborate. Another category of items deals with such special issues of international law and politics as state territory, nationality, statelessness, the trusteeship system, UNESCO, supra-national institutions, self-determination and other questions. A third group of articles surveys individual countries and states, and supplies the reader with reliable background information on their history and geography, their constitutional and legal systems, their social structures and their economies. There are, finally, a great many biographical articles on political and legal writers and on statesmen of the recent and the remote past.

It is not at all surprising that the editors of the *Staatslexikon* have given

<sup>1</sup> See 56 A.J.I.L. 1135 ff. (1962).

special attention to political and legal questions that are agitating the mind of the German-speaking public. The treatment of these issues is on the whole well balanced, as is evidenced by the comments on the *Sudetenfrage* and on *Südtirol*. Nor is it objectionable, in principle, that in the bibliographical notes at the bottom of each article preference is given to German-written literature. But one wonders whether some contributors do not actually indulge in a kind of scholarly parochialism. The bibliography on the state runs almost two and a half small-printed columns, but merely mentions about a dozen treatises by other than German-writing authors. In the entries on the *Staatenbund* and on supra-national institutions, the respective bibliographies refer only to one French and to no English or American work. In fact, the tendency to neglect things outside Germany is sometimes even noticeable in the content of articles. Thus, the entry on the jury system omits in its historical introduction any reference to the rôle this institution has played in Anglo-Saxon legal history. But these are minor flaws that in no way detract from the great merits of the monumental undertaking that the *Staatslexikon* represents.

ERICH HULA

*The Alliance for Progress: Problems and Perspectives.* Edited by John C. Dreier. Baltimore: The Johns Hopkins Press, 1962. pp. xx, 146. Index. \$3.95.

A former U. S. Ambassador to the Organization of American States, Mr. John C. Dreier, in this slim volume has edited a series of lectures given at the Pan American Union by five personalities involved in the background and the administration of the Alliance for Progress. The contributors are Dr. Milton Eisenhower, Dr. Raúl Prebisch, Sr. José Figueres, Mr. Teodoro Moscoso, and Secretary of State Dean Rusk. Mr. Dreier's "Introduction" is in reality a perceptive summary of the history, objectives, and well-nigh insuperable difficulties in the way of the Alliance. He declares that

during the period from the mid-1930's to the mid-1950's the Good Neighbor Policy made possible the creation of an effective multilateral system for the protection of the sovereignty and independence of the American states, replacing the unilateral, interventionist exercise of this function by the United States.

Pointing out the drastic changes contemplated by the Alliance, Mr. Dreier notes that the consequences of rapid population growth demand more attention than they receive in the lectures. He believes, furthermore, that creative thought is needed to determine how political parties and public opinion can be mobilized to assist this "long, difficult, and ambitious undertaking." To these *lacunae* the reviewer would add another: the failure of the lectures to mention the epochal Papal Encyclical *Mater et Magistra* of 1961. This document, advocating many of the concepts embraced by the Alliance, has a vast potential impact on the social action of a predominantly Roman Catholic region.



Statements by Dr. Eisenhower as to the bipartisan origins of the United States commitments to an inter-American program for social progress are confirmed in Mr. Moscoso's subsequent lecture, which then goes on to comment on the gulf between the poor and the rich in Latin America, and the flight of capital from that area. Dr. Prebisch directs attention to the Latin American initiatives in creating the Alliance. Sr. Figueres suggests that the cause of misunderstandings has been the propensity of North Americans to deal with the Latin American elite, who are either non-political or representative of a conservative minority. Secretary Rusk's concluding lecture establishes the context of the Alliance in the struggle for worldwide economic development, and emphasizes the participants' rôle of self-help.

WILLARD F. BARBER

*La Organización de los Estados Americanos (O. E. A.). Une Nueva Visión de América.* By Felix G. Fernández-Shaw. Madrid: Ediciones Cultura Hispánica, 1959. pp. 770. Appendices. Index. Pts. 180.

The author, a young Spanish diplomat, publishes in this volume a revised version of his doctoral thesis, approved with special distinction in the Faculty of Law of the University of Madrid. The result is another scholarly, chronological treatment of inter-American conferences and organization. The history of the years from 1826 (the Congress of Panama) through 1947 (the Rio Treaty), which constitutes Part One, is preceded by an interesting introduction dealing with various formulations of notions of Hispanic-Americanism, Pan Americanism, and inter-Americanism (pp. 17-84). A certain ethnocentrism is evident, but the usefulness of the book is not seriously impaired. Although Dr. Fernández-Shaw himself is concerned with penetrating *inside* the American reality, a major value of his work is that he is clearly viewing the scene from *outside* the Hemisphere, but from inside the Hispanic tradition. His is a worthwhile additional viewpoint on inter-American relations, supplementing the studies made by authors rooted in other (chiefly Anglo-Saxon) cultures and legal traditions, and the studies made by Latin Americans themselves. The entire work is generously documented. Effective legal analysis is found particularly in Part Two on the present juridical status of the Organization of American States (O.A.S.). The chronology of meetings and agreements is there brought down to 1958 and "Operation Pan America," with express contemplation of the Eleventh Inter-American Conference, which was postponed.

An epilogue, "Spain and the O.A.S.," is required reading for anyone who thinks *Hispanidad* is dead. Although the author outlines and discusses some standard "unity" alternatives (union of Spanish-speaking countries in America, Western Hemisphere union, and Union of Spain and Spanish America), this is obviously a case of special pleading. Unintentionally he exaggerates the community of interest between his country and Spanish America. He even points out that some of the same problems

are shared, but he does not suggest how closer association with Spain would help resolve any such problems. The United States, of course, is not a member of the "family." For example, Fernández-Shaw seems typically oblivious of the future impact of Brazil, and fails to do justice to the future rôle of British Commonwealth units in the Hemisphere. Though he constantly urges facing up to realities, the young diplomat is still a victim of that special Spanish romanticism about the "mother country." Almost everyone in Latin America will pay homage to the historical links on appropriate ceremonial occasions—and quite naturally Spaniards will ever clip and quote such sentimental expressions—but there is little actual willingness to follow or to identify with the "parent" and less economic or other substantive basis for the *Hispanidad* dream. Even the literary and spiritual trends are quite divergent.

The volume concludes with a series of appendices, including a summary of conferences and other descriptive matter (pp. 479-590), and document annexes (pp. 593-733). The recent shifts and developments in the inter-American system render the volume sadly out of date as a reference manual; however, as an external view and as a restatement of Spanish notions about Western Hemisphere relations, it is significant.

ROBERT D. HAYTON

*Cursos Monográficos.* Vol. VIII. Published by the Academia Interamericana de Derecho Comparado e Internacional. Havana: Editorial Lex, 1960. pp. 504. Index.

Delayed in publication and in distribution, this printing of the 1958 lectures at the Tenth Annual Meeting of the Inter-American Academy of Comparative and International Law is still welcome (Vol. VII was reviewed in 55 A.J.I.L. 187-190 (1961)). There is no indication when the 1959 lectures will become available. The Academy is now virtually dormant; in this volume the traditional page listing officers and members was omitted, although Dr. Ernesto Dihigo continues as director.

The first two of this volume's eight contributions deal with the inter-American system. Professor William Manger, formerly Assistant Secretary General of the Organization of American States (O.A.S.), discourses in Spanish on the beginnings and growth of co-operation among the American Republics, with that familiarity of subject matter and ease of quotation from the Hemisphere's statesmen born of decades of dedication to Pan Americanism (pp. 7-56). Charles Fenwick, at the time Director of the Pan American Union's Legal Affairs Department, ably traces the development and applications of collective security in the inter-American system (pp. 57-100, in English). Although the rush of events has added important practice since these two statements were made, both are sound historically and reflect deep understanding of problems and prospects.

Uruguay's Eduardo Jiménez de Aréchaga, now a member of the International Law Commission, contributed a careful and detailed examination of the legal relationship between the O.A.S. and the United Nations and

between the O.A.S. and its specialized organizations (pp. 101-179, in Spanish). Dr. Isidoro Zanotti, a Brazilian lawyer with the Pan American Union Legal Affairs Department, takes up the topic of "Extradition" (pp. 181-321, in Spanish), with principal focus on the Western Hemisphere. Of particular value are the comparative analysis, the eleven-page bibliography and appended treaty texts. The Pan American Union's Director of Economic and Social Affairs, Amos E. Taylor, lectured on "Economic and Social Problems of the Americas" (pp. 323-371), with certain revisions in the manuscript to February, 1960. The problems have not changed.

Mexico's distinguished Professor Ermilo Abreu-Gómez's section on "American Culture and the Organization of American States" (pp. 373-393, in Spanish) discloses to the uninitiated the numerous publication and conference accomplishments of the Pan American Union in the artistic and intellectual spheres. "The Regime of the Sea in Contemporary International Law" (pp. 395-473, in Spanish) by Dr. Francisco V. García Amador (now the Pan American Union's chief legal officer) is a balanced, documented, introductory examination of the modern problems, especially those involving marginal sea, continental shelf, and marine resources. Professor Martin Domke contributes the final piece in this volume on one of his favorite topics, "International Aspects of Commercial Arbitration in the Americas" (pp. 475-504). The essay is wide-ranging and well documented.

The volume is still a useful one in spite of all delay. More important, it represents a tradition that has had to be suspended. There is no present prospect for the next "annual meeting"—unless the Academy be removed temporarily from Cuba.

ROBERT D. HAYTON

*Nationalisation of Foreign Property.* By Gillian White. (Library of World Affairs, No. 57.) Published under the auspices of the London Institute of World Affairs. London: Stevens & Sons, Ltd., 1961; New York: Frederick A. Praeger, 1962. pp. xxvi, 283. Index. \$13.75.

This is a valuable and useful survey of the law pertaining to the nationalization of foreign property. The subject is illuminated by the author's admirable accuracy and comprehensive research, but perhaps it benefits most from Miss White's high capacity for dispassionate analysis. All these virtues are combined in the very full presentation of the nationalization behavior of the socialist states in the post-World-War II period, especially in the detailed discussions of what the East European members of the Soviet bloc have and have not done with respect to private property situated within their territory.

Miss White carefully documents her conclusion that

the practice of the Communist States of Eastern Europe indicates that even though these States may have refused to compensate their nationals, and though they have come near to abolishing altogether the

institution of private ownership of property, they still recognize a liability on the international level. (p. 232.)

This contrasts with the candidly confiscatory claims of Soviet expropriation decrees in the period following 1917. It challenges the widespread assumption that the spread of socialism has necessarily meant the weakening of international protection of private property. For although Miss White questions the *adequacy* of several of the East European settlements, there is clear evidence that these settlements have given foreign owners, *substantial*, and not *nominal*, compensation. The book covers the whole range of legal questions presented by nationalization, including the provision of historical background to the modern experience, and an account of remedial opportunities and obstacles available to deprived aliens. In short, for practitioners and scholars alike, this is an indispensable handbook, and is adapted to this rôle by suitable footnotes, bibliography, and index.

There is a caveat, however. This study exhibits the defects, as well as the aforementioned virtues, that result from a disciplined adherence to the methods of analytical jurisprudence in the indestructible manner of John Austin. Hence, there is no evaluation of the link between rules and policies, and one is disappointed by the rather rigid depiction of the social environment within which law functions. The legal analyst describes and classifies the legal materials, but he neither challenges nor confirms our deeper commitments that alone impart meaning to the data of law. What is at stake is first of all a matter of method: the proper delineation of the province of law. Are we always to be compelled to choose between dispassionate description and biased insight? In the reviewer's opinion, the work of Sir Hersch Lauterpacht and Myres S. McDougal provides the most significant, if not the most consistently successful, modern effort by international lawyers to achieve a synthesis of knowledge and passion. Miss White's refusal to try, however numerous her other accomplishments may be, must be regarded in this special sense as an unfortunate, although quite common, retrogression.

RICHARD A. FALK

*International Legal Materials: Current Documents.* Edited by H. C. L. Merillat. Richard W. Edwards, Jr., Assistant Editor. Bimonthly. Washington, D. C.: American Society of International Law, August, 1962—. Subscription: \$24.00 per year (\$18.00 for Society members). Single numbers, \$4.00.

Anyone working in the field of international law is familiar with the frustrations and risks of error which arise from the unavailability of sufficient data. Securing adequate documentation in reliable form is an ever-present problem: not only are documents slow to appear in standard reports and treaty series, but many significant items never become available at all except in ephemeral and elusive sources. To help solve this problem is the object of this publication of the American Society of International Law, of which the first number appeared in August, 1962, the second in

October, 1962 (both experimental), and subsequent issues bimonthly commencing with January, 1963. Each number contains approximately 200 pages, 8½ by 11 inches in size, in which materials are reproduced by photo-offset either from original prints or from typewritten copy. All items are in English: only the English versions of multilingual instruments are given, and materials from foreign languages appear in translation obtained from official or competent private sources. Documents are generally reproduced in full, except for occasional omissions (always indicated) of irrelevant or superfluous portions.

The items selected cover a wide range, the main criterion of choice being that they should be of substantial interest to a large number of scholars, practicing lawyers, and public officials. The categories into which each issue has been divided comprise: (1) treaties and agreements, including proposals and correspondence relating thereto; (2) judicial and similar proceedings, both national and international, including not only judgments and opinions but also briefs and memoranda deemed to be of general interest; (3) reports of officials and official bodies of national governments and international groups, including the United Nations and the European Economic Community; and (4) legislation and regulations of both states and international organizations. Thus the May, 1963, issue contained fifteen items, among them the Israeli ministerial report on the *Soblen* case and the report of the U.N. Working Group on the Financing of Peace-Keeping Operations; the Vietnamese Decree-Law of February, 1963, regulating private investment; a decision by the E.E.C. Court of Justice interpreting Article 12 of the Rome Treaty; the China-Pakistan Boundary Agreement of March 2, 1963; and the report of the U.N. Secretary General of April 29, 1963, on military disengagement arrangements in Yemen.

In addition to texts, the numbers contain from time to time useful reports on matters such as United States treaties signed but not in force, a list of United States investment guaranty agreements, and notices of documents not reproduced, with information as to where they may be obtained. Excluded from the publication in general are documents of private origin not forming part of a public transaction, and documents in highly specialized and technical areas, such as United States tax law. The new periodical will not replace the Official Documents section of the *JOURNAL*, which will continue to carry texts of major importance.

The editing of the series, done with the assistance of an advisory board composed of Professors Stanley D. Metzger, Arthur S. Miller, and Walter S. Surrey, shows a high degree of resourcefulness and speed in obtaining documents, imagination in their selection, and accuracy in their reproduction. If any criticism were to be made thus far, it might be to question whether a few documents fairly accessible elsewhere need have been reproduced; for example, items appearing also in the *Department of State Bulletin*. Yet for readers abroad, with limited American materials available, even these may be useful. The series has begun in most commendable

fashion, and in the opinion of this reviewer it promises to be a valuable service to all concerned with current developments in international law.

RICHARD YOUNG

*Offshore Geography of Northwestern Europe: The Political and Economic Problems of Delimitation and Control.* By Lewis M. Alexander. (Association of American Geographers, Monograph Series, No. 3.) Chicago: Rand McNally & Co., 1963. pp. xii, 162. Maps. Index. \$5.00.

In this monograph Professor Alexander undertakes to examine, from the standpoint of the political geographer, the various factors which enter into the formulation of national claims to offshore control in a particular region, in this case, the maritime basin occupied by the North Sea and adjacent waters from Denmark to Iceland. These factors include physical, political, economic, legal, historical and other influences, many of which have been studied separately, but have been considered only rarely in their effects on one another within a given region. While the treatment in this short volume is not exhaustive with respect to any of them, it does illuminate their interaction and is a stimulus to profitable thought on the subject.

A large part of the study focuses on fisheries questions, in which the interplay of forces can be readily demonstrated, and especially on the disputes of recent years concerning the fisheries off Norway, the Faeroe Islands, and Iceland. On these, and particularly on Iceland, the author's correlation of geographical, economic, and biological data with the various legal claims and settlements is of special interest. Unfortunately, the text was written before the discovery of significant offshore gas deposits in the North Sea, and hence does not deal with a development which is likely to have substantial impact on national claims in the region.

In his discussion of the general legal principles relating to offshore jurisdiction, as also in his remarks about the 1958 Geneva Conventions, the author says nothing new for the international lawyer and occasionally slips into minor error. What is of interest to the lawyer is the information he has assembled about particular offshore situations in the area. These include not only the fisheries questions but also such little-publicized boundary problems as those between Germany and The Netherlands in the Ems estuary, between The Netherlands and Belgium in the Scheldt, and between the Irish Republic and Northern Ireland in Lough Foyle and Carlingford Lough. Several of these boundary and fishery situations are made clear with excellent black-and-white maps, which are a valuable feature of the volume.

RICHARD YOUNG

#### BRIEFER NOTICES

*The "Etiamsi Daremus" of Hugo Grotius.* By James St. Leger, M.M. (Rome: Casa Editrice Herder, 1962. pp. viii, 160. Index.) In a well-known passage of the *Prolegomena* of his *Law of War and Peace*, Grotius expressed the view that natural law would exist "even if we should con-

cede (which cannot be conceded without the greatest wickedness) that God does not exist, or is not concerned about human affairs" ("etiamsi daremus quod sine summo scelere dari nequit, non esse Deum, aut non curari ab eo negotia humana"). This statement, sometimes hailed as heralding the emancipation of jurisprudence from theology, is regarded by the author of this doctoral dissertation rather as a concept derived from the perennial philosophical debate whether law is based upon reason or will. St. Thomas Aquinas, on the one hand, and Duns Scotus and William of Occam, on the other, were protagonists in this dispute. Hugh of St. Victor (1096-1141), Gregory of Rimini (d. 1358), and Gabriel Biel (1429-1495) regarded natural law as *lex indicativa* rather than *imperativa*. So did the Jesuit Gabriel Vásquez (ca. 1551-1604), a contemporary and intellectual rival of Suárez (pp. 129-132). The author advances the hypothesis that it was the influence of Vásquez which led Grotius to adopt a rationalistic rather than voluntaristic view of natural law (p. 141).

EDWARD DUMBAULD

*Der Schutz von ausländischen Vermögen im Völkerrecht.* By Werner Veith and Karl-Heinz Böckstiefel. (Baden-Baden: Verlag August Lutzeyer, 1962. pp. 230. DM. 22.) As stated by Hermann J. Abs in the Introduction, "the present survey (of all relevant rules of international law) shows that the principles of good faith and of the fair treatment of others are firmly rooted in public international law as well as in the national laws of civilized states" (p. 5). We are informed by the authors that such principles of good faith and fair dealing include, among other things, the direct applicability of *pacta sunt servanda* to all concession agreements between a state and aliens (pp. 127-136); full compensation for all expropriations of the property of aliens, including general nationalizations (pp. 169-181); the illegality of compensation payments in annual installments (p. 183); and the invalidity of expropriations "grossly" violating international law. They also assert that states which recognize the validity of title to goods expropriated in violation of international law have to refuse such recognition on grounds of public policy (pp. 183-184); and that even without resort to public policy, courts of states where public international law is the law of the land are prevented from recognizing such title (p. 184).

All of these conclusions are documented in a manner that made at least this reviewer wonder about the pervasiveness of "the principles of good faith and of the fair treatment of others."

HANS W. BAADE

*Le Problème du Droit de Guerre dans la Pensée de Pie XII.* By René Coste. (Paris: Editions Montaigne, 1962. pp. 522.) The present volume deals with the *jus ad bellum* and refers only occasionally to the *jus in bello*, but otherwise covers a much broader ground than the title suggests. The learned author does not confine himself to an analysis of the moral and legal aspects of war but discusses the phenomenon of war also from an historical, political, and sociological point of view. Moreover, since he is anxious to show how far the thought of Pope Pius XII on war conforms with, and to what extent it deviates from, the traditional Catholic doctrine on just and unjust war, he opens the volume with a lengthy sketch of the evolution of this doctrine. In another chapter of the first part he sets forth the chief tenets of Catholic theology and philosophy in general, so far as they have a direct bearing on the Church's teaching on the right to wage war. The second and lengthiest part of the book is a

statement and interpretation of Pius XIIth's doctrine on war. The author shows that Pius' teaching, contrary to the traditional Catholic doctrine, practically recognizes only a war of self-defense as lawful. (One wonders, however, whether he succeeds in making Pius' conception of self-defense and its limits sufficiently clear.) The third part contains an exposition of the late Pope's ideas on the possibility and desirability of a fully organized and effective political world community with truly supranational authority, and the implications that the existence of such a society would have for the *jus ad bellum*. There is added to the text a valuable bibliography but, unfortunately, no index. In sum, this is a highly significant, profound and scholarly exegesis in moral theology which should prove most useful for the student of international law and organization. It is to be hoped that a translation into English will soon be undertaken.

ERICH HULA

*Toward World Order.* By Amry Vandenbosch and Willard N. Hogan. (New York, London and Toronto: McGraw-Hill Book Co., 1963. pp. x, 389. Index. \$7.95.) Under a new title the authors bring us what is in effect a revised and enlarged edition of their *The United Nations*, published in 1952;<sup>1</sup> and, to those who found the earlier volume an exceptionally helpful study, the present volume will be even more welcome. It not only gives us the same scholarly analysis of the structure and activities of the Organization, but it offers us a more mature judgment of the decisions of the Security Council and the General Assembly. On almost every page, notably in the chapter on "The Regulation of Armaments," there are comments that mark a more experienced approach to the new and complex problems that have developed over the years.

The method of the volume is to present basic factual information and a clarification of the issues involved. After a background of historical development, the authors survey the Organization of the United Nations and its activities, accomplishments and problems. Then follows a section on regional organizations and a closing section on problems and prospects. The descriptions are accurate and the authors give life to them by avoiding abstractions and giving specific instances of the application of principles. One by one, the concrete cases that have come before the Security Council and the General Assembly are concisely summarized: the Kashmir, Berlin, Suez, and other conflicts; and running like a thread through the descriptions is the underlying analysis of the problem in terms of world order.

The authors are to be congratulated upon the fulfillment of what might seem to be a simple task of enumeration of events, but which in reality is a most difficult critical estimate of the possibilities of international organization in a world of conflicting political, economic and social forces, calling urgently for regulation yet presenting daily new elements of disagreement as to ways and means.

C. G. FENWICK

*The Secretariat of the United Nations.* By Sydney Bailey. (New York: Carnegie Endowment for International Peace; London: Stevens & Sons, 1962. pp. vi, 113. \$3.50; 25 s.) This little book is the eleventh number in the *United Nations Study Series*, begun by the Carnegie Endowment in 1947 to provide "independent appraisals of problems relating to the structure and development of the United Nations." The author has been an observer of the political scene and a student of political institutions for

<sup>1</sup> Reviewed in 47 A.J.I.L. 520 (1953).



many years, having served as secretary of the Hansard Society, editor of *Parliamentary Affairs*, director of the Quaker United Nations Program and reporter for *The Economist*. He was the author of an earlier number in this series, *The General Assembly*, which appeared in 1960.

The preparation and writing of this book were no doubt prompted by the crisis through which the United Nations, and more particularly the office of Secretary General, was passing as the result of the Congo crisis. As a consequence, the study, while dealing broadly though briefly with the nature of the United Nations and various aspects of the organization and activity of the Secretariat, focuses on two particular questions which the Congo crisis brought to the forefront of public attention: the rôle of the Secretary General and the geographical distribution of personnel. In discussing these matters, particularly the latter, the author gives special consideration to some of the recommendations contained in the Report of the Committee of Experts on the Organization and Activities of the Secretariat, submitted to the Secretary General in 1961.

Mr. Bailey firmly defends the idea of an international civil service. He readily admits that members of the Secretariat on occasion have been guilty of mistakes, but he believes this to be no reason "for giving up ideals." The United Nations cannot achieve its purpose "unless the decisions of policy-making organs are impartially prepared and implemented." He is firmly against "transforming the Secretariat into a congress of ambassadors." Holding this view, he finds the current increase in the proportion of fixed-term apportionments in the Secretariat, with the inevitable result of greater dependence on governments, a cause for concern. While condemning the "troika" proposal, he recognizes that the heavy political responsibilities that the Secretary General has assumed require that special attention be given to arrangements for advice and consultation.

This is a very useful study, though somewhat outdated by the rapid pace of events.

LELAND M. GOODRICH

*International Regional Organizations: Constitutional Foundations.* Edited by Ruth C. Lawson. (New York: Frederick A. Praeger, 1962. pp. xviii, 387. \$8.50.) International law has developed in such a fashion that it can no longer be regarded as a system which deals exclusively, or even basically, with the principles which govern the mutual relations of sovereign states. A parallel phenomenon, and one which is in part responsible for the expansion of the international legal system, has occurred in the international organizational area. Thus, at present, the field of international organization is not merely or solely concerned with a universal entity the primary task of which is the preservation or restoration of world peace. Rather, the proliferation of functional regional or quasi-regional associations has been one of the most conspicuous aspects of the postwar era. For this reason, Professor Lawson's compilation of regional constitutions is a useful addition to the literature.

While the author places little emphasis, and rightly so, in a collection of this sort, on the all-important evolutionary processes of these organizations, the introductory remarks preceding each document nevertheless highlight certain aspects of the institutions, and include significant historical data. The organizations themselves are divided on a geographic rather than functional basis, and it is in this fashion that all or part of twenty-five constitutive documents, ranging from the more familiar Western and Eastern European and Latin American associations to the more recent African groupings, are presented.

On the basis of Dr. Lawson's own criteria for selection, not all of the documents should technically have been incorporated, an observation which is particularly applicable to the 1947 Rio Treaty. Nor is the deletion or summation of certain provisions of some of the constitutions, for example, the policy articles of the Common Market Treaty, desirable. At the same time, this reviewer would have favored the inclusion of documents such as those establishing the European Free Trade Association or the Central Rhine Commission at the expense of some of those which have been set forth. But these comments are not intended as a criticism, for the issues involved are essentially those of choice and necessity. Indeed, both author and publisher are to be congratulated for having produced a manageable volume of important data, some of which is not easily accessible elsewhere, and most of which is indispensable in analyzing and understanding international developments.

GUENTER WEISSBERG

*International Contracts: Choice of Law and Language.* Parker School of Foreign and Comparative Law, 30th Anniversary Symposium. (Dobbs Ferry, N. Y.: Oceana Publications, 1962. pp. 76. \$5.00.) The value of this collection of papers, delivered to commemorate the Thirtieth Anniversary of the Parker School's establishment, is that it contains the comments and observations of several active and able international lawyers on choice-of-law provisions in various types of international transactions. Many of these transactions do not lead to litigation or arbitration, and, consequently, information pertaining to them is often scattered and incomplete. Of special interest to the student of public international law is the paper by the General Counsel of the International Bank on "Choice-of-Law Provisions in Contracts with Governments." Mr. Broches makes a survey of the provisions contained in several different types of agreements between national governments and foreigners, and, because these agreements are not generally available for study, his observations are of particular concern to the teacher of international law interested in some of the current problems in negotiating financial agreements, concession contracts, and contracts for the supply of goods and services. The sometimes contrasting views of lawyers advising an American business are presented in the papers by Victor Folsom, Vice President and General Counsel of the United Fruit Company, on "Choice-of-Law Provisions in Latin American Contracts," and by Granville M. Brumbaugh on "Choice-of-Law Provisions in Licensing Contracts." A mild critique of the developing "grouping of contacts" theory applied by United States courts is contained in "Conflict Avoidance in International Contracts," by Carlyle E. Maw, who courageously describes himself as "an old Bealean."

The remarks of Professor Georges A. van Hecke of the University of Louvain, "A Civilian Looks at the Common-Law Lawyer," are illuminating and supply a useful summary of the differences between the American and European-trained attorney. However, neither this address nor the introductory and provocative remarks of Dean Jacques Barzun of Columbia deal directly with the problem of choice-of-law provisions in international contracts.

International law study today suffers from the scarcity of empirical research. One would like to know, for example, what reliance parties actually place upon law in negotiating international business transactions, and whether our assumptions as to the rôle of international law as a protector of individual values and national interests are well founded. This volume makes a major contribution to the extent that it presents the reader with the informed views and observations of practicing lawyers actually

concerned with the international business transaction. Unfortunately, the book lacks an index and an analytical table of contents. Both would be helpful.

GORDON B. BALDWIN

*Soviet Legal Institutions: Doctrines and Social Functions.* By Kazimierz Grzybowski. (Ann Arbor: University of Michigan Press, 1962. pp. xiv, 285. Index. \$7.50.) Building his exposition of Soviet legal institutions around their effect upon the life of the individual, Dr. Grzybowski has turned his well-known erudition once again to exploring contrasts between Soviet and Western legal systems. He concludes that there are differences, but they flow more from extension of Western concepts and institutions than from the invention of new concepts. Soviet law was Romanist in its origin in the period of the "New Economic Policy," and Romanist it remains, in spite of the socialization of the economy through nationalization of means of production.

Two major influences are being brought to bear on Soviet legal development: that of the interest group represented by the state administrators, who want clear rules to facilitate their work, and that created by the desire to introduce a social ordering of human conduct in accordance with an ill-defined concept of "Communist morals." The first leads to a tendency to stabilize the law and to eliminate flexibility in its application; the second, to the very opposite in composition rather than litigation of disputes between citizens by their fellow citizens, who have no official status.

The latter influence appears to Grzybowski to be more Chinese than Western, but it is only in a developmental stage. Since he completed his book, this aspect of Soviet law seems to be in some measure of retreat as law-trained officials seek to limit its inroads upon the stability they foster.

For international lawyers the volume can be a reminder that their Soviet counterparts, no matter how recalcitrant on one or another specific issue, are within the tradition of Western legal thought. Full understanding in negotiation cannot always be hoped for, but at least the negotiators from East as well as West follow essentially the same thought processes, although they may mask them in language that turns the dictionary definitions inside out. For this contribution to understanding of the well-springs of Soviet legal thinking Dr. Grzybowski deserves the gratitude of common-law lawyers who sometimes, in their inadequate understanding of the traditions of the Continent, think they are dealing with a thoroughly strange phenomenon when approaching Soviet law.

JOHN N. HAZARD

*Nuevos Estudios de Derecho Comparado.* By Roberto Goldschmidt. (Caracas: Universidad Central de Venezuela, Facultad de Derecho, 1962. pp. v, 449. Index.) This second volume of comparative studies by the distinguished author contains contributions of greatly varying weight, size and importance. The majority deal with subjects of Venezuelan or another specific (e.g., Belgian) law, taken particularly from the laws of sales and property (hire-purchase, parceling and quota sales, *fideicomisum*, horizontal property), corporations (directors' liability, stockholders' meeting, merger), and traffic law. Several important studies are devoted to the reform of Venezuelan company, commercial, banking, bankruptcy and copyright laws. Even these seemingly local studies are permeated with the author's mastery of the comparative technique. While comparison in these studies is essentially limited to the civil-law world, many

among the remaining contributions of more general scope, including those on the right of privacy, on the legal impact of modern technical developments and on "preventive actions," show the author's familiarity with the problems and solutions of the common-law orbit.

ALBERT A. EHRENZWEIG

*Repertorio de Derecho Internacional Privado. Jurisprudencia, Legislación, Concordancias y Notas. Apéndice Bibliográfico.* By Manuel García Calderon. (Lima, Peru: San Marcos University Press, 1961. pp. 119. Index.) Professor García presents here a bibliographical supplement to a four-volume compilation of Peruvian private international law cases, legislation and treaties. The listing is limited to materials, including periodical literature, published since about 1930 and available at the Law School Library in Lima. The scope is not limited to conflicts of law problems. Included are works on nationality and the status of aliens, international civil law (contracts, marital relations, international payments), international commercial law, international procedural law, international financial and administrative labor law, and codification and unification. It must be remembered that the famous Bustamante Code (Havana, 1928) is still a large part of the law for 15 Latin American countries. A student of legal education and scholarship in Latin America will find this publication enlightening in several respects; for example, the sparse and apparently accidental record of acquisitions outside the Romance languages. Within the Hispano-Luso nations the striving for uniformity continues, and the specialist will want to keep up with, and equip his own institution's library with, commentaries on these efforts. This bibliography is useful to that end.

ROBERT D. HAYTON

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ELEANOR H. FINCH

## OFFICIAL DOCUMENTS

### UNITED NATIONS CONFERENCE ON CONSULAR RELATIONS

VIENNA, MARCH 4–APRIL 22, 1963

#### FINAL ACT<sup>1</sup>

1. The General Assembly of the United Nations, by Resolution 1685 (XVI) of 18 December 1961, decided to convene an international conference of plenipotentiaries to consider the question of consular relations and to embody the results of its work in an international convention and such other instruments as it might deem appropriate. The General Assembly, accepting an invitation extended by the Federal Government of the Republic of Austria, also asked the Secretary-General to convoke the conference at Vienna at the beginning of March 1963.

2. The United Nations Conference on Consular Relations met at the Neue Hofburg in Vienna, Austria, from 4 March to 22 April 1963.

3. The Governments of the following ninety-two states were represented at the Conference: Albania, Algeria, Argentina, Australia, Austria, Belgium, Brazil, Bulgaria, Burundi, Byelorussian Soviet Socialist Republic, Cambodia, Canada, Ceylon, Chad, Chile, China, Colombia, Congo (Brazzaville), Congo (Leopoldville), Costa Rica, Cuba, Czechoslovakia, Denmark, Dominican Republic, Ecuador, El Salvador, Ethiopia, Federal Republic of Germany, Federation of Malaya, Finland, France, Ghana, Greece, Guinea, Holy See, Honduras, Hungary, India, Indonesia, Iran, Iraq, Ireland, Israel, Italy, Japan, Jordan, Kuwait, Laos, Lebanon, Liberia, Libya, Liechtenstein, Luxembourg, Madagascar, Mali, Mexico, Mongolia, Morocco, Netherlands, New Zealand, Nigeria, Norway, Pakistan, Panama, Peru, Philippines, Poland, Portugal, Republic of Korea, Republic of Viet-Nam, Romania, Rwanda, San Marino, Saudi Arabia, Sierre Leone, South Africa, Spain, Sweden, Switzerland, Syria, Thailand, Tunisia, Turkey, Ukrainian Soviet Socialist Republic, Union of Soviet Socialist Republics, United Arab Republic, United Kingdom of Great Britain and Northern Ireland, United States of America, Upper Volta, Uruguay, Venezuela, Yugoslavia.

4. The Governments of Bolivia, Guatemala and Paraguay were represented at the Conference by observers.

5. The General Assembly invited the specialized agencies and interested intergovernmental organizations to send observers to the Conference. The following specialized agencies and interested intergovernmental organizations accepted this invitation:

International Labour Organisation,  
Food and Agriculture Organization of the United Nations,  
International Atomic Energy Agency,  
Council of Europe.

<sup>1</sup> U.N. Doc. A/CONF.25/13, April 23, 1963.

[Paragraphs 6-9 omitted here]

10. The General Assembly, by its Resolution 1685 (XVI) convening the Conference, referred to the Conference, as the basis for its consideration of the question of consular relations, Chapter II of the Report of the International Law Commission covering the work of its thirteenth session, containing the text of draft articles on consular relations and commentaries adopted by the Commission at that session.<sup>2</sup>

11. The Conference also had before it the following documentation:

- (a) observations submitted by governments during successive stages of the work of the International Law Commission on consular relations;
- (b) the records of the relevant debates in the General Assembly;
- (c) amendments submitted by governments in advance of the convening of the Conference, pursuant to General Assembly Resolution 1813 (XVII) of 21 December 1962, to the draft articles on consular relations;
- (d) the text of the Convention regarding Consular Agents adopted by the Sixth International American Conference and signed at Havana on 20 February 1928;<sup>3</sup>
- (e) a collection of bilateral consular treaties, a collection of laws and regulations regarding diplomatic and consular privileges and immunities, a bibliography on consular relations, a guide to the draft articles on consular relations, and other pertinent documentation prepared by the Secretariat of the United Nations.

[Paragraph 12 omitted here]

13. On the basis of the deliberations, as recorded in the records of the plenary meetings and in the records and reports of the First and Second Committees, the Conference prepared the following Convention and Protocols:

Vienna Convention on Consular Relations;  
Optional Protocol concerning Acquisition of Nationality;  
Optional Protocol concerning the Compulsory Settlement of Disputes.

14. The foregoing Convention and Protocols, which are subject to ratification, were adopted by the Conference on 22 April 1963, and opened for signature on 24 April 1963, in accordance with their provisions, until 31 October 1963 at the Federal Ministry for Foreign Affairs of the Republic of Austria and, subsequently, until 31 March 1964, at the United Nations Headquarters in New York. The same instruments were also opened for accession, in accordance with their provisions.

<sup>2</sup> U.N. Gen. Assembly, 16th Sess., Official Records, Supp. No. 9, at 5 (A/4843) (1961); 2 I.L.O. Yearbook [1961] 88 at 92 (A/CN.4/SERA/1961/Add. 1) (1962); 56 A.J.I.L. 268 at 276 (1962).

<sup>3</sup> 22 A.J.I.L. Supp. 147 (1928).

15. After the closing date for signature at the Federal Ministry for Foreign Affairs of the Republic of Austria on 31 October 1963, the Convention and Protocols will be deposited with the Secretary-General of the United Nations.

16. In addition, the Conference adopted the following resolutions,<sup>4</sup> which are annexed to this Final Act:

Resolution on Refugees;

Resolution expressing a tribute to the International Law Commission;

Resolution expressing a tribute to the Federal Government and to the people of the Republic of Austria.

IN WITNESS WHEREOF the representatives have signed this Final Act.

DONE AT VIENNA this twenty-fourth day of April, one thousand nine hundred and sixty-three, in a single copy in the Chinese, English, French, Russian and Spanish languages, each text being equally authentic. By unanimous decision of the Conference, the original of this Final Act shall be deposited in the archives of the Federal Ministry for Foreign Affairs of the Republic of Austria.

#### VIENNA CONVENTION ON CONSULAR RELATIONS<sup>5</sup>

*Signed at Vienna, April 24, 1963*

*The States Parties to the present Convention,*

*Recalling* that consular relations have been established between peoples since ancient times,

*Having in mind* the Purposes and Principles of the Charter of the United Nations concerning the sovereign equality of states, the maintenance of international peace and security, and the promotion of friendly relations among nations,

*Considering* that the United Nations Conference on Diplomatic Intercourse and Immunities adopted the Vienna Convention on Diplomatic Relations which was opened for signature on 18 April 1961,<sup>6</sup>

*Believing* that an international convention on consular relations, privileges and immunities would also contribute to the development of friendly relations among nations, irrespective of their differing constitutional and social systems,

*Realizing* that the purpose of such privileges and immunities is not to benefit individuals but to ensure the efficient performance of functions by consular posts on behalf of their respective states,

*Affirming* that the rules of customary international law continue to govern matters not expressly regulated by the provisions of the present Convention,

*Have agreed* as follows:

<sup>4</sup> Omitted here.

<sup>5</sup> U.N. Doc. A/CONF.25/12, April 23, 1963.

<sup>6</sup> U.N. Doc. A/CONF.20/10, April 15, 1961; 55 A.J.I.L. 1064 (1961).

## ARTICLE 1

*Definitions*

1. For the purposes of the present Convention, the following expressions shall have the meanings hereunder assigned to them:

- (a) "consular post" means any consulate-general, consulate, vice-consulate or consular agency;
- (b) "consular district" means the area assigned to a consular post for the exercise of consular functions;
- (c) "head of consular post" means the person charged with the duty of acting in that capacity;
- (d) "consular officer" means any person, including the head of a consular post, entrusted in that capacity with the exercise of consular functions;
- (e) "consular employee" means any person employed in the administrative or technical service of a consular post;
- (f) "member of the service staff" means any person employed in the domestic service of a consular post;
- (g) "members of the consular post" means consular officers, consular employees and members of the service staff;
- (h) "members of the consular staff" means consular officers, other than the head of a consular post, consular employee and members of the service staff;
- (i) "member of the private staff" means a person who is employed exclusively in the private service of a member of the consular post;
- (j) "consular premises" means the buildings or parts of buildings and the land ancillary thereto, irrespective of ownership, used exclusively for the purposes of the consular post;
- (k) "consular archives" includes all the papers, documents, correspondence, books, films, tapes and registers of the consular post, together with the ciphers and codes, the card-indexes and any article of furniture intended for their protection or safekeeping.

2. Consular officers are of two categories, namely career consular officers and honorary consular officers. The provisions of Chapter II of the present Convention apply to consular posts headed by career consular officers; the provisions of Chapter III govern consular posts headed by honorary consular officers.

3. The particular status of members of the consular posts who are nationals or permanent residents of the receiving state is governed by Article 71 of the present Convention.

## CHAPTER I. CONSULAR RELATIONS IN GENERAL

## SECTION I. ESTABLISHMENT AND CONDUCT OF CONSULAR RELATIONS

## ARTICLE 2

*Establishment of consular relations*

1. The establishment of consular relations between states takes place by mutual consent.

2. The consent given to the establishment of diplomatic relations between two states implies, unless otherwise stated, consent to the establishment of consular relations.

3. The severance of diplomatic relations shall not *ipso facto* involve the severance of consular relations.

### ARTICLE 3

#### *Exercise of consular functions*

Consular functions are exercised by consular posts. They are also exercised by diplomatic missions in accordance with the provisions of the present Convention.

### ARTICLE 4

#### *Establishment of a consular post*

1. A consular post may be established in the territory of the receiving state only with that state's consent.

2. The seat of the consular post, its classification and the consular district shall be established by the sending state and shall be subject to the approval of the receiving state.

3. Subsequent changes in the seat of the consular post, its classification or the consular district may be made by the sending state only with the consent of the receiving state.

4. The consent of the receiving state shall also be required if a consulate-general or a consulate desires to open a vice-consulate or a consular agency in a locality other than that in which it is itself established.

5. The prior express consent of the receiving state shall also be required for the opening of an office forming part of an existing consular post elsewhere than at the seat thereof.

### ARTICLE 5

#### *Consular functions*

Consular functions consist in:

- (a) protecting in the receiving state the interests of the sending state and of its nationals, both individuals and bodies corporate, within the limits permitted by international law;
- (b) furthering the development of commercial, economic, cultural and scientific relations between the sending state and the receiving state and otherwise promoting friendly relations between them in accordance with the provisions of the present Convention;
- (c) ascertaining by all lawful means conditions and developments in the commercial, economic, cultural and scientific life of the receiving state, reporting thereon to the government of the sending state and giving information to persons interested;
- (d) issuing passports and travel documents to nationals of the sending state, and visas or appropriate documents to persons wishing to travel to the sending state;

- (e) helping and assisting nationals, both individuals and bodies corporate, of the sending state;
- (f) acting as notary and civil registrar and in capacities of a similar kind, and performing certain functions of an administrative nature, provided that there is nothing contrary thereto in the laws and regulations of the receiving state;
- (g) safeguarding the interests of nationals, both individuals and bodies corporate, of the sending state in cases of succession *mortis causa* in the territory of the receiving state, in accordance with the laws and regulations of the receiving state;
- (h) safeguarding, within the limits imposed by the laws and regulations of the receiving state, the interests of minors and other persons lacking full capacity who are nationals of the sending state, particularly where any guardianship or trusteeship is required with respect to such persons;
- (i) subject to the practices and procedures obtaining in the receiving state, representing or arranging appropriate representation for nationals of the sending state before the tribunals and other authorities of the receiving state, for the purpose of obtaining, in accordance with the laws and regulations of the receiving state, provisional measures for the preservation of the rights and interests of these nationals, where, because of absence or any other reason, such nationals are unable at the proper time to assume the defence of their rights and interests;
- (j) transmitting judicial and extra-judicial documents or executing letters rogatory or commissions to take evidence for the courts of the sending state in accordance with international agreements in force or, in the absence of such international agreements, in any other manner compatible with the laws and regulations of the receiving state;
- (k) exercising rights of supervision and inspection provided for in the laws and regulations of the sending state in respect of vessels having the nationality of the sending state, and of aircraft registered in that state, and in respect of their crews;
- (l) extending assistance to vessels and aircraft mentioned in subparagraph (k) of this article, and to their crews, taking statements regarding the voyage of a vessel, examining and stamping the ship's papers, and, without prejudice to the powers of the authorities of the receiving state, conducting investigations into any incidents which occurred during the voyage, and settling disputes of any kind between the master, the officers and the seamen in so far as this may be authorized by the laws and regulations of the sending state;
- (m) performing any other functions entrusted to a consular post by the sending state which are not prohibited by the laws and regulations of the receiving state or to which no objection is taken



by the receiving state or which are referred to in the international agreements in force between the sending state and the receiving state.

#### ARTICLE 6

##### *Exercise of consular functions outside the consular district*

A consular officer may, in special circumstances, with the consent of the receiving state, exercise his functions outside his consular district.

#### ARTICLE 7

##### *Exercise of consular functions in a third state*

The sending state may, after notifying the states concerned, entrust a consular post established in a particular state with the exercise of consular functions in another state, unless there is express objection by one of the states concerned.

#### ARTICLE 8

##### *Exercise of consular functions on behalf of a third state*

Upon appropriate notification to the receiving state, a consular post of the sending state may, unless the receiving state objects, exercise consular functions in the receiving state on behalf of a third state.

#### ARTICLE 9

##### *Classes of heads of consular posts*

1. Heads of consular posts are divided into four classes, namely:

- (a) consuls-general;
- (b) consuls;
- (c) vice-consuls;
- (d) consular agents.

2. Paragraph 1 of this article in no way restricts the right of any of the Contracting Parties to fix the designation of consular officers other than the heads of consular posts.

#### ARTICLE 10

##### *Appointment and admission of heads of consular posts*

1. Heads of consular posts are appointed by the sending state and are admitted to the exercise of their functions by the receiving state.

2. Subject to the provisions of the present Convention, the formalities for the appointment and for the admission of the head of a consular post are determined by the laws, regulations and usages of the sending state and of the receiving state respectively.

## ARTICLE 11

*The consular commission or notification of appointment*

1. The head of a consular post shall be provided by the sending state with a document, in the form of a commission or similar instrument, made out for each appointment, certifying his capacity and showing, as a general rule, his full name, his category and class, the consular district and the seat of the consular post.

2. The sending state shall transmit the commission or similar instrument through the diplomatic or other appropriate channel to the government of the state in whose territory the head of a consular post is to exercise his functions.

3. If the receiving state agrees, the sending state may, instead of a commission or similar instrument, send to the receiving state a notification containing the particulars required by paragraph 1 of this article.

## ARTICLE 12

*The exequatur*

1. The head of a consular post is admitted to the exercise of his functions by an authorization from the receiving state termed an *exequatur*, whatever the form of this authorization.

2. A state which refuses to grant an *exequatur* is not obliged to give to the sending state reasons for such refusal.

3. Subject to the provisions of Articles 13 and 15, the head of a consular post shall not enter upon his duties until he has received an *exequatur*.

## ARTICLE 13

*Provisional admission of heads of consular posts*

Pending delivery of the *exequatur*, the head of a consular post may be admitted on a provisional basis to the exercise of his functions. In that case, the provisions of the present Convention shall apply.

## ARTICLE 14

*Notification to the authorities of the consular district*

As soon as the head of a consular post is admitted even provisionally to the exercise of his functions, the receiving state shall immediately notify the competent authorities of the consular district. It shall also ensure that the necessary measures are taken to enable the head of a consular post to carry out the duties of his office and to have the benefit of the provisions of the present Convention.

## ARTICLE 15

*Temporary exercise of the functions of the head of a consular post*

1. If the head of a consular post is unable to carry out his functions or the position of head of consular post is vacant, an acting head of post may act provisionally as head of the consular post.

2. The full name of the acting head of post shall be notified either by the diplomatic mission of the sending state or, if that state has no such mission in the receiving state, by the head of the consular post, or, if he is unable to do so, by any competent authority of the sending state, to the Ministry for Foreign Affairs of the receiving state or to the authority designated by that Ministry. As a general rule, this notification shall be given in advance. The receiving state may make the admission as acting head of post of a person who is neither a diplomatic agent nor a consular officer of the sending state in the receiving state conditional on its consent.

3. The competent authorities of the receiving state shall afford assistance and protection to the acting head of post. While he is in charge of the post, the provisions of the present Convention shall apply to him on the same basis as to the head of the consular post concerned. The receiving state shall not, however, be obliged to grant to an acting head of post any facility, privilege or immunity which the head of the consular post enjoys only subject to conditions not fulfilled by the acting head of post.

4. When, in the circumstances referred to in paragraph 1 of this article, a member of the diplomatic staff of the diplomatic mission of the sending state in the receiving state is designated by the sending state as an acting head of post, he shall, if the receiving state does not object thereto, continue to enjoy diplomatic privileges and immunities.

#### ARTICLE 16

##### *Precedence as between heads of consular posts*

1. Heads of consular posts shall rank in each class according to the date of the grant of the *exequatur*.

2. If, however, the head of a consular post before obtaining the *exequatur* is admitted to the exercise of his functions provisionally, his precedence shall be determined according to the date of the provisional admission; this precedence shall be maintained after the granting of the *exequatur*.

3. The order of precedence as between two or more heads of consular posts who obtained the *exequatur* or provisional admission on the same date shall be determined according to the dates on which their commissions or similar instruments or the notifications referred to in paragraph 3 of Article 11 were presented to the receiving state.

4. Acting heads of posts shall rank after all heads of consular posts and, as between themselves, they shall rank according to the dates on which they assumed their functions as acting heads of posts as indicated in the notifications given under paragraph 2 of Article 15.

5. Honorary consular officers who are heads of consular posts shall rank in each class after career heads of consular posts, in the order and according to the rules laid down in the foregoing paragraphs.

6. Heads of consular posts shall have precedence over consular officers not having that status.

## ARTICLE 17

*Performance of diplomatic acts by consular officers*

1. In a state where the sending state has no diplomatic mission and is not represented by a diplomatic mission of a third state, a consular officer may, with the consent of the receiving state, and without affecting his consular status, be authorized to perform diplomatic acts. The performance of such acts by a consular officer shall not confer upon him any right to claim diplomatic privileges and immunities.

2. A consular officer may, after notification addressed to the receiving state, act as representative of the sending state to any inter-governmental organization. When so acting, he shall be entitled to enjoy any privileges and immunities accorded to such a representative by customary international law or by international agreements; however, in respect of the performance by him of any consular function, he shall not be entitled to any greater immunity from jurisdiction than that to which a consular officer is entitled under the present Convention.

## ARTICLE 18

*Appointment of the same person by two or more states  
as a consular officer*

Two or more states may, with the consent of the receiving state, appoint the same person as a consular officer in that state.

## ARTICLE 19

*Appointment of members of consular staff*

1. Subject to the provisions of Articles 20, 22 and 23, the sending state may freely appoint the members of the consular staff.

2. The full name, category and class of all consular officers, other than the head of a consular post, shall be notified by the sending state to the receiving state in sufficient time for the receiving state, if it so wishes, to exercise its rights under paragraph 3 of Article 23.

3. The sending state may, if required by its laws and regulations, request the receiving state to grant an *exequatur* to a consular officer other than the head of a consular post.

4. The receiving state may, if required by its laws and regulations, grant an *exequatur* to a consular officer other than the head of a consular post.

## ARTICLE 20

*Size of the consular staff*

In the absence of an express agreement as to the size of the consular staff, the receiving state may require that the size of the staff be kept within limits considered by it to be reasonable and normal, having regard to circumstances and conditions in the consular district and to the needs of the particular consular post.

## ARTICLE 21

*Precedence as between consular officers of a consular post*

The order of precedence as between the consular officers of a consular post and any change thereof shall be notified by the diplomatic mission of the sending state or, if that state has no such mission in the receiving state, by the head of the consular post, to the Ministry for Foreign Affairs of the receiving state or to the authority designated by that Ministry.

## ARTICLE 22

*Nationality of consular officers*

1. Consular officers should, in principle, have the nationality of the sending state.
2. Consular officers may not be appointed from among persons having the nationality of the receiving state except with the express consent of that state which may be withdrawn at any time.
3. The receiving state may reserve the same right with regard to nationals of a third state who are not also nationals of the sending state.

## ARTICLE 23

*Persons declared non grata*

1. The receiving state may at any time notify the sending state that a consular officer is *persona non grata* or that any other member of the consular staff is not acceptable. In that event, the sending state shall, as the case may be, either recall the person concerned or terminate his functions with the consular post.
2. If the sending state refuses or fails within a reasonable time to carry out its obligations under paragraph 1 of this article, the receiving state may, as the case may be, either withdraw the *exequatur* from the person concerned or cease to consider him as a member of the consular staff.
3. A person appointed as a member of a consular post may be declared unacceptable before arriving in the territory of the receiving state or, if already in the receiving state, before entering on his duties with the consular post. In any such case, the sending state shall withdraw his appointment.
4. In the cases mentioned in paragraphs 1 and 3 of this article, the receiving state is not obliged to give to the sending state reasons for its decision.

## ARTICLE 24

*Notification to the receiving state of appointments,  
arrivals and departures*

1. The Ministry for Foreign Affairs of the receiving state or the authority designated by that Ministry shall be notified of:

- (a) the appointment of members of a consular post, their arrival after appointment to the consular post, their final departure or the termination of their functions and any other changes affecting their status that may occur in the course of their service with the consular post;
- (b) the arrival and final departure of a person belonging to the family of a member of a consular post forming part of his household and, where appropriate, the fact that a person becomes or ceases to be such a member of the family;
- (c) the arrival and final departure of members of the private staff and, where appropriate, the termination of their service as such;
- (d) the engagement and discharge of persons resident in the receiving state as members of a consular post or as members of the private staff entitled to privileges and immunities.

2. When possible, prior notification of arrival and final departure shall also be given.

## SECTION II. END OF CONSULAR FUNCTIONS

### ARTICLE 25

#### *Termination of the functions of a member of a consular post*

The functions of a member of a consular post shall come to an end *inter alia*:

- (a) on notification by the sending state to the receiving state that his functions have come to an end;
- (b) on withdrawal of the *exequatur*;
- (c) on notification by the receiving state to the sending state that the receiving state has ceased to consider him as a member of the consular staff.

### ARTICLE 26

#### *Departure from the territory of the receiving state*

The receiving state shall, even in case of armed conflict, grant to members of the consular post and members of the private staff, other than nationals of the receiving state, and to members of their families forming part of their households irrespective of nationality, the necessary time and facilities to enable them to prepare their departure and to leave at the earliest possible moment after the termination of the functions of the members concerned. In particular, it shall, in case of need, place at their disposal the necessary means of transport for themselves and their property other than property acquired in the receiving state the export of which is prohibited at the time of departure.

## ARTICLE 27

*Protection of consular premises and archives and of the interests of the sending state in exceptional circumstances*

1. In the event of the severance of consular relations between two states:
  - (a) the receiving state shall, even in case of armed conflict, respect and protect the consular premises, together with the property of the consular post and the consular archives;
  - (b) the sending state may entrust the custody of the consular premises, together with the property contained therein and the consular archives, to a third state acceptable to the receiving state;
  - (c) the sending state may entrust the protection of its interests and those of its nationals to a third state acceptable to the receiving state.
2. In the event of the temporary or permanent closure of a consular post, the provisions of sub-paragraph (a) of paragraph 1 of this article shall apply. In addition,
  - (a) if the sending state, although not represented in the receiving state by a diplomatic mission, has another consular post in the territory of that state, that consular post may be entrusted with the custody of the premises of the consular post which has been closed, together with the property contained therein and the consular archives, and, with the consent of the receiving state, with the exercise of consular functions in the district of that consular post; or
  - (b) if the sending state has no diplomatic mission and no other consular post in the receiving state, the provisions of sub-paragraphs (b) and (c) of paragraph 1 of this article shall apply.

CHAPTER II. FACILITIES, PRIVILEGES AND IMMUNITIES RELATING TO  
CONSULAR POSTS, CAREER CONSULAR OFFICERS AND OTHER  
MEMBERS OF A CONSULAR POST

SECTION I. FACILITIES, PRIVILEGES AND IMMUNITIES  
RELATING TO A CONSULAR POST

## ARTICLE 28

*Facilities for the work of the consular post*

The receiving state shall accord full facilities for the performance of the functions of the consular post.

## ARTICLE 29

*Use of national flag and coat-of-arms*

1. The sending state shall have the right to the use of its national flag and coat-of-arms in the receiving state in accordance with the provisions of this article.

2. The national flag of the sending state may be flown and its coat-of-arms displayed on the building occupied by the consular post and at the entrance door thereof, on the residence of the head of the consular post and on his means of transport when used on official business.

3. In the exercise of the right accorded by this article regard shall be had to the laws, regulations and usages of the receiving state.

#### ARTICLE 30

##### *Accommodation*

1. The receiving state shall either facilitate the acquisition on its territory, in accordance with its laws and regulations, by the sending state of premises necessary for its consular post or assist the latter in obtaining accommodation in some other way.

2. It shall also, where necessary, assist the consular post in obtaining suitable accommodation for its members.

#### ARTICLE 31

##### *Inviolability of the consular premises*

1. Consular premises shall be inviolable to the extent provided in this article.

2. The authorities of the receiving state shall not enter that part of the consular premises which is used exclusively for the purpose of the work of the consular post except with the consent of the head of the consular post or of his designee or of the head of the diplomatic mission of the sending state. The consent of the head of the consular post may, however, be assumed in case of fire or other disaster requiring prompt protective action.

3. Subject to the provisions of paragraph 2 of this article, the receiving state is under a special duty to take all appropriate steps to protect the consular premises against any intrusion or damage and to prevent any disturbance of the peace of the consular post or impairment of its dignity.

4. The consular premises, their furnishings, the property of the consular post and its means of transport shall be immune from any form of requisition for purposes of national defence or public utility. If expropriation is necessary for such purposes, all possible steps shall be taken to avoid impeding the performance of consular functions, and prompt, adequate and effective compensation shall be paid to the sending state.

#### ARTICLE 32

##### *Exemption from taxation of consular premises*

1. Consular premises and the residence of the career head of consular post of which the sending state or any person acting on its behalf is the owner or lessee shall be exempt from all national, regional or municipal dues and taxes whatsoever, other than such as represent payment for specific services rendered.



2. The exemption from taxation referred to in paragraph 1 of this article shall not apply to such dues and taxes if, under the law of the receiving state, they are payable by the person who contracted with the sending state or with the person acting on its behalf.

#### ARTICLE 33

##### *Inviolability of the consular archives and documents*

The consular archives and documents shall be inviolable at all times and wherever they may be.

#### ARTICLE 34

##### *Freedom of movement*

Subject to its laws and regulations concerning zones entry into which is prohibited or regulated for reasons of national security, the receiving state shall ensure freedom of movement and travel in its territory to all members of the consular post.

#### ARTICLE 35

##### *Freedom of communication*

1. The receiving state shall permit and protect freedom of communication on the part of the consular post for all official purposes. In communicating with the government, the diplomatic missions and other consular posts, wherever situated, of the sending state, the consular post may employ all appropriate means, including diplomatic or consular couriers, diplomatic or consular bags and messages in code or cipher. However, the consular post may install and use a wireless transmitter only with the consent of the receiving state.

2. The official correspondence of the consular post shall be inviolable. Official correspondence means all correspondence relating to the consular post and its functions.

3. The consular bag shall be neither opened nor detained. Nevertheless, if the competent authorities of the receiving state have serious reason to believe that the bag contains something other than the correspondence, documents or articles referred to in paragraph 4 of this article, they may request that the bag be opened in their presence by an authorized representative of the sending state. If this request is refused by the authorities of the sending state, the bag shall be returned to its place of origin.

4. The packages constituting the consular bag shall bear visible external marks of their character and may contain only official correspondence and documents or articles intended exclusively for official use.

5. The consular courier shall be provided with an official document indicating his status and the number of packages constituting the consular bag. Except with the consent of the receiving state he shall be neither a national of the receiving state, nor, unless he is a national of the sending

state, a permanent resident of the receiving state. In the performance of his functions he shall be protected by the receiving state. He shall enjoy personal inviolability and shall not be liable to any form of arrest or detention.

6. The sending state, its diplomatic missions and its consular posts may designate consular couriers *ad hoc*. In such cases the provisions of paragraph 5 of this article shall also apply except that the immunities therein mentioned shall cease to apply when such a courier has delivered to the consignee the consular bag in his charge.

7. A consular bag may be entrusted to the captain of a ship or of a commercial aircraft scheduled to land at an authorized port of entry. He shall be provided with an official document indicating the number of packages constituting the bag, but he shall not be considered to be a consular courier. By arrangement with the appropriate local authorities, the consular post may send one of its members to take possession of the bag directly and freely from the captain of the ship or of the aircraft.

#### ARTICLE 36

##### *Communication and contact with nationals of the sending state*

1. With a view to facilitating the exercise of consular functions relating to nationals of the sending state:

- (a) consular officers shall be free to communicate with nationals of the sending state and to have access to them. Nationals of the sending state shall have the same freedom with respect to communication with and access to consular officers of the sending state;
- (b) if he so requests, the competent authorities of the receiving state shall, without delay, inform the consular post of the sending state if, within its consular district, a national of that state is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph;
- (c) consular officers shall have the right to visit a national of the sending state who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending state who is in prison, custody or detention in their district in pursuance of a judgment. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action.

2. The rights referred to in paragraph 1 of this article shall be exercised in conformity with the laws and regulations of the receiving state, subject to the proviso, however, that the said laws and regulations must enable

full effect to be given to the purposes for which the rights accorded under this article are intended.

#### ARTICLE 37

##### *Information in cases of deaths, guardianship or trusteeship, wrecks and air accidents*

If the relevant information is available to the competent authorities of the receiving state, such authorities shall have the duty:

- (a) in the case of the death of a national of the sending state, to inform without delay the consular post in whose district the death occurred;
- (b) to inform the competent consular post without delay of any case where the appointment of a guardian or trustee appears to be in the interests of a minor or other person lacking full capacity who is a national of the sending state. The giving of this information shall, however, be without prejudice to the operation of the laws and regulations of the receiving state concerning such appointments;
- (c) if a vessel, having the nationality of the sending state, is wrecked or runs aground in the territorial sea or internal waters of the receiving state, or if an aircraft registered in the sending state suffers an accident on the territory of the receiving state, to inform without delay the consular post nearest to the scene of the occurrence.

#### ARTICLE 38

##### *Communication with the authorities of the receiving state*

In the exercise of their functions, consular officers may address:

- (a) the competent local authorities of their consular district;
- (b) the competent central authorities of the receiving state if and to the extent that this is allowed by the laws, regulations and usages of the receiving state or by the relevant international agreements.

#### ARTICLE 39

##### *Consular fees and charges*

1. The consular post may levy in the territory of the receiving state the fees and charges provided by the laws and regulations of the sending state for consular acts.

2. The sums collected in the form of the fees and charges referred to in paragraph 1 of this article, and the receipts for such fees and charges, shall be exempt from all dues and taxes in the receiving state.

SECTION II. FACILITIES, PRIVILEGES AND IMMUNITIES RELATING TO CAREER  
CONSULAR OFFICERS AND OTHER MEMBERS OF A CONSULAR POST

ARTICLE 40

*Protection of consular officers*

The receiving state shall treat consular officers with due respect and shall take all appropriate steps to prevent any attack on their person, freedom or dignity.

ARTICLE 41

*Personal inviolability of consular officers*

1. Consular officers shall not be liable to arrest or detention pending trial, except in the case of a grave crime and pursuant to a decision by the competent judicial authority.

2. Except in the case specified in paragraph 1 of this article, consular officers shall not be committed to prison or liable to any other form of restriction on their personal freedom save in execution of a judicial decision of final effect.

3. If criminal proceedings are instituted against a consular officer, he must appear before the competent authorities. Nevertheless, the proceedings shall be conducted with the respect due to him by reason of his official position and, except in the case specified in paragraph 1 of this article, in a manner which will hamper the exercise of consular functions as little as possible. When, in the circumstances mentioned in paragraph 1 of this article, it has become necessary to detain a consular officer, the proceedings against him shall be instituted with the minimum of delay.

ARTICLE 42

*Notification of arrest, detention or prosecution*

In the event of the arrest or detention, pending trial, of a member of the consular staff, or of criminal proceedings being instituted against him, the receiving state shall promptly notify the head of the consular post. Should the latter be himself the object of any such measure, the receiving state shall notify the sending state through the diplomatic channel.

ARTICLE 43

*Immunity from jurisdiction*

1. Consular officers and consular employees shall not be amenable to the jurisdiction of the judicial or administrative authorities of the receiving state in respect of acts performed in the exercise of consular functions.

2. The provisions of paragraph 1 of this article shall not, however, apply in respect of a civil action either:

- (a) arising out of a contract concluded by a consular officer or a consular employee in which he did not contract expressly or impliedly as an agent of the sending state;  
or
- (b) by a third party for damage arising from an accident in the receiving state caused by a vehicle, vessel or aircraft.

#### ARTICLE 44

##### *Liability to give evidence*

1. Members of a consular post may be called upon to attend as witnesses in the course of judicial or administrative proceedings. A consular employee or a member of the service staff shall not, except in the cases mentioned in paragraph 3 of this article, decline to give evidence. If a consular officer should decline to do so, no coercive measure or penalty may be applied to him.

2. The authority requiring the evidence of a consular officer shall avoid interference with the performance of his functions. It may, when possible, take such evidence at his residence or at the consular post or accept a statement from him in writing.

3. Members of a consular post are under no obligation to give evidence concerning matters connected with the exercise of their functions or to produce official correspondence and documents relating thereto. They are also entitled to decline to give evidence as expert witnesses with regard to the law of the sending state.

#### ARTICLE 45

##### *Waiver of privileges and immunities*

1. The sending state may waive, with regard to a member of the consular post, any of the privileges and immunities provided for in Articles 41, 43 and 44.

2. The waiver shall in all cases be express, except as provided in paragraph 3 of this article, and shall be communicated to the receiving state in writing.

3. The initiation of proceedings by a consular officer or a consular employee in a matter where he might enjoy immunity from jurisdiction under Article 43 shall preclude him from invoking immunity from jurisdiction in respect of any counter-claim directly connected with the principal claim.

4. The waiver of immunity from jurisdiction for the purposes of civil or administrative proceedings shall not be deemed to imply the waiver of immunity from the measures of execution resulting from the judicial decision; in respect of such measures, a separate waiver shall be necessary.

#### ARTICLE 46

##### *Exemption from registration of aliens and residence permits*

1. Consular officers and consular employees and members of their families forming part of their households shall be exempt from all obligations under

the laws and regulations of the receiving state in regard to the registration of aliens and residence permits.

2. The provisions of paragraph 1 of this article shall not, however, apply to any consular employee who is not a permanent employee of the sending state or who carries on any private gainful occupation in the receiving state or to any member of the family of any such employee.

#### ARTICLE 47

##### *Exemption from work permits*

1. Members of the consular post shall, with respect to services rendered for the sending state, be exempt from any obligations in regard to work permits imposed by the laws and regulations of the receiving state concerning the employment of foreign labour.

2. Members of the private staff of consular officers and of consular employees shall, if they do not carry on any other gainful occupation in the receiving state, be exempt from the obligations referred to in paragraph 1 of this article.

#### ARTICLE 48

##### *Social security exemption*

1. Subject to the provisions of paragraph 3 of this article, members of the consular post with respect to services rendered by them for the sending state, and members of their families forming part of their households, shall be exempt from social security provisions which may be in force in the receiving state.

2. The exemption provided for in paragraph 1 of this article shall apply also to members of the private staff who are in the sole employ of members of the consular post, on condition:

- (a) that they are not nationals of or permanently resident in the receiving state, and
- (b) that they are covered by the social security provisions which are in force in the sending state or a third state.

3. Members of the consular post who employ persons to whom the exemption provided for in paragraph 2 of this article does not apply shall observe the obligations which the social security provisions of the receiving state impose upon employers.

4. The exemption provided for in paragraphs 1 and 2 of this article shall not preclude voluntary participation in the social security system of the receiving state, provided that such participation is permitted by that state.

#### ARTICLE 49

##### *Exemption from taxation*

1. Consular officers and consular employees and members of their families forming part of their households shall be exempt from all dues and taxes, personal or real, national, regional or municipal, except:

- (a) indirect taxes of a kind which are normally incorporated in the price of goods or services;
- (b) dues or taxes on private immovable property situated in the territory of the receiving state, subject to the provisions of Article 32;
- (c) estate, succession or inheritance duties, and duties on transfers, levied by the receiving state, subject to the provisions of paragraph (b) of Article 51;
- (d) dues and taxes on private income, including capital gains, having its source in the receiving state and capital taxes relating to investments made in commercial or financial undertakings in the receiving state;
- (e) charges levied for specific services rendered;
- (f) registration, court or record fees, mortgage dues and stamp duties, subject to the provisions of Article 32.

2. Members of the service staff shall be exempt from dues and taxes on the wages which they receive for their services.

3. Members of the consular post who employ persons whose wages or salaries are not exempt from income tax in the receiving state shall observe the obligations which the laws and regulations of that state impose upon employers concerning the levying of income tax.

## ARTICLE 50

### *Exemption from customs duties and inspection*

1. The receiving state shall, in accordance with such laws and regulations as it may adopt, permit entry of and grant exemption from all customs duties, taxes, and related charges other than charges for storage, cartage and similar services, on:

- (a) articles for the official use of the consular post;
- (b) articles for the personal use of a consular officer or members of his family forming part of his household, including articles intended for his establishment. The articles intended for consumption shall not exceed the quantities necessary for direct utilization by the persons concerned.

2. Consular employees shall enjoy the privileges and exemptions specified in paragraph 1 of this article in respect of articles imported at the time of first installation.

3. Personal baggage accompanying consular officers and members of their families forming part of their households shall be exempt from inspection. It may be inspected only if there is serious reason to believe that it contains articles other than those referred to in sub-paragraph (b) of paragraph 1 of this article, or articles the import or export of which is prohibited by the laws and regulations of the receiving state or which are subject to its quarantine laws and regulations. Such inspection shall be

carried out in the presence of the consular officer or member of his family concerned.

#### ARTICLE 51

##### *Estate of a member of the consular post or of a member of his family*

In the event of the death of a member of the consular post or of a member of his family forming part of his household, the receiving state:

- (a) shall permit the export of the movable property of the deceased, with the exception of any such property acquired in the receiving state the export of which was prohibited at the time of his death;
- (b) shall not levy national, regional or municipal estate, succession or inheritance duties, and duties on transfers, on movable property the presence of which in the receiving state was due solely to the presence in that state of the deceased as a member of the consular post or as a member of the family of a member of the consular post.

#### ARTICLE 52

##### *Exemption from personal services and contributions*

The receiving state shall exempt members of the consular post and members of their families forming part of their households from all personal services, from all public service of any kind whatsoever, and from military obligations such as those connected with requisitioning, military contributions and billeting.

#### ARTICLE 53

##### *Beginning and end of consular privileges and immunities*

1. Every member of the consular post shall enjoy the privileges and immunities provided in the present Convention from the moment he enters the territory of the receiving state on proceeding to take up his post or, if already in its territory, from the moment when he enters on his duties with the consular post.

2. Members of the family of a member of the consular post forming part of his household and members of his private staff shall receive the privileges and immunities provided in the present Convention from the date from which he enjoys privileges and immunities in accordance with paragraph 1 of this article or from the date of their entry into the territory of the receiving state or from the date of their becoming a member of such family or private staff, whichever is the latest.

3. When the functions of a member of the consular post have come to an end, his privileges and immunities and those of a member of his family forming part of his household or a member of his private staff shall normally cease at the moment when the person concerned leaves the receiving state or on the expiry of a reasonable period in which to do so, whichever is the sooner; but shall subsist until that time, even in case of



armed conflict. In the case of the persons referred to in paragraph 2 of this article, their privileges and immunities shall come to an end when they cease to belong to the household or to be in the service of a member of the consular post provided, however, that if such persons intend leaving the receiving state within a reasonable period thereafter, their privileges and immunities shall subsist until the time of their departure.

4. However, with respect to acts performed by a consular officer or a consular employee in the exercise of his functions, immunity from jurisdiction shall continue to subsist without limitation of time.

5. In the event of the death of a member of the consular post, the members of his family forming part of his household shall continue to enjoy the privileges and immunities accorded to them until they leave the receiving state or until the expiry of a reasonable period enabling them to do so, whichever is the sooner.

#### ARTICLE 54

##### *Obligations of third states*

1. If a consular officer passes through or is in the territory of a third state, which has granted him a visa if a visa was necessary, while proceeding to take up or return to his post or when returning to the sending state, the third state shall accord to him all immunities provided for by the other articles of the present Convention as may be required to ensure his transit or return. The same shall apply in the case of any member of his family forming part of his household enjoying such privileges and immunities who are accompanying the consular officer or travelling separately to join him or to return to the sending state.

2. In circumstances similar to those specified in paragraph 1 of this article, third states shall not hinder the transit through their territory of other members of the consular post or of members of their families forming part of their households.

3. Third states shall accord to official correspondence and to other official communications in transit, including messages in code or cipher, the same freedom and protection as the receiving state is bound to accord under the present Convention. They shall accord to consular couriers who have been granted a visa, if a visa was necessary, and to consular bags in transit, the same inviolability and protection as the receiving state is bound to accord under the present Convention.

4. The obligations of third states under paragraphs 1, 2 and 3 of this article shall also apply to the persons mentioned respectively in those paragraphs, and to official communications and to consular bags, whose presence in the territory of the third state is due to *force majeure*.

#### ARTICLE 55

##### *Respect for the laws and regulations of the receiving state*

1. Without prejudice to their privileges and immunities, it is the duty of all persons enjoying such privileges and immunities to respect the laws and

regulations of the receiving state. They also have a duty not to interfere in the internal affairs of that state.

2. The consular premises shall not be used in any manner incompatible with the exercise of consular functions.

3. The provisions of paragraph 2 of this article shall not exclude the possibility of offices of other institutions or agencies being installed in part of the building in which the consular premises are situated, provided that the premises assigned to them are separate from those used by the consular post. In that event, the said offices shall not, for the purposes of the present Convention, be considered to form part of the consular premises.

#### ARTICLE 56

##### *Insurance against third party risks*

Members of the consular post shall comply with any requirement imposed by the laws and regulations of the receiving state in respect of insurance against third party risks arising from the use of any vehicle, vessel or aircraft.

#### ARTICLE 57

##### *Special provisions concerning private gainful occupation*

1. Career consular officers shall not carry on for personal profit any professional or commercial activity in the receiving state.

2. Privileges and immunities provided in this chapter shall not be accorded:

- (a) to consular employees or to members of the service staff who carry on any private gainful occupation in the receiving state;
- (b) to members of the family of a person referred to in sub-paragraph (a) of this paragraph or to members of his private staff;
- (c) to members of the family of a member of a consular post who themselves carry on any private gainful occupation in the receiving state.

#### CHAPTER III. REGIME RELATING TO HONORARY CONSULAR OFFICERS AND CONSULAR POSTS HEADED BY SUCH OFFICERS

#### ARTICLE 58

##### *General provisions relating to facilities, privileges and immunities*

1. Articles 28, 29, 30, 34, 35, 36, 37, 38 and 39, paragraph 3 of Article 54 and paragraphs 2 and 3 of Article 55 shall apply to consular posts headed by an honorary consular officer. In addition, the facilities, privileges and immunities of such consular posts shall be governed by Articles 59, 60, 61 and 62.

2. Articles 42 and 43, paragraph 3 of Article 44, Articles 45 and 53 and paragraph 1 of Article 55 shall apply to honorary consular officers. In addition, the facilities, privileges and immunities of such consular officers shall be governed by Articles 63, 64, 65, 66 and 67.

3. Privileges and immunities provided in the present Convention shall not be accorded to members of the family of an honorary consular officer or of a consular employee employed at a consular post headed by an honorary consular officer.

4. The exchange of consular bags between two consular posts headed by honorary consular officers in different states shall not be allowed without the consent of the two receiving states concerned.

#### ARTICLE 59

##### *Protection of the consular premises*

The receiving state shall take such steps as may be necessary to protect the consular premises of a consular post headed by an honorary consular officer against any intrusion or damage and to prevent any disturbance of the peace of the consular post or impairment of its dignity.

#### ARTICLE 60

##### *Exemption from taxation of consular premises*

1. Consular premises of a consular post headed by an honorary consular officer of which the sending state is the owner or lessee shall be exempt from all national, regional or municipal dues and taxes whatsoever, other than such as represent payment for specific services rendered.

2. The exemption from taxation referred to in paragraph 1 of this article shall not apply to such dues and taxes if, under the laws and regulations of the receiving state, they are payable by the person who contracted with the sending state.

#### ARTICLE 61

##### *Inviolability of consular archives and documents*

The consular archives and documents of a consular post headed by an honorary consular officer shall be inviolable at all times and wherever they may be, provided that they are kept separate from other papers and documents and, in particular, from the private correspondence of the head of a consular post and of any person working with him, and from the materials, books or documents relating to their profession or trade.

#### ARTICLE 62

##### *Exemption from customs duties*

The receiving state shall, in accordance with such laws and regulations as it may adopt, permit entry of, and grant exemption from all customs duties, taxes, and related charges other than charges for storage, cartage

and similar services on, the following articles, provided that they are for the official use of a consular post headed by an honorary consular officer: coats-of-arms, flags, signboards, seals and stamps, books, official printed matter, office furniture, office equipment and similar articles supplied by or at the instance of the sending state to the consular post.

#### ARTICLE 63

##### *Criminal proceedings*

If criminal proceedings are instituted against an honorary consular officer, he must appear before the competent authorities. Nevertheless, the proceedings shall be conducted with the respect due to him by reason of his official position and, except when he is under arrest or detention, in a manner which will hamper the exercise of consular functions as little as possible. When it has become necessary to detain an honorary consular officer, the proceedings against him shall be instituted with the minimum of delay.

#### ARTICLE 64

##### *Protection of honorary consular officers*

The receiving state is under a duty to accord to an honorary consular officer such protection as may be required by reason of his official position.

#### ARTICLE 65

##### *Exemption from registration of aliens and residence permits*

Honorary consular officers, with the exception of those who carry on for personal profit any professional or commercial activity in the receiving state, shall be exempt from all obligations under the laws and regulations of the receiving state in regard to the registration of aliens and residence permits.

#### ARTICLE 66

##### *Exemption from taxation*

An honorary consular officer shall be exempt from all dues and taxes on the remuneration and emoluments which he receives from the sending state in respect of the exercise of consular functions.

#### ARTICLE 67

##### *Exemption from personal services and contributions*

The receiving state shall exempt honorary consular officers from all personal services and from all public services of any kind whatsoever and from military obligations such as those connected with requisitioning, military contributions and billeting.

## ARTICLE 68

*Optional character of the institution of honorary consular officers*

Each state is free to decide whether it will appoint or receive honorary consular officers.

## CHAPTER IV. GENERAL PROVISIONS

## ARTICLE 69

*Consular agents who are not heads of consular posts*

1. Each state is free to decide whether it will establish or admit consular agencies conducted by consular agents not designated as heads of consular post by the sending state.

2. The conditions under which the consular agencies referred to in paragraph 1 of this article may carry on their activities and the privileges and immunities which may be enjoyed by the consular agents in charge of them shall be determined by agreement between the sending state and the receiving state.

## ARTICLE 70

*Exercise of consular functions by diplomatic missions*

1. The provisions of the present Convention apply also, so far as the context permits, to the exercise of consular functions by a diplomatic mission.

2. The names of members of a diplomatic mission assigned to the consular section or otherwise charged with the exercise of the consular functions of the mission shall be notified to the Ministry for Foreign Affairs of the receiving state or to the authority designated by that Ministry.

3. In the exercise of consular functions a diplomatic mission may address:

- (a) the local authorities of the consular district;
- (b) the central authorities of the receiving state if this is allowed by the laws, regulations and usages of the receiving state or by relevant international agreements.

4. The privileges and immunities of the members of a diplomatic mission referred to in paragraph 2 of this article shall continue to be governed by the rules of international law concerning diplomatic relations.

## ARTICLE 71

*Nationals or permanent residents of the receiving state*

1. Except in so far as additional facilities, privileges and immunities may be granted by the receiving state, consular officers who are nationals of or permanently resident in the receiving state shall enjoy only immunity from jurisdiction and personal inviolability in respect of official acts performed in the exercise of their functions, and the privilege provided in

paragraph 3 of Article 44. So far as these consular officers are concerned, the receiving state shall likewise be bound by the obligation laid down in Article 42. If criminal proceedings are instituted against such a consular officer, the proceedings shall, except when he is under arrest or detention, be conducted in a manner which will hamper the exercise of consular functions as little as possible.

2. Other members of the consular post who are nationals of or permanently resident in the receiving state and members of their families, as well as members of the families of consular officers referred to in paragraph 1 of this article, shall enjoy facilities, privileges and immunities only in so far as these are granted to them by the receiving state. Those members of the families of members of the consular post and those members of the private staff who are themselves nationals of or permanently resident in the receiving state shall likewise enjoy facilities, privileges and immunities only in so far as these are granted to them by the receiving state. The receiving state shall, however, exercise its jurisdiction over those persons in such a way as not to hinder unduly the performance of the functions of the consular post.

#### ARTICLE 72

##### *Non-discrimination*

1. In the application of the provisions of the present Convention the receiving state shall not discriminate as between states.

2. However, discrimination shall not be regarded as taking place:

- (a) where the receiving state applies any of the provisions of the present Convention restrictively because of a restrictive application of that provision to its consular posts in the sending state;
- (b) where by custom or agreement states extend to each other more favourable treatment than is required by the provisions of the present Convention.

#### ARTICLE 73

##### *Relationship between the present Convention and other international agreements*

1. The provisions of the present Convention shall not affect other international agreements in force as between states parties to them.

2. Nothing in the present Convention shall preclude states from concluding international agreements confirming or supplementing or extending or amplifying the provisions thereof.

#### CHAPTER V. FINAL PROVISIONS

#### ARTICLE 74

##### *Signature*

The present Convention shall be open for signature by all states Members of the United Nations or of any of the specialized agencies or parties to the Statute of the International Court of Justice, and by any other state in-

vited by the General Assembly of the United Nations to become a party to the Convention, as follows until 31 October 1963 at the Federal Ministry for Foreign Affairs of the Republic of Austria and subsequently, until 31 March 1964, at the United Nations Headquarters in New York.

#### ARTICLE 75

##### *Ratification*

The present Convention is subject to ratification. The instruments of ratification shall be deposited with the Secretary-General of the United Nations.

#### ARTICLE 76

##### *Accession*

The present Convention shall remain open for accession by any state belonging to any of the four categories mentioned in Article 74. The instruments of accession shall be deposited with the Secretary-General of the United Nations.

#### ARTICLE 77

##### *Entry into force*

1. The present Convention shall enter into force on the thirtieth day following the date of deposit of the twenty-second instrument of ratification or accession with the Secretary-General of the United Nations.

2. For each state ratifying or acceding to the Convention after the deposit of the twenty-second instrument of ratification or accession, the Convention shall enter into force on the thirtieth day after deposit by such state of its instrument of ratification or accession.

#### ARTICLE 78

##### *Notifications by the Secretary-General*

The Secretary-General of the United Nations shall inform all states belonging to any of the four categories mentioned in Article 74:

- (a) of signatures to the present Convention and of the deposit of instruments of ratification or accession, in accordance with Articles 74, 75 and 76;
- (b) of the date on which the present Convention will enter into force, in accordance with Article 77.

#### ARTICLE 79

##### *Authentic texts*

The original of the present Convention, of which the Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations, who shall send certified copies thereof to all states belonging to any of the four categories mentioned in Article 74.

IN WITNESS WHEREOF the undersigned Plenipotentiaries, being duly authorized thereto by their respective governments, have signed the present Convention.

DONE AT VIENNA, this twenty-fourth day of April, one thousand nine hundred and sixty-three.

[Signed on behalf of Argentina, Austria, Brazil, Central African Republic, Chile, China, Colombia, Congo (Brazzaville), Congo (Léopoldville), Cuba, Dahomey, Denmark, Dominican Republic, France, Gabon, Ghana, Holy See, Iran, Ireland, Ivory Coast, Lebanon, Liberia, Liechtenstein, Niger, Norway, Peru, Philippines, United States, Upper Volta, Uruguay, Venezuela and Yugoslavia.]

#### OPTIONAL PROTOCOL CONCERNING ACQUISITION OF NATIONALITY<sup>1</sup>

*Signed at Vienna, April 24, 1963*

*The States Parties to the present Protocol and to the Vienna Convention on Consular Relations, hereinafter referred to as "the Convention", adopted by the United Nations Conference held at Vienna from 4 March to 22 April 1963,*

*Expressing their wish to establish rules between them concerning acquisition of nationality by members of the consular post and by members of their families forming part of their households,*

*Have agreed as follows:*

##### ARTICLE I

For the purposes of the present Protocol, the expression "members of the consular post" shall have the meaning assigned to it in sub-paragraph (g) of paragraph 1 of Article 1 of the Convention, namely, "consular officers, consular employees and members of the service staff".

##### ARTICLE II

Members of the consular post not being nationals of the receiving state, and members of their families forming part of their households, shall not, solely by the operation of the law of the receiving state, acquire the nationality of that state.

##### ARTICLE III

The present Protocol shall be open for signature by all states which may become parties to the Convention, as follows: until 31 October 1963 at the Federal Ministry for Foreign Affairs of the Republic of Austria and, subsequently, until 31 March 1964, at the United Nations Headquarters in New York.

##### ARTICLE IV

The present Protocol is subject to ratification. The instruments of ratification shall be deposited with the Secretary-General of the United Nations.

<sup>1</sup> U.N. Doc. A/CONF.25/14, April 23, 1963.



## ARTICLE V

The present Protocol shall remain open for accession by all states which may become parties to the Convention. The instruments of accession shall be deposited with the Secretary-General of the United Nations.

## ARTICLE VI

1. The present Protocol shall enter into force on the same day as the Convention or on the thirtieth day following the date of deposit of the second instrument of ratification or accession to the Protocol with the Secretary-General of the United Nations, whichever date is the later.

2. For each state ratifying or acceding to the present Protocol after its entry into force in accordance with paragraph 1 of this article, the Protocol shall enter into force on the thirtieth day after deposit by such state of its instrument of ratification or accession.

## ARTICLE VII

The Secretary-General of the United Nations shall inform all states which may become parties to the Convention:

- (a) of signatures to the present Protocol and of the deposit of instruments of ratification or accession, in accordance with Articles III, IV and V;
- (b) of the date on which the present Protocol will enter into force, in accordance with Article VI.

## ARTICLE VIII

The original of the present Protocol, of which the Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations, who shall send certified copies thereof to all states referred to in Article III.

IN WITNESS WHEREOF the undersigned Plenipotentiaries, being duly authorized thereto by their respective governments, have signed the present Protocol.

DONE AT VIENNA, this twenty-fourth day of April, one thousand nine hundred and sixty-three.

OPTIONAL PROTOCOL CONCERNING THE COMPULSORY  
SETTLEMENT OF DISPUTES<sup>a</sup>

*Signed at Vienna, April 24, 1963*

*The States Parties to the present Protocol and to the Vienna Convention on Consular Relations, hereinafter referred to as "the Convention", adopted by the United Nations Conference held at Vienna from 4 March to 22 April 1963,*

*Expressing their wish to resort in all matters concerning them in respect of any dispute arising out of the interpretation or application of the Con-*

<sup>a</sup> U.N. Doc. A/CONF.25/15, April 23, 1963.

vention to the compulsory jurisdiction of the International Court of Justice, unless some other form of settlement has been agreed upon by the parties within a reasonable period,

*Have agreed* as follows:

#### ARTICLE I

Disputes arising out of the interpretation or application of the Convention shall lie within the compulsory jurisdiction of the International Court of Justice and may accordingly be brought before the Court by an application made by any party to the dispute being a party to the present Protocol.

#### ARTICLE II

The parties may agree, within a period of two months after one party has notified its opinion to the other that a dispute exists, to resort not to the International Court of Justice but to an arbitral tribunal. After the expiry of the said period, either party may bring the dispute before the Court by an application.

#### ARTICLE III

1. Within the same period of two months, the parties may agree to adopt a conciliation procedure before resorting to the International Court of Justice.

2. The conciliation commission shall make its recommendations within five months after its appointment. If its recommendations are not accepted by the parties to the dispute within two months after they have been delivered, either party may bring the dispute before the Court by an application.

#### ARTICLE IV

States parties to the Convention, to the Optional Protocol concerning Acquisition of Nationality, and to the present Protocol may at any time declare that they will extend the provisions of the present Protocol to disputes arising out of the interpretation or application of the Optional Protocol concerning Acquisition of Nationality. Such declarations shall be notified to the Secretary-General of the United Nations.

#### ARTICLE V

The present Protocol shall be open for signature by all states which may become parties to the Convention as follows: until 31 October 1963 at the Federal Ministry for Foreign Affairs of the Republic of Austria and, subsequently, until 31 March 1964, at the United Nations Headquarters in New York.

#### ARTICLE VI

The present Protocol is subject to ratification. The instruments of ratification shall be deposited with the Secretary-General of the United Nations.

## ARTICLE VII

The present Protocol shall remain open for accession by all states which may become parties to the Convention. The instruments of accession shall be deposited with the Secretary-General of the United Nations.

## ARTICLE VIII

1. The present Protocol shall enter into force on the same day as the Convention or on the thirtieth day following the date of deposit of the second instrument of ratification or accession to the Protocol with the Secretary-General of the United Nations, whichever date is the later.

2. For each state ratifying or acceding to the present Protocol after its entry into force in accordance with paragraph 1 of this article, the Protocol shall enter into force on the thirtieth day after deposit by such state of its instrument of ratification or accession.

## ARTICLE IX

The Secretary-General of the United Nations shall inform all states which may become parties to the Convention:

- (a) of signatures to the present Protocol and of the deposit of instruments of ratification or accession, in accordance with Articles V, VI and VII;
- (b) of declarations made in accordance with Article IV of the present Protocol;
- (c) of the date on which the present Protocol will enter into force, in accordance with Article VIII.

## ARTICLE X

The original of the present Protocol, of which the Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations, who shall send certified copies thereof to all states referred to in Article V.

IN WITNESS WHEREOF the undersigned Plenipotentiaries, being duly authorised thereto by their respective governments, have signed the present Protocol.

DONE AT VIENNA, this twenty-fourth day of April, one thousand nine hundred and sixty-three.

[Signed on behalf of Argentina, Austria, Central African Republic, Chile, China, Colombia, Congo (Brazzaville), Congo (Léopoldville), Dahomey, Denmark, Dominican Republic, France, Gabon, Ghana, Ireland, Ivory Coast, Lebanon, Liberia, Liechtenstein, Niger, Norway, Peru, Philippines, United States, Upper Volta, Uruguay, and Yugoslavia.]

UNITED STATES-UNITED KINGDOM-UNION OF SOVIET  
SOCIALIST REPUBLICS

TREATY BANNING NUCLEAR WEAPON TESTS IN THE  
ATMOSPHERE, IN OUTER SPACE AND  
UNDER WATER<sup>1</sup>

*Signed at Moscow August 5, 1963; in force October 10, 1963*

The Governments of the United States of America, the United Kingdom of Great Britain and Northern Ireland, and the Union of Soviet Socialist Republics, hereinafter referred to as the "Original Parties",

Proclaiming as their principal aim the speediest possible achievement of an agreement on general and complete disarmament under strict international control in accordance with the objectives of the United Nations which would put an end to the armaments race and eliminate the incentive to the production and testing of all kinds of weapons, including nuclear weapons,

Seeking to achieve the discontinuance of all test explosions of nuclear weapons for all time, determined to continue negotiations to this end, and desiring to put an end to the contamination of man's environment by radioactive substances,

Have agreed as follows:

ARTICLE I

1. Each of the Parties to this Treaty undertakes to prohibit, to prevent, and not to carry out any nuclear weapon test explosion, or any other nuclear explosion, at any place under its jurisdiction or control:

(a) in the atmosphere; beyond its limits, including outer space; or underwater, including territorial waters or high seas; or

(b) in any other environment if such explosion causes radioactive debris to be present outside the territorial limits of the state under whose jurisdiction or control such explosion is conducted. It is understood in this connection that the provisions of this subparagraph are without prejudice to the conclusion of a treaty resulting in the permanent banning of all nuclear test explosions, including all such explosions underground, the conclusion of which, as the Parties have stated in the Preamble to this Treaty, they seek to achieve.

2. Each of the Parties to this Treaty undertakes furthermore to refrain from causing, encouraging, or in any way participating in, the carrying out of any nuclear weapon test explosion, or any other nuclear explosion, anywhere which would take place in any of the environments described, or have the effect referred to, in paragraph 1 of this article.

ARTICLE II

1. Any Party may propose amendments to this Treaty. The text of any proposed amendment shall be submitted to the Depositary Governments

<sup>1</sup> White House Press Release, July 25, 1963; 49 Department of State Bulletin 239 (1963); Sen. Exec. M., 88th Cong., 1st Sess.

which shall circulate it to all Parties to this Treaty. Thereafter, if requested to do so by one-third or more of the Parties, the Depositary Governments shall convene a conference, to which they shall invite all the Parties, to consider such amendment.

2. Any amendment to this Treaty must be approved by a majority of the votes of all the Parties to this Treaty, including the votes of all of the Original Parties. The amendment shall enter into force for all Parties upon the deposit of instruments of ratification by a majority of all the Parties, including the instruments of ratification of all of the Original Parties.

### ARTICLE III

1. This Treaty shall be open to all states for signature. Any state which does not sign this Treaty before its entry into force in accordance with paragraph 3 of this article may accede to it at any time.

2. This Treaty shall be subject to ratification by signatory states. Instruments of ratification and instruments of accession shall be deposited with the Governments of the Original Parties—the United States of America, the United Kingdom of Great Britain and Northern Ireland, and the Union of Soviet Socialist Republics—which are hereby designated the Depositary Governments.

3. This Treaty shall enter into force after its ratification by all the Original Parties and the deposit of their instruments of ratification.

4. For states whose instruments of ratification or accession are deposited subsequent to the entry into force of this Treaty, it shall enter into force on the date of the deposit of their instruments of ratification or accession.

5. The Depositary Governments shall promptly inform all signatory and acceding states of the date of each signature, the date of deposit of each instrument of ratification of and accession to this Treaty, the date of its entry into force, and the date of receipt of any requests for conferences or other notices.

6. This Treaty shall be registered by the Depositary Governments pursuant to Article 102 of the Charter of the United Nations.

### ARTICLE IV

This Treaty shall be of unlimited duration.

Each Party shall in exercising its national sovereignty have the right to withdraw from the Treaty if it decides that extraordinary events, related to the subject matter of this Treaty, have jeopardized the supreme interests of its country. It shall give notice of such withdrawal to all other Parties to the Treaty three months in advance.

### ARTICLE V

This Treaty, of which the English and Russian texts are equally authentic, shall be deposited in the archives of the Depositary Governments.

Duly certified copies of this Treaty shall be transmitted by the Depositary Governments to the governments of the signatory and acceding states.

IN WITNESS WHEREOF the undersigned, duly authorized, have signed this Treaty.

DONE in triplicate at the city of Moscow the fifth day of August, one thousand nine hundred and sixty-three.

For the Government of the United States of America:

DEAN RUSK

WAH

For the Government of the United Kingdom of Great Britain and Northern Ireland:

HOME

H

For the Government of the Union of Soviet Socialist Republics:

A. GROMYKO

A.G.

*[Released on July 25, 1963]*

#### AGREED COMMUNIQUE

The special representatives of the President of the United States of America and of the Prime Minister of the United Kingdom, W. Averell Harriman, Under Secretary of State for Political Affairs of the United States, and Lord Hailsham, Lord President of the Council and Minister of Science for the United Kingdom, visited Moscow together with their advisers on July 14. Mr. Harriman and Lord Hailsham were received by the Chairman of the Council of Ministers of the Union of Soviet Socialist Republics, N. S. Khrushchev, who presided on July 15 at the first of a series of meetings to discuss questions relating to the discontinuance of nuclear tests, and other questions of mutual interest. The discussions were continued from July 16 to July 25 with A. A. Gromyko, Minister of Foreign Affairs of the Union of Soviet Socialist Republics. During these discussions each principal was assisted by his advisers.

The discussions took place in a businesslike, cordial atmosphere. Agreement was reached on the text of a treaty banning nuclear weapons tests in the atmosphere, in outer space and under water. This text is being published separately and simultaneously with this communique. It was initialed on July 25 by A. A. Gromyko, Mr. Harriman and Lord Hailsham. Mr. Harriman and Lord Hailsham together with their advisers will leave Moscow shortly to report and bring back the initialed texts to their respective Governments. Signature of the treaty is expected to take place in the near future in Moscow.

The heads of the three delegations agreed that the test ban treaty constituted an important first step toward the reduction of international tension and the strengthening of peace, and they look forward to further progress in this direction.

The heads of the three delegations discussed the Soviet proposal relating to a pact of non-aggression between the participants in the North Atlantic

Treaty Organization and the participants in the Warsaw Treaty. The three Governments have agreed fully to inform their respective allies in the two organizations concerning these talks and to consult with them about continuing discussions on this question with the purpose of achieving agreement satisfactory to all participants. A brief exchange of views also took place with regard to other measures, directed at a relaxation of tension.

**COMPROMIS OF ARBITRATION BETWEEN THE GOVERN-  
MENT OF THE UNITED STATES OF AMERICA AND THE  
GOVERNMENT OF THE FRENCH REPUBLIC RELAT-  
ING TO THE AGREEMENT OF MARCH 27, 1946,  
AS AMENDED <sup>1</sup>**

*Signed at Paris, January 22, 1963; in force same date*

The Government of the United States of America and the Government of the French Republic:

Considering:

1. That there is a dispute between them relevant to the interpretation of the Air Transport Services Agreement between the United States of America and France, signed at Paris on March 27, 1946, and of its Annex; <sup>2</sup>
2. That they have been unable to settle this dispute through consultation;
3. That Article X of the Air Transport Services Agreement as amended <sup>3</sup> provides that:

“Except as otherwise provided in this Agreement or its Annex, any dispute between the Contracting Parties relative to the interpretation or application of this Agreement or its Annex which can not be settled through consultation shall be submitted for an advisory report to a tribunal of three arbitrators, one to be named by each Contracting Party, and the third to be agreed upon by the two arbitrators so chosen, provided that such third arbitrator shall not be a national of either Contracting Party. Each of the Contracting Parties shall designate an arbitrator within two months of the date of delivery by either Party to the other Party of a diplomatic note requesting arbitration of a dispute; and the third arbitrator shall be agreed upon within one month after such period of two months.

“If either of the Contracting Parties fails to designate its own arbitrator within two months, or if the third arbitrator is not agreed upon within the time limit indicated, the President of the International Court of Justice shall be requested to make the necessary appointments by choosing the arbitrator or arbitrators, after consulting the President of the Council of the International Civil Aviation Organization.

<sup>1</sup> T.I.A.S., No. 5280.

<sup>2</sup> T.I.A.S., No. 1679; 61 Stat. (Pt. 4) 3445, 3456.

<sup>3</sup> T.I.A.S., No. 2257; 2 U. S. Treaties 1033.

"The Contracting Parties will use their best efforts under the powers available to them to put into effect the opinion expressed in any such advisory report. A moiety of the expenses of the arbitral tribunal shall be borne by each Party."

and

4. That the Government of the United States of America on October 12, 1962 submitted to the Government of France a diplomatic note<sup>4</sup> requesting arbitration of this dispute;

Have decided to submit the dispute to an arbitral tribunal<sup>5</sup> and for this purpose have agreed as follows:

#### ARTICLE I

The Tribunal is requested to decide the following questions:

1. Under the provisions of the Air Transport Services Agreement between the United States of America and France, and in particular the terms of Route 1 of Schedule II of the Annex to that Agreement, does a United States airline have the right to provide international aviation services between the United States and Turkey via Paris and does it have the right to carry traffic which is embarked in Paris and disembarked at Istanbul, Ankara or other points in Turkey, or embarked at Istanbul, Ankara or other points in Turkey and disembarked at Paris?

2. Under the provisions of the Air Transport Services Agreement between the United States of America and France, and in particular the terms of Route 1 of Schedule II of the Annex to that Agreement, does a United States airline have the right to provide international aviation services between the United States and Iran via Paris and does it have the right to carry traffic which is embarked in Paris and disembarked at Tehran or other points in Iran, or embarked in Tehran or other points in Iran and disembarked at Paris?

#### ARTICLE II

Each Party shall be represented before the Tribunal by an agent who shall be responsible for its part in the proceedings. Each agent may nominate a deputy to act for him and may be assisted by such advisors, counsel, and staff as he deems necessary. Each Party shall communicate the name and address of its respective agent and deputy to the other Party and to the members of the Tribunal.

#### ARTICLE III

A) The proceedings shall consist of written pleadings and oral hearings.

B) The written pleadings shall be limited, unless the Tribunal otherwise directs, to the following documents:

<sup>4</sup> Not printed here.

<sup>5</sup> The United States Government has designated Professor Milton Katz as its arbitrator. The French Government has designated Professor Paul Reuter. The third arbitrator, who has been appointed by the President of the International Court of Justice, is Professor Roberto Ago.



1. A memorial, which shall be submitted by the Government of the United States of America to the French agent within four weeks after the date of signature of this Agreement;

2. A counter-memorial, which shall be submitted by the Government of France to the United States agent within four weeks after the date of submission of the United States memorial;

3. A reply, which shall be submitted by the Government of the United States of America to the French agent within three weeks after the date of submission of the French counter-memorial;

4. A surrejoinder, which shall be submitted by the French Government to the United States agent within three weeks after the date of the submission of the American reply.

Each document shall be communicated to each member of the Tribunal and to the other Party in six copies and shall not be made public, except as provided in paragraph B of Article VI of this Compromis. Any written document shall annex the originals, if obtainable, or copies of all such documents, except for those which have already been published.

C) The oral hearings shall be held at a time to be fixed by the President of the Tribunal and shall be held in private at such place and time as the Tribunal may determine.

D) The Tribunal may extend the above time limits at the request of either Party for good cause shown.

#### ARTICLE IV

A) The Parties shall present their written pleadings and any other documents to the Tribunal in English or in French.

B) The Parties shall present their oral arguments in English or in French. The Tribunal shall make the necessary arrangements for interpretation of the oral pleadings.

C) The Tribunal shall provide for the keeping of a verbatim record of all oral hearings.

#### ARTICLE V

A) The Tribunal shall, subject to the provisions of this Compromis, determine its own procedure and all questions affecting the conduct of the arbitration.

B) The decisions of the Tribunal on all questions, whether of substance or procedure, shall be determined by a majority vote of its members.

C) The Tribunal, after consultation with the two agents, shall arrange for a place of hearing, and may engage such technical, secretarial, and clerical staff and obtain such services and equipment as may be necessary.

#### ARTICLE VI

A) The Tribunal shall render its decision after the date of the closing of the oral hearings. The conclusions of the Tribunal may be adopted by a majority vote of the members. The decision shall state the reasons of

the members for the conclusions reached, and shall include the dissenting opinion of any member. A signed copy of the decision shall be immediately communicated to each of the agents.

B) The decision shall be made public at a date agreed upon by the Parties. The record shall not be made public except by agreement of the Parties.

#### ARTICLE VII

Any dispute between the Parties as to the interpretation of the decision shall, at the request of either Party, and within four weeks after the rendering of the decision, be referred to the Tribunal for clarification.

#### ARTICLE VIII

A) Each Party shall be responsible for the remuneration and other expenses of the member of the Tribunal whom it has nominated, and shall bear its own expenses incurred in and for the preparation of its case.

B) The remuneration of the third member who has been selected by the two members nominated by the Parties, or by the President of the International Court of Justice, as the case may be, and all general expenses of the arbitration, shall be borne equally by the Parties. The Tribunal shall keep a record and render a final account of all general expenses.

#### ARTICLE IX

The provisions of Articles 59, 60 paragraph 3, 63 paragraph 3, and 64 to 84 of the Convention of October 18, 1907 for the pacific settlement of international differences [sic] \* shall be applicable with respect to any points which are not covered by the present Compromis. The Parties reserve the right to have recourse to the privilege provided for in paragraph 1 of Article 83. They will, in such case, exercise this privilege within a period of six months.

#### ARTICLE X

This Compromis shall come into force on the date of signature.

In witness whereof, the undersigned, being duly authorized by their respective governments, have signed this Compromis and have attached their seals.

Done in duplicate at Paris this twenty second day of January, 1963 in English and French, each of which shall be of equal authenticity.

FOR THE GOVERNMENT OF  
THE UNITED STATES OF  
AMERICA:

JACQUES J. REINSTEIN  
[SEAL]

FOR THE GOVERNMENT OF  
THE REPUBLIC OF  
FRANCE:

AUGUSTIN JORDAN  
[SEAL]

\* Treaty Series, No. 536; 36 Stat. 2228; 2 A.J.I.L. Supp. 43 (1908).

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[Abbreviations: *AJIL*, American Journal of International Law; *ASIL*, American Society of International Law; *BN*, Book Note; *BR*, Book Review; *CN*, Notes and Comments; *Ed*, Editorial Comment; *I.C.J.*, International Court of Justice; *I.L.C.*, International Law Commission; *JD*, Judicial Decision; *LA*, Leading Article]

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